Neutral Citation Number: [2014] EWCA Civ 13

Case No: C1/2013/2452 & C1/2013/2453

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION, DIVISIONAL COURT
LORD JUSTICE LAWS AND MR JUSTICE CRANSTON
CO24832013&CO2488201 & CO248224832488248624

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2014

Before:

MASTER OF THE ROLLS
LORD JUSTICE LONGMORE
and
LORD JUSTICE RYDER

- -

Between:

THE QUEEN ON THE APPLICATION OF MA & OTHERS	**Appellants**
- and -	
THE SECRETARY OF STATE FOR WORK AND PENSIONS	**Respondent**
EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

- -
- -

Martin Westgate QC and Kate Markus (instructed by **Leigh Day Solicitors and Public Law Solicitors**) **Richard Drabble QC** (instructed by **Leigh Day**) for the **Appellants**
Tim Eicke QC and Edward Brown (instructed by **Treasury Solicitors**) for the **Respondent**
Helen Mountfield QC (instructed by **Equality and Human Rights Commission)** for the **Intervener**

Hearing dates: 20, 21 & 23 January 2014

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Approved Judgment

Master of the Rolls:

1. Housing benefit ("HB") is a means-tested benefit available to assist tenants to pay their rent. The claimants in these proceedings complain about the basis on which HB is calculated in relation to rents in the public sector. The measures of which complaint is made are contained in the Housing Benefit (Amendment) Regulations 2012 ("the 2012 Regulations") as further amended by the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013 ("the 2013 Regulations") which amended the Housing Benefit Regulations 2006 ("the 2006 Regulations"). The 2012 Regulations reduced the eligible rent for the purpose of calculating HB where the number of bedrooms in a property let exceeds the number to which a claimant is entitled by reference to the standard criteria set out in Regulation B13 ("the bedroom criteria"). The reduction in eligible rent is 14% where there is one excess bedroom and 25% where there are two or more.

2. The 2012 Regulations were intended to address the problem that some tenants of social housing were occupying more space than they needed, by limiting the HB entitlement of those "under-occupying" accommodation to an "appropriate maximum housing benefit". "Under-occupation" is defined by reference to the bedroom criteria. The adoption of these criteria to determine the appropriate maximum housing benefit has been a matter of great public controversy.

3. Under the existing regime (which will change when Universal Credit is introduced), eligibility for HB is assessed by reference to broad criteria for the assessment of deemed need at the local level by local authority decision-makers. Regulation B13 applies the bedroom criteria to public sector tenants so as to determine the number of bedrooms the claimant's household is deemed to need for the purpose of determining the appropriate maximum HB. Having applied the bedroom criteria, the decision-maker then applies specific additional criteria to certain categories of persons ("the additional categories"). Once an applicant's deemed need has been assessed, the overall scheme then provides for an inquiry into any further case-specific actual need, which is carried out by the local authority decision-maker on receipt of an application for additional assistance. This is done by a consideration of individual circumstances in order to determine whether to make additional contributions by way of Discretionary Housing Payments ("DHPs"). This is the scheme provided for by the Discretionary Financial Assistance Regulations 2001 ("the DFA Regulations").

4. The challenge is now based on two grounds. First, it is said that the reduction in eligible rent discriminated against disabled persons such as the claimants without justification and therefore violates their rights under article 14 of the European Convention on Human Rights ("the Convention") when read in conjunction with article 1 of the First Protocol of the Convention ("A1P1"). Secondly, it is said that the Secretary of State introduced the new measures in breach of his public sector equality duty ("PSED") under section 149 of the Equality Act 2010 ("EA") to have "due regard" to the need to eliminate discrimination and advance equality of opportunity between persons who are disabled and those who are not. It is common ground that

HB falls within the ambit of A1P1 as a "possession" and disability falls within the concluding words of article 14 as "other status".

5. Both challenges were rejected by the Divisional Court (Laws LJ and Cranston J) in judgments handed down on 30 July 2013.

The Legislation

Article 14

6. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Social Security Statutes

7. The material amendments of the 2006 Regulations effected by the 2012 Regulations and the 2013 Regulations were made under powers conferred by the Social Security Contributions and Benefits Act 1992 as amended by section 69 of the Welfare Reform Act 2012. Section 130(1) of the 1992 Act entitles a person to HB if certain conditions are fulfilled, including

> "(a) he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home;
>
> (b) there is an appropriate maximum housing benefit in his case."

8. Section 130A provides for the determination of the appropriate maximum HB. So far as material, it states:

> "(2) Regulations may prescribe the manner in which the appropriate maximum housing benefit is to be determined.
>
> …….
>
> (5) The regulations may, for the purpose of determining the appropriate maximum housing benefit, provide for the amount of the liability mentioned in section 130(1)(a) above to be taken to be an amount other than the actual amount of that liability...
>
> (6) The regulations may, for that purpose, make provision for determining the amount of liability under section 130(1)(a)

> above which a person is treated as having by virtue of regulations under section 137(2)(j) below..."

9. Section 69(1) of the Child Support, Pensions and Social Security Act 2000 provides:

> "The Secretary of State may by regulations make provision conferring a power on relevant authorities to make payments by way of financial assistance ("discretionary housing payments") to persons who—
>
> (a) are entitled to housing benefit or council tax benefit, or to both; and
>
> (b) appear to such an authority to require some further financial assistance (in addition to the benefit or benefits to which they are entitled) in order to meet housing costs."

The Regulations

10. The relevant provisions of the 2006 Regulations as amended by the 2012 Regulations and further amended by the 2013 Regulations are as follows:

> "11(1) Subject to the following provisions of this regulation, housing benefit shall be payable in respect of the payments specified in regulation 12(1) (rent) and a claimant's maximum housing benefit shall be calculated under Part 8 (amount of benefit) by reference to the amount of his eligible rent determined in accordance with –
>
> (a) regulation 12B (eligible rent)..."

11. The eligible rent is the rent due subject to certain adjustments (see in particular Regulation 12B(2)). Regulation A13(1) requires the relevant authority (subject to exceptions with which we are not concerned) to "determine a maximum rent (social sector) in accordance with regulation B13." Regulation B13 provides so far as material:

> "(1) The maximum rent (social sector) is determined in accordance with paragraphs (2) to (4).
>
> (2) The relevant authority must determine a limited rent by—
>
> (a) determining the amount that the claimant's eligible rent would be in accordance with regulation 12B(2)...;
>
> (b) where the number of bedrooms in the dwelling exceeds the number of bedrooms to which the claimant is entitled in

> accordance with paragraph (5), reducing that amount by the appropriate percentage set out in paragraph (3);...
>
> (3) The appropriate percentage is—
>
> (a) 14% where the number of bedrooms in the dwelling exceeds by one the number of bedrooms to which the claimant is entitled; and
>
> (b) 25% where the number of bedrooms in the dwelling exceeds by two or more the number of bedrooms to which the claimant is entitled.
>
> (4) Where it appears to the relevant authority that in the particular circumstances of any case the limited rent is greater than it is reasonable to meet by way of housing benefit, the maximum rent (social sector) shall be such lesser sum as appears to that authority to be an appropriate rent in that particular case.
>
> (5) The claimant is entitled to one bedroom for each of the following categories of person whom the relevant authority is satisfied occupies the claimant's dwelling as their home (and each person shall come within the first category only which is applicable)—
>
> (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;
>
> (c) two children of the same sex;
>
> (d) two children who are less than 10 years old;
>
> (e) a child..."

12. The Regulations also provide for one additional bedroom in any case where the claimant or the claimant's partner is an adult who requires overnight care (B13(6)(a)); is a qualifying parent or carer (being a foster parent or carer) (B13(6)(b)); or is a member of the armed forces away on operations (B13(8)).

The Equality Act 2010

13. As I have indicated, section 149 of the EA introduced the PSED, on which the second ground of challenge is based. So far as material, it 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."

Section 149(7) shows that disability is one of the protected characteristics.

14. The DFA Regulations made under section 69 of the Child Support, Pensions and Social Security Act 2000 empower the grant of DHPs by local authorities. Regulation 2 provides so far as material:

> "(1) ... [A] relevant authority may make payments by way of financial assistance ("discretionary housing payments") to persons who –
>
> (a) are entitled to housing benefit; and
>
> (b) appear to such an authority to require some further financial assistance (in addition to the benefit to which they are entitled) in order to meet housing costs."

Evolution of the Policy

15. It is necessary to consider the evolution of the policy which found expression in the 2012 Regulations in some detail since it is relevant to both issues that arise in this appeal.

16. In the Coalition Agreement dated 20 May 2010, the Government stated:

> "it is time for a fundamental shift of power from Westminster to people. We will promote decentralisation and democratic engagement, and will end the era of top-down government by giving new powers to local councils, communities, neighbourhoods and individuals."

17. The Coalition Government came to power in 2010 with a mandate to reduce the budget deficit. It has introduced a radical welfare reform scheme which is designed to control the cost of the social security budget. It announced the proposed bedroom criteria in its June 2010 Budget Statement para 1.102 of which said:

> "The Government will introduce a package of reforms to Housing Benefit from April 2011 onwards. This includes changing the percentile of market rents used to calculate Local Housing Allowance rates, and uprating these rates by CPI from 2013-14, capping the maximum Local Housing Allowance payable for each property size, time-limiting the receipt of full Housing Benefit for claimants who can be expected to look for work, and restricting Housing Benefit for claimants in the social rented sector who are occupying a larger property than their household size warrants."

18. An important element of the scheme, therefore, was to reduce the HB that was being paid to persons who were occupying more bedrooms than they needed. It was recognised at an early stage that special arrangements would have to be made for certain disabled persons who needed to occupy more bedrooms than their non-disabled peers. In a submission to the Minister for Welfare Reform dated 20 August 2010, officials recommended that a scheme be designed for HB to be based on size criteria and that certain defined groups be excluded "from the outset to help limit any likely criticism". The categories identified at this stage were "those caring full-time for a disabled person/someone with a long-term health condition and the employment and support allowance support group which comprises more severely disabled people who are not expected to work".

19. Another submission was made by officials dated 21 January 2011. This recorded that the Minister had agreed that the same size criteria should be adopted as were used for the Local Housing Allowance, which included allowing a room for an overnight carer from April 2011. Various percentage deductions of HB were recommended for tenants under-occupying accommodation of 1, 2 and 3 or more bedrooms. Annex E of the submission recorded that representations had been made about groups that could be made exempt from the measure. It stated that, if exclusions were not

considered appropriate for certain groups, local authorities could consider the award of a DHP to meet any shortfall. Further work was recommended.

20. Much of the work that followed was focused on the issue raised by accommodation that had been adapted to meet the needs of disabled persons. This presented particular problems because (i) some of the adaptations gave rise to a need for more bedrooms than would otherwise be necessary, and (ii) if disabled persons had a need for specially adapted accommodation and were required to move because their HB was reduced by application of the proposed bedroom criteria, they would require similar adaptations to be made in the accommodation to which they moved (occasioning additional public expense).

21. The next material submission to the Minister is dated 12 August 2011. The Opposition had put down amendments to the Welfare Reform Bill seeking exemptions from the bedroom criteria for disabled persons living in adapted accommodation. The officials wrote:

> "There is a strong case for exempting disabled claimants where significant adaptations have been made to their properties. However, any exemption criteria would need to be affordable, well-targeted and workable within Universal Credit. An alternative to an exemption would be to increase DHP funding to enable local authorities to accurately target support where it is most needed."

22. The paper recommended that there be a £20 million per annum increase in the DHP package for the next two years and that the percentage reduction rates in HB for cases in two-plus bedroom under-occupation be increased from 23% to 25%. The officials said that increasing the DHP pot was "finely balanced against what, in our view, would be the next best option—an exemption based on eligibility for Disabled Band Relief (DBR) in Council Tax". But it would not be possible to ringfence the DHP money. They recommended increasing the DHP pot in preference to an exemption based on DBR because of the "lower financial risk to the taxpayer; limited finds available; and the flexibility it gave local authorities in identifying and providing support for priority cases".

23. From August 2011 onwards, there was a consistent view within Government that the most workable solution to the difficulties for the disabled that would result from the introduction of the bedroom criteria was to increase what could be made available through DHPs. In a paper dated 2 September, the officials provided more information on the expected response to an increase in the DHP package as the best means of mitigating the effect of the under-occupation measure for "hard cases" such as people living in adapted accommodation. Para 4 of the paper stated that those living in adapted accommodation had been singled out by the "lobby" as a group that should be exempted from the measure (mostly) on cost grounds. The officials stated that they had explored the possibility of an exemption for this group and other types of "hard cases" which had been flagged up by stakeholders. They had concluded that trying to

define "significantly adapted accommodation" for exemption purposes would not be workable. Such an exemption would be difficult and expensive to deliver effectively, especially when Universal Credit was introduced. It would either be too broad brush or leave out many other equally deserving hard cases. The recommendation of increasing the DHP pot by £20 million per annum:

> "would enable local authorities to make decisions at a local level about which cases should be prioritised for financial help to meet any shortfall caused by this measure. It would also better protect the taxpayer by offering a limited funding pot rather than an exemption of which the potential scale would be quite uncertain."

24. Para 6 of the paper noted that the lobby was unlikely to be satisfied with a DHP approach. Although increasing the pot by £20 million should help to dampen discontent, there was bound to be concern that the increase may not be sufficient "to help the many different hard cases affected by the measure". Para 7 stated:

> "A DHP approach is likely to attract criticism for lacking the certainty (and therefore 'peace of mind' for potentially vulnerable claimants) that only an exemption would appear to be able to offer in these cases. Whilst DHP decisions are made at a local level, which should lead to a better-targeted approach to applications based on an understanding of local circumstances (such as housing supply) this approach may produce inconsistencies in the way individual cases are treated across different parts of the country."

25. Para 8 noted that officials had been meeting various stakeholders to discuss the implications of the measure; and that they had carried out a survey to which 56 local authorities and housing associations had responded. This work was helping to inform their approach to implementation.

26. On 29 September 2011 officials informed the Minister that the Treasury declined to agree the proposed means of funding the suggested DHP package. Accordingly, they suggested a revised approach: that the HB reduction rates be revised upwards, to 14% and 25% for one and two excess bedrooms respectively, and "[t]hat we use the increased level of savings to provide a £25million DHP package to mitigate the impact of this measure in a targeted way". In the same document they reported amendments received from two members of the House of Lords which proposed six categories of case for exemption from the reductions. The officials set out arguments against these proposals, which included affordability (most of the proposed amendments would significantly erode savings); effective targeting (many of the exemptions would include cases that may not need help, such as people in work); complexity (drawing up an exemption based on significantly adapted accommodation would be virtually unworkable); and fairness to taxpayers. Then at paragraph 16 they stated:

> "DHPs provide a targeted means of mitigating the impact of this measure from a limited funding pot. It is also in line with a localised approach which will allow local authorities to take into account the circumstances of individual households."

More detail was given in the Annex to the submission of 29 September 2011. Thus:

> "18. Although the discretionary nature of DHPs can run the risk of uncertainty for individuals, it does have a number of advantages:
>
> o It would enable [local authorities] to provide additional help to claimants based upon a local-level decision about need.
>
> o It would deliver mitigation in a targeted way that ensures limited funds are not wasted on cases where the shortfall can be met by the individual...
>
> o It fits with the localism agenda…..
>
> o We will also allocate this money to local authorities in a way that broadly reflects need in relation to the impact of this measure."

27. At paragraph 20 of the Annex the officials stated that "[b]ased upon average weekly losses from the size criteria, £25 million annual funding [sc. the proposed DHP package] would be sufficient to remove approx 35,000 claimants from the impacts of the social sector size criteria". At paragraph 21:

> "We will monitor demand for DHPs in relation to this measure and how they are being used by local authorities"

28. On 12 January 2012, officials submitted a paper on possible concessions to the bedroom criteria measure following amendments to the Welfare Reform Bill that had been introduced in the House of Lords. These included the possibility of exempting recipients of Disability Living Allowance (DLA) Care component and those entitled to a Carer's Allowance.

29. The Welfare Reform Act received the Royal Assent on 6 March 2012. By April, a version of what was to become the 2012 Regulations had been drafted. In June, an updated Impact Assessment and Equality Impact Assessment of the effect of the proposed under-occupation measures were published. It is sufficient to refer to the latter. At para 22, there is a statement that the bedroom criteria are likely to affect an estimated 660,000 HB claimants living in the social rented sector. The impact on disabled persons (estimated at 420,000) is considered at paras 42 to 47. At para 42, it recognises that "a higher proportion of households containing a disabled person would be more likely to be affected by the introduction of the size criteria." Para 47 states that those facing a rent shortfall can be considered for extra help from the DHP scheme.

30. In July 2012, the Secretary of State issued to local authorities the Housing Benefit and Council Tax Circular (Circular HB/CTB A4/2012). The background to the 2012 Regulations is explained, and the effect of the changes summarised. Paragraph 9 reacts to the judgments of this court in *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117 (to which I shall come in detail later in this judgment). DHPs are addressed later in the Circular. At that stage the extra £30m for the DHP fund was "aimed specifically at two groups: disabled people living in accommodation that has been substantially adapted to their needs,… [and] foster carers including those between foster placements" (paragraph 52). And then:

> "54. There are many reasons, as well as those mentioned in paragraph 52, why it may not be appropriate for someone with a disability to either move house or make up any shortfall in rent themselves. A good example of this may be an individual or family who rely heavily on a local support network. In circumstances such as these it may be appropriate to use the DHP fund to make up the shortfall in their rent."

After describing various means by which affected persons might be able to make up the shortfall caused by the reduction in their HB, the circular states:

> "67. For those claimants who cannot cover a reduction in [HB] from their own resources and who have a compelling case for remaining in their current accommodation, there is the DHP fund … "

31. The proposed regulations were the subject of lively discussion both inside and outside Parliament (they were laid before Parliament on 28 June 2012). In the House of Commons on 16 October 2012, the Minister of State for the Department of Work and Pensions (Steve Webb) answered a question about what the position would be where a disabled or elderly tenant had had adaptations made to his accommodation. He said:

> "We looked at whether we could simply exclude any house that had had any adaptation done to it. It quickly became apparent that there is a spectrum of adaptations…..Trying to define in legislation that this or that type of adaptation was or was not exempt is very complex. Rather than have a blanket exemption for a ramp or a stair rail, we have allocated money to local authorities which broadly matches what we think would be the cost of protecting people in the circumstances that the Hon Gentleman has described…."

32. There was a vigorous debate in the House of Lords on 15 October 2012. Lord Freud (the Parliamentary Under-Secretary of State) said that the Government was adding £30 million to the DHP fund to help claimants living in significantly adapted accommodation and foster carers. He said that he would keep a "watchful eye" on this. They were talking to local authorities and were considering how best to allocate

the money. The sum of £30 million was realistic based on what could be afforded. Concerns were expressed as to (i) the basis on which the Government could be satisfied that £30 million was sufficient to meet the needs of disabled tenants; and (ii) the position of tenants who did not fall into either of the two categories for whom the £30 million had been identified (£25 million for persons whose accommodation had been the subject of significant adaptations and £5 million for foster carers). Lord Freud said that the total DHP pot would be £165 million (plus the localised social welfare fund, a further £178 million). "Hard cases" which did not fall into either of the two identified categories could be met out of the DHP fund. He repeated that the scheme would be kept under review. The regulations were agreed.

33. The draft regulations were considered in the House of Commons on the following day. The Government's position was defended by Steve Webb who said that the key principle had been simplification. That is why the number of exempted groups was small. He did not believe that they were relying too heavily on DHPs. They had added what they thought was affordable to the fund, but it was for local authorities to decide how to use it, taking into account priority needs. He said:

> "We have allocated money to local authorities to reflect the two key grounds that came up in debates in this House, but we have not ring-fenced the money. That is the important point. We have indicated the two groups who clearly have a strong case for discretionary support. But the key word is 'discretionary'. Therefore a local authority will be able to take the discretionary payments for the social housing under-occupation, the discretionary payments for the private sector rent 30% rule and the discretionary payments associated with the benefit cap. All those things will come together and will be a discretionary pot for a local authority to tailor to their local and individual needs. We recognise that every constituency is different, which is why we are giving local authorities, such as his, the flexibility to use that money to meet individual local circumstances. "

34. The Regulations came into force on 1 April 2013**.** On 12 March 2013, the Secretary of State issued a Written Ministerial Statement announcing his intention to lay amending regulations to clarify the size criteria rules for two specific groups of HB recipient, namely foster carers and armed forces personnel (these two groups were added to the list of additional categories in 2013). Under the unamended 2012 Regulations, the needs of these groups would be considered under the DHP scheme. The Secretary of State also said that he was issuing guidance to local authorities emphasising that DHPs remained available for other priority groups "including the needs of people whose homes have had significant disability adaptations and those with long-term medical conditions that create difficulties in sharing a bedroom". He added that he would continue to closely monitor and adjust the implementation of the policy "to ensure that the needs of these groups are effectively addressed in the longer term".

35. On 1 April 2013, the DHP Good Practice Guide was issued together with the DHP Guidance Manual.

36. Following the decision of this court in *Burnip*, a further amendment was made in 2013 to the 2012 Regulations to add to the list of additional groups "a child who cannot share a bedroom".

The facts

37. Mitting J directed that the parties agree a summary of the facts of each claimant's case. This has been done, although the Secretary of State has made it clear that he does not admit the alleged details in any of the cases: in the event of a successful challenge in these proceedings, it would be for the local authorities concerned to consider each claimant's application for HB and assess the particular facts of the case as part of that process. I reproduce as an Annex to this judgment the summary of the facts that appears as an Annex to the judgments of the Divisional Court in so far as they relate to the five claimants whose cases have been pursued in this appeal.

The issues

38. The issues in relation to the article 14 claim are (i) whether the under-occupation policy based on the bedroom criteria contained in the 2012 Regulations (as amended by the 2013 Regulations) discriminates against disabled persons such as the claimants on the ground of their disability; and if so (ii) whether the discrimination is justified. The issue in relation to the PSED is simply whether there has been a breach of the duty in relation to the policy.

Discrimination

39. In my view, Regulation B13, if read in isolation and without regard to the DHP scheme, plainly discriminates against those disabled persons who have a need for an additional bedroom by reason of their disability as compared with otherwise comparable non-disabled persons who do not have such a need. The point can be easily illustrated. The bedroom criteria deem that a couple needs one bedroom. Suppose one partner suffers from a disability (for example, serious dementia) which makes it unreasonable for the other partner to be required to share a bedroom. Or take the agreed facts relating to the case of Mrs Carmichael. She and her husband cannot share a bed by reason of her disability. They require separate beds and there is no space for an additional bed in their bedroom. Or suppose one partner is disabled and has a need for bulky equipment by reason of the disability and it cannot be accommodated in their bedroom. In such cases, the couple has an *actual* need for accommodation which is greater than the one bedroom which Regulation B13 deems a couple to need. In short, the bedroom criteria define under-occupation by reference to the objective needs of non-disabled households, but not by reference to the

objective needs of at least some disabled households. This demonstrates that on any view Regulation 13B discriminates on the ground of disability.

40. But it is not realistic to confine the enquiry to Regulation B13. That is because the Secretary of State has made it clear all along that this regulation is part of a package for dealing with the problem of under-occupation. He has recognised that there are some persons who should not be subjected to the percentage reductions in HB specified in Regulation B13(4). That recognition has found expression in (i) the inclusion in Regulation B13 of certain exempted groups (children who cannot share a bedroom, persons who require overnight care, foster carers and certain members of armed forces who are away on operations categories) and (ii) his reliance on the DHP scheme for payment to others to whom it may not be reasonable to apply the bedroom criteria. So the question is whether the scheme *as a whole* discriminates against disabled persons.

41. The claimants (supported by the Equality and Human Rights Commission) make two separate (but overlapping) criticisms of the structure of Regulation B13 supplemented as it is by the DHP scheme. First, they submit that the Secretary of State has failed to secure that the terms of the 2012 Regulations (as amended) afford equal benefit to disabled and non-disabled persons. Those who have a non-disability related need for the additional accommodation that Regulation B13 deems them to require are *entitled* to HB to meet their need, although this entitlement is subject to possible adjustment in the light of the particular circumstances of the case: see Regulation B13(4). On the other hand, those who have a disability-related need for additional accommodation and who do not fall within one of the Regulation B13 additional groups have no more than a right to seek a discretionary payment from a limited fund of DHPs. Those who have a *right* to receive HB are better protected than those who may seek a *discretionary* payment which may or may not compensate for the percentage reduction in HB that would result from an application of Regulation B13. A refusal to pay HB can be challenged on appeal (as to fact and law) to the first-tier tribunal. Challenge to a refusal by a local authority to make a discretionary payment can only be made by way of judicial review for error of law on the usual public law grounds. In short, it is more difficult to challenge a refusal of a DHP than an adverse decision in relation to a claim for HB.

42. Secondly, it is said that the absence of an exceptions mechanism in the Regulations for "hard cases" which are disproportionately likely to come from some protected status groups (including disabled persons) means that the disadvantage of the bedroom criteria will be disproportionately felt by members of those groups. For example, disabled people are likely to be disproportionately dependent on close community links or adapted accommodation which would in such cases impose particular difficulties for them in moving from "under-occupied" accommodation.

43. There has been much discussion in this case on the question whether this discrimination is direct or indirect discrimination or whether it is a species of discrimination of the kind which was recognised by the ECtHR in *Thlimmenos v*

Greece (2000) 31 EHRR 411. At para 44 of its judgment in that case, the ECtHR said:

> "The court has so far considered that the right under article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when states treat differently persons in analogous situation without providing an objective and reasonable justification. However, the court considers that this is not the only facet of the prohibition of discrimination in article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

44. The Divisional Court decided that the discrimination in the present case was most appropriately classified as *Thlimmenos* discrimination. For the purposes of deciding discrimination questions arising under our domestic law, it is necessary to determine whether discrimination is direct or indirect (not least because the latter can be justified and the former cannot). But Strasbourg has adopted a less complicated approach: see per Lady Hale in *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434 at paras 20 to 25. She noted the statement of Lord Nicholls in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 at para 3:

> "…the essential question for the court is whether the alleged discrimination that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to that question will be plain. There may be such an obvious relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact"

45. As the ECtHR said in *Stec v United Kingdom* (2006) 43 EHRR 1017 at para 51:

> "A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

46. In contrast to domestic and EU equality law, the Strasbourg case law does not speak of "direct" or "indirect" discrimination. When analysing the extent of justification required, it is the substance of the discrimination which matters, not its form. I doubt whether it matters whether the discrimination is properly to be characterised as direct,

indirect or *Thlimennos.* It is said that it does matter because the bar is set higher for justification of direct than for indirect or *Thlimennos* discrimination. But it is clear from what Lady Hale said at para 19 in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545 that in a benefits case the test for justification is the same however the discrimination is characterised. I shall return to justification later.

47. In case the classification question is material, I shall content myself with saying that I agree with Laws LJ that, for the reasons that he gives at para 42, the discrimination in this case is one of indirect or *Thlimennos* discrimination. It is not necessary to distinguish between these two. As a matter of substance, Regulation B13 discriminates against disabled persons on the ground of disability for the reason that I have given.

Justification

48. In my view, the central question that arises on this appeal is whether the discrimination is justified. There is no challenge to the fundamental policy objective of the 2012 Regulations (as amended), namely to reduce under-occupation by public sector tenants by awarding HB on the basis of occupation need. But the Secretary of State is required to justify his different treatment of the need for additional accommodation of disabled and non-disabled persons and must establish that there is objective and reasonable justification for this different treatment: see para 51 of the judgment in *Stec.*

The standard of review

49. An important question is: what is the standard to which the Secretary of State must establish justification? The claimants submit that "very weighty reasons" are needed to justify discrimination on the grounds of disability. The Divisional Court accepted the submission of the Secretary of State that the correct test is whether the justification advanced is "manifestly without reasonable foundation". I agree with the Divisional Court. First, in *Burnip* the Court of Appeal was faced with the same issue in relation to Regulation 13D (private sector) as arises here in relation to regulation B13. At para 28 of his judgment (with which the two other members of the court agreed), Henderson J said:

> "Weighty reasons may well be needed in a case of positive discrimination, but there is no good reason to impose a similarly high standard in cases of indirect discrimination, or cases where the discrimination lies in the failure to make an exception from a policy or criterion of general application, especially where questions of social policy are in issue. As in the *AM (Somalia)* case, therefore, the proportionality review applicable in the present case must be made by reference to the usual standard, not an enhanced one."

50. I can see no basis for distinguishing *Burnip* from the present case on this issue. In any event, I am satisfied that the reasoning of Henderson J is right. The approach of the Court of Appeal in *Burnip* is reinforced by the decision of the Supreme Court in *Humphreys.* This is a case about alleged discrimination in relation to payments of child tax credit on grounds of sex. Lady Hale discussed the issue of justification between paras 15 and 21 in a passage set out in full in para 57 of the judgment of Laws LJ. She cited para 52 of *Stec:*

> "The scope of this margin will vary according to the circumstances, the subject matter and the background. As a general rule, very weighty reasons would have to be put forward before the court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."

51. At para 18, Lady Hale noted that the same test was applied by Lord Neuberger in *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311 which concerned the denial of income support disability premium to rough sleepers. Having quoted para 52 of *Stec*, Lord Neuberger said that this was "an area where the court should be very slow to substitute its view for that of the executive, especially as the discrimination is not on one of the express or primary grounds." He concluded at para 57:

> "The fact that there are grounds for criticising or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable."

52. At para 19, Lady Hale said:

> "It seems clear from *Stec* , however, that the normally strict test for justification of sex discrimination in the enjoyment of the Convention rights gives way to the "manifestly without reasonable foundation" test in the context of state benefits. The same principles were applied to the sex discrimination involved in denying widow's pensions to men in *Runkee v United*

> *Kingdom [2007] 2 FCR 178*, para 36. If they apply to the direct sex discrimination involved in the *Stec* and *Runkee* cases, they must, as the Court of Appeal observed, at para 50, apply a fortiori to the indirect sex discrimination with which we are concerned. "

53. Mr Westgate QC submits that the "manifestly without reasonable foundation" test is not applicable in this case because the discrimination in issue lacks the elements of high policy which were in play in *Humphreys.* He says that the appellants do not challenge the general policy decision to introduce the bedroom criteria. But he says that the social objective pursued by that decision never extended to reducing HB for people who needed to live in accommodation larger than that allowed for. The claim is concerned with addressing the needs of that group and the working through the detail of the scheme in accordance with its purpose rather than an attack on the fundamental elements of the scheme. He submits, therefore, that the correct approach is to ask whether the discrimination in this case is a proportionate means of meeting a legitimate aim without asking whether it was manifestly without reasonable foundation.

54. I cannot accept this submission. Although the precise detail and scope of the Regulations may not be matters of high policy in themselves, they form an integral part of what was unquestionably a high policy decision. The particular decisions taken to give effect to the high policy decision cannot be dismissed as being technical detail. These decisions involved policy choices even if at a lower level than the overarching decision to reduce HB by focusing on the problem of "under-occupancy" of accommodation.

55. This area of the law would suffer from undesirable uncertainty if the test were to be "manifestly without reasonable foundation" where there is a challenge to high policy decisions and a less stringent test where the challenge is to lower level policy decisions. I see no warrant for taking this course. There is no hint of it in *Stec* or *Humphreys.* In my view, we should follow para 19 of Lady Hale's judgment in *Humphreys.*

56. But as Lady Hale made clear at para 22, the fact that the test is less stringent than the "weighty reasons" normally required to justify sex discrimination (which was in play in that case) does not mean that the justifications put forward for the rule should escape "careful scrutiny". On analysis, it may lack a "reasonable basis". In my view, this is the correct approach to apply in the present case.

57. A further factor that is relevant to the intensity of the court's review of the scheme is that the Regulations were approved by affirmative resolution in both Houses of Parliament. That is not a bar to judicial review, but it is a factor which must be firmly borne in mind. When a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful: see *Bank Mellat v HM Treasury* [2013] 3 WLR 179

at para 44 per Lord Sumption and *Black v Wilkinson* [2013] EWCA Civ 820, [2013] 1 WLR 2490 at paras 46 to 49. In my view, considerable weight should be given to this factor, particularly because some of the alleged shortcomings in the scheme that have been canvassed before us were debated in Parliament. The effect of the 2012 Regulations (as amended) in conjunction with the DHP scheme on the position of disabled persons was well understood by Parliament.

58. Mr Westgate relies on a passage in the judgment of Lord Hope in *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173 to support his submission that, in an area such as discrimination, the courts should be slow to defer to the judgment of the legislature. Lord Hope said at para 48:

> "It is, of course, now well settled that the best guide as to whether the courts should deal with the issue is whether it lies within the field of social or economic policy on the one hand or of the constitutional responsibility which resides especially with them on the other: see, for example, *R (ProLife Alliance) v British Broadcasting Corpn* [2004] 1 AC 185, para 136, per Lord Walker of Gestingthorpe. The fact that the issue is a political issue too adds weight to the argument that, because it lies in the area of social policy, it is best left to the judgment of the legislature. But the reason why I differ from the Court of Appeal's approach is that it lies in the latter area as well. Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests."

59. Laws LJ at para 61 said that these observations applied in cases of discrimination by reference to characteristics such as race or sexual orientation and probably discrimination on grounds of individual status such as marriage. Since the present case was not within these categories, the wide margin remained. But disabled persons are a vulnerable group who need protection. I cannot see why in principle the margin of respect for the choices of the democratic system should differ as between (i) disability and (ii) sex and race. If Parliament had produced a benefit scheme which treated disabled and non-disabled persons alike (ie without making any provision to accommodate the special needs of the disabled), it is inconceivable that the court would not declare it to be in breach of article 14. But Lord Hope was not saying that the court should not respect the judgment made by Parliament even in the context of discrimination. Nor is Mr Eicke QC saying in the present case that the court should not scrutinise carefully the scheme that has been produced by Parliament. I do not consider that *Re G* contributes materially to the argument.

60. I acknowledge that, despite the fact that we should (i) apply the manifestly without reasonable foundation test and (ii) exercise considerable caution before interfering with the scheme approved by Parliament, we are obliged to scrutinise carefully the reasons advanced by the Secretary of State in justification of his scheme: see *Humphreys* at para [22] and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at paras 45, 46 and 61 per Lord Wilson. That is particularly important since we are dealing with a vulnerable group (disabled persons) and the discrimination is closely connected with their disabilities.

Burnip

61. Before I consider the issue of justification further, I need to refer to the way in which it was dealt with in *Burnip.* In broad terms, the issues raised by the three appeals considered by the Court of Appeal (in the context of private sector accommodation) were very similar to those which arise in the present appeal. The only substantive judgment on the issue was given by Henderson J. After reviewing the range of benefits available to the three claimants in that case, he considered whether the wider benefits context provided an objective and reasonable justification for the discrimination against them. Of particular relevance to this appeal is what he said about the availability of DHPs.

> "46. Secondly, it is clear on the evidence that Mr Burnip's objectively verifiable need was for a flat with two bedrooms, and that the maximum LHA available to him on the one bedroom basis left a substantial shortfall from the rent which he had to pay to his landlord. Discretionary housing payments were in principle available as a possible way of bridging this gap, but they cannot in my judgment be regarded as a complete or satisfactory answer to the problem. This follows from the cumulative effect of a number of separate factors. The payments were purely discretionary in nature; their duration was unpredictable; they were payable from a capped fund; and their amount, if they were paid at all, could not be relied upon to cover even the difference between the one and two bedroom rates of [local housing allowances], and still less the full amount of the shortfall. To recognise these shortcomings is not in any way to belittle the valuable assistance that discretionary housing payments are able to provide, but is merely to make the point that, taken by themselves, they cannot come anywhere near providing an adequate justification for the discrimination in cases of the present type.
>
> 47 A further aspect of the problem is that housing, by its very nature, is likely to be a long term commitment. This is particularly so in the case of a severely disabled person, because of the difficulty in finding suitable accommodation and the probable need for substantial physical alterations to be made to the property in order to adapt it to the person's needs. Before undertaking such a commitment, therefore, a disabled

> person needs to have a reasonable degree of assurance that he will be able to pay the rent for the foreseeable future, and that he will not be left at the mercy of short term fluctuations in the amount of his housing-related benefits. For the reasons which I have given, discretionary housing payments cannot in practice provide a disabled person with that kind of assurance."

62. At para 63, he said that the simple point was that:

> "without the benefit of the extra room rate, Mr Burnip would be left in a *worse* position than an able-bodied person living alone: it is only to correct such disparity of treatment that the claim is brought."

63. Finally, at para 64 he said:

> "Furthermore, there are in my judgment important differences between the circumstances of the present appeals and the position in *AM (Somalia) v Entry Clearance Officer* [2009] UKHRR 1073. First, these are not cases of immigration control, where, as Elias LJ noted, the courts are particularly reluctant to interfere in matters of policy. On the contrary, we are here concerned with a benefit (HB) the purpose of which is to help people to meet their basic human need for accommodation of an acceptable standard. Secondly, there is no question of a general exception from the normal bedroom test for disabled people of all kinds. The exception is sought for only a very limited category of claimants, namely those whose disability is so severe that an extra bedroom is needed for a carer to sleep in (or, in cases like that of Mr Gorry, where separate bedrooms are needed for children who, in the absence of disability, could reasonably be expected to share a single room). Thirdly, such cases are 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. The cost and human resource implications of accommodating them should therefore be modest, quite apart from the point that in some cases the effect of refusing the claim could well be to force the claimant into full time residential care at much greater expense to the public purse. Fourth, for the reasons which I have already given, the extra assistance which can be provided by discretionary housing payments, valuable though it can be, falls far short of being an adequate solution to the problem. Finally, the fact that Parliament has now seen fit to legislate for cases like those of Mr Burnip and Ms Trengove, and to do so at a time of general economic hardship, may in my view reasonably be taken as recognising both the justice of such claims and the proportionate cost and nature of the remedy."

64. The claimants rely heavily on this reasoning. They go so far as to say that it is determinative of the justification issue. I do not accept this. The court in *Burnip* was concerned with a different scheme although it was similar in many ways to the scheme with which we are concerned. The DHP scheme has changed to some extent. Further guidance has been issued to the local authorities that administer it. The DHP fund is now better resourced. It is also not clear that the evidential material as to the evolution of the policy that was placed before the court was the same as was placed before us. There is the further point that the Regulations that were being considered in *Burnip* were not made under the shadow of the financial crisis and the need to reduce public spending which the Coalition Government was elected in 2010 to bring about. Having said that, I acknowledge that, if this court is to differ from the court in *Burnip*, it will be necessary to deal with the main strands of the reasoning of Henderson J. I discuss this at paras 71 and 72 below.

Has justification been made out?

The Secretary of State's case

65. Beverley Anne Walsh of the Working Age Strategy Directorate of the DWP says this about disability:

> "87. Using the definition of disability contained in the Equalities Act 2010 a disproportionate number of households including an adult with a Disability Discrimination Act (DDA) recognised disability are likely to be affected by the introduction of the size criteria to social sector tenants (420,000) as opposed to non-disabled tenants (250,000). However this is based upon the claimant or partner reporting a DDA recognised disability and includes cases who do not currently have difficulties with daily activities but who have in the past or are expected to in the future or would do if they were not able to control symptoms with medication.
>
> 88. If disability was based upon the receipt of a Disability Living Allowance this figure would be much lower (180,000). To provide a blanket exemption for disabled adults in receipt of Disability Living Allowance from the size criteria rules in the social sector only would cost around £130 million. This estimate was modelled using the PSM FRS 90/10.
>
> 89. Options for broader exemptions for disabled people were considered but rejected as unacceptable. Providing a blanket exemption to disabled people using a broad definition would have been too expensive and would not have targeted help at those who need it most. It would also potentially mean that disabled people with no

> specific needs received a greater contribution for no reason. Applying a tighter definition would have resulted in an administratively intensive and costly process involving outside agencies as well as local authority staff. This is because of the difficulties in identifying the minority of HB claimants who are unable to share a bedroom due to the nature and extent of their disabilities. The costs of this approach were considered to be disproportionate as we think it unlikely that the vast majority of disabled people do not require a spare bedroom.
>
> 90. Also, the impact of the reforms on disabled people is not uniform. Whereas some will be significantly affected by the measures, others will not suffer any more than able-bodied people. In addition the nature of a person's disability may change and will fluctuate regularly (or over a longer-period), which means that even if they are unable to share currently, that position may change. Similarly, the condition of someone who is currently able to share may deteriorate so that they may no longer do so. As such, this would require ongoing monitoring, which would increase administrative time and costs significantly.
>
> 91. Any general exemption for disabled people would have to apply in the private sector and Universal Credit. It would not be feasible completely to exempt disabled claimants in general from the size criteria in the private sector as the criteria also controls the rent levels set by landlords to ensure it is reasonable.
>
> 92. Further the impact of the reforms on disabled people is not uniform. Some will be significantly affected by the measures; others will not suffer any more than able-bodied people. In addition the nature of a person's disability may change will fluctuate over time (or even weeks) which means that even if they are unable to share currently, that position may change. Similarly, the condition of someone who is currently able to share may deteriorate so that they may no longer do so."

66. In the course of his oral submissions, Mr Eicke made the further point that, in operating the DHP scheme, local authorities are locally accountable for the decisions they make. Promotion of "localism" is an important element of Government policy. Moreover, local authorities and social landlords are better able than any central authority to ensure use their housing stock to best effect (having regard to the waiting list and significant number of people who are overcrowding).

The claimants' response

67. The claimants submit that, essentially for the reasons given by Henderson J in *Burnip*, the scheme is not a fair and proportionate response to the discrimination that has been established. In particular, they say that the Secretary of State has not justified the decision to apply the bedroom criteria to those disabled persons who have a need for more accommodation than is assumed to be necessary by the criteria. They say that the discrimination is not rationally connected with any of the aims of the general policy, namely (i) to contain HB expenditure in the social rented sector, (ii) to incentivise tenants to move where accommodation is too large for their needs, (iii) to introduce greater fairness between claimants living in the social rented sector and the private sector, (iv) to promote greater financial responsibility among HB claimants and (v) to create greater work incentives. Thus, they say that an objective of incentivising tenants to move is inapplicable where the tenant has to occupy his current accommodation in order to meet his disability-related needs. They also say that the aims are not aimed at disabled tenants and to apply them to such tenants imposes an unfair and excessive burden on them relative to their non-disabled peers.

68. Ms Mountfield QC submits that the additional costs of making exceptions in the case of particular hard cases such as those who cannot work or get a lodger and others who cannot mitigate the effects of the bedroom criteria on them may be very minor. There would be no or few additional costs in including an exception mechanism equivalent to regulation B13(4): HB authorities must exercise their discretion under this regulation and consider applications for DHPs in any event. The addition of exceptions for disabled children by the 2013 Regulations shows that this is not unworkable. Since the existing discretion to disapply the appropriate maximum housing benefit and award a *lesser* amount in regulation B13(4) is conferred on a HB authority, it is difficult to see how the provision of an analogous discretion to award a *higher* amount would conflict with the policy to promote "localism". Accordingly, the absence of an exceptions mechanism permitting the disapplication of the appropriate maximum housing benefit means that there is no fair balance between the rights of the individual and the interests of the community.

69. The claimants also submit that Laws LJ was wrong to say at para 53 that there was no "precise class of persons—those who need extra bedroom space by reason of disability—which can be identified in practical and objective terms and sufficiently differentiated from other groups equally in need of extra space but for other reasons".

70. Mr Westgate suggested an amendment to B13 that would be satisfactory to meet this point:

> "B13(7A)
>
> "Where because of their disability or that of a member of their family or household, a person has a need to occupy accommodation where the number of bedrooms exceeds the number of which they would otherwise be entitled under

> Regulation B13(5), (6) and (7), then they shall be entitled to such additional bedroom or bedrooms as are necessary to meet that need".
>
> B13(7B)
>
> "A need of a kind described in B13(7A) shall only be found to exist where:
>
> (i) the disabled person in question is entitled to the care component of disability living allowance at the highest or middle rate prescribed in accordance with section 72(3) of the Act; and
>
> (ii) the person provides the relevant authority with such certificates, documents, information or evidence as are sufficient to satisfy the authority of that need."

Conclusion on the justification issue

71. In my view, the Secretary of State has justified the discriminatory effect of the policy. First, I do not consider that the reasoning of Henderson J at para 64 of his judgment requires us to reach the same conclusion as he did. In summary, among the main reasons given by Henderson J for his conclusion were the following: (a) the category of persons that it was sought to exclude from the bedroom criteria was "very limited", namely (i) carers who need an additional bedroom and (ii) children who, in the absence of disability cannot reasonably be expected to share a single room (I interpolate that both categories have now been introduced into the Regulations); (b) such cases were likely to be "relatively few in number, easy to recognise, not open to abuse and unlikely to undergo change or need regular monitoring"; and (c) the DHP scheme was less advantageous for claimants than the HB scheme.

72. None of the considerations identified in (a) and (b) applies (or applies with equal force) to the broader category of disabled persons with a need to be excluded from the bedroom criteria with which we are concerned : I leave out of account at this stage the sub-category of disabled persons of whom Mrs Carmichael is an example and which I discuss at paras 77 to 80 below. This broader category of cases may be relatively large, not always easy to recognise, may be open to abuse and (in some cases at least) will require monitoring. As for (c), the DHP fund has since been increased and Henderson J was not aware of (or, if he was, he made no reference to) the repeated statements by the Department that the fund would be kept under review and topped up if necessary. The fund has in fact been increased in size and the DHP Guidance altered.

73. Secondly, the Secretary of State was entitled to take the view that it was not practicable to add an imprecise class of persons (those who need extra bedroom space

by reason of disability) to whom the bedroom criteria would not apply. I accept that the class could have been identified by a form of words such as suggested by Mr Westgate, but that would necessarily have introduced more complexity into the assessment of HB. The issue raised by houses which have been significantly adapted provides a good illustration of the problem (see paras 30 and 31 above). I acknowledge that regulation B13(4) gives the relevant authority a discretion to reduce HB if it is reasonable to do so . But it does not follow from this that it was irrational or unfair of the Secretary of State to refuse to add a class such as is suggested by Mr Westgate. As Ms Walsh points out (para 89 of her statement), applying a tighter definition would have resulted in an administratively intensive and costly process involving outside agencies as well as local authority staff. This is because of the difficulties in identifying the minority of HB claimants who are unable to share a bedroom due to the nature of their disabilities. It was considered that the costs of this approach "would be disproportionate as we think that the vast majority of disabled people do not require a spare bedroom".

74. Thirdly, as Ms Walsh points out (paras 90 and 92), the nature of a person's disability and disability-related needs may change over time (even over a period of a few weeks). This is relevant for two reasons: (i) it means that, if disability-related needs for more accommodation were to be dealt with by additional HB, this "would increase the administrative time and costs significantly" (para 90); and (ii) the greater flexibility of DHPs is more appropriate at least for those of whom it cannot be said with confidence how long their disability-related needs will persist. DHPs can be awarded for short fixed periods. On the other hand, once a person becomes entitled to HB, his entitlement continues until it ceases in accordance with the elaborate scheme provided by regulation 77 of the Housing Benefit Regulations 2006 DHPs.

75. Fourthly, Mr Eicke made the point orally that DHPs are administered by local authorities who are accountable locally for the money they spend. Under the existing regime, eligibility for HB is assessed at the local level by local authority decision-makers, but in almost every case 100% of the HB paid by local authorities is reimbursed by the Secretary of State. Thus local authorities are not subject to the same financial discipline in relation to HBs as they are in relation to DHPs.

The case of Mrs Carmichael

76. On the agreed facts, Mrs Carmichael needs a separate (specialist) bed with space for carers and manoeuvring of her wheelchair. She and her husband cannot share a bed and there is no space for an additional bed in the room. Mr Drabble QC submits that she is in a position which, for all practical purposes, is indistinguishable from that of the children in *Gorry* (the third appellant in *Burnip*). She is in a small and easily identifiable group of disabled persons who plainly need an extra room directly as a result of their physical disability. She has been awarded DHP for a limited period. This serves to show that she has a need for an extra bedroom, but the DHP award is no answer to the basic complaint of discrimination for the reasons given by Henderson J in *Burnip* at paras 46-47 (see para 61 above). Mr Drabble submits that, even if the Secretary of State is able to justify discrimination against the *general*

group of disabled persons who need an extra bedroom by reason of their disability, he cannot justify discrimination against persons in the position of Mrs Carmichael. There is no objective and reasonable justification for the discriminatory effect of the statutory criteria in the case of couples who, by reason of the disability of one or both of them, objectively require separate bedrooms.

77. Ms Walsh has sought to justify the different treatment of disabled couples and disabled children. In her statement, she says:

> "99. There are differences between disabled couples and disabled children. Couples are expected to share a bedroom. Further, adults are able to exercise choice in all aspects of their lives. They are able to enter living arrangements knowing that they may have to compromise to accommodate their needs. As well as making applications for benefits and DHPs, they are also able to negotiate with landlords and [local authorities], take proactive steps to find more suitable accommodation of the right size, take in a lodger, find work or increase hours of work. Children do not have this level of independence or control over decision-making. As a result the Government has recognised that children require some level of additional protection.
>
> 100. The risks of children sharing a room are different from that of an adult in that children cannot reasonably be expected to know when they are a danger to another child, when they are likely to be a danger to themselves, or when they are likely to impact the long-term sleep patterns of another child.
>
> 101. The Government has scarce resources in this current climate and therefore funding has been targeted at children as the Government believes that they are a priority and because young people aged 16 or over are allocated to their own room, numbers are restricted. This policy supports wider Government strategy on the rights of the child, supports family life and helps make families make the best choices for the welfare and development of all the children in their care. In addition, it acknowledges that there is an implicit vulnerability in childhood."

78. It will be recalled that, following the decision in *Burnip*, the Secretary of State amended the 2012 Regulations by adding subparagraph (ba) ("a child who cannot share a bedroom") to the list of categories in Regulation B13(5). Mr Drabble submits that the distinctions between adults and children identified by Ms Walsh do not provide rational reasons for excluding adults such as Mrs Carmichael from B13(5).

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: see, for example, *R (JS) v Secretary of State for Work and Pensions* [2013] EWHC 3350 (QB) per Elias LJ at paras 42 to 46. For that reason alone, the Secretary of State was entitled to decide to provide 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. Ms Walsh explains the particular reasons why children require additional protection. I do not consider that these reasons are far-fetched or do not provide an objective and reasonable justification for the different treatment of the needs for additional accommodation of disabled children and disabled adults.

Overall conclusion on the justification issue

80. For all these reasons, I am satisfied that the Secretary of State has justified the discriminatory effect of his policy. I would emphasise the following three points. First, the "manifestly without reasonable foundation" test is a stringent test. I would not go so far as to say that all that the Secretary of State has to show is that his policy is not irrational, although Lord Neuberger in *R (RJM)* (see para 51 above) perhaps came quite close to that. The question is simply whether the discrimination has an objective and reasonable justification. I accept that the court must scrutinise carefully the justification advanced. But it is not sufficient to expose some flaws in the scheme or to conclude that the justification is not particularly convincing. The stringent nature of the test requires the court to be satisfied that there is a serious flaw in the scheme which produces an unreasonable discriminatory effect.

81. Secondly, the need for the court to be cautious about finding unlawful discrimination of a statutory instrument passed by affirmative resolution of Parliament is heightened by the fact that some of the principal complaints that are made by the claimants were expressly raised and discussed during the Parliamentary debates and rejected.

82. Thirdly, the Secretary of State has explained in detail his reasons for structuring the scheme in the way that he has. In particular, he has explained why he has decided to provide for the disability-related needs of some disabled persons for additional accommodation by means of the 2012 Regulations (as amended) and the needs of other disabled persons by means of DHPs. In combination, his reasons are far from irrational. Central to his thinking is the idea that there are certain groups of persons whose needs for assistance with payment of their rent are better dealt with by DHPs than HB. For the reasons given at paras 71 to 75 above, I consider that they amount to an objective and reasonable justification of the scheme.

Public Sector Equality Duty

The law

83. The relevant statutory provisions are set out at para 8 above. The proper interpretation of them has been considered by the courts on a number of occasions.

The general principles are not in doubt. It has been repeatedly stated in the cases that the principal question in relation to the PSED is not whether the decision (or "outcome") is justifiable, but whether, in the process leading to the making of the decision, the decision-maker had "due regard" to the relevant considerations. A helpful summary of the case law appears at para 26 of the judgment of McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2014] EqLR 60:

> "(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213; [2006] EWCA Civ 1293* at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).
>
> (3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154* at [26 – 27] per Sedley LJ.
>
> (4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in Kaur & Shah v LB Ealing [2008] EWHC 2062 (Admin) at [23 – 24].
>
> (5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin), as follows:
>
> > i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;
> >
> > ii) The duty must be fulfilled before and at the time when a particular policy is being considered;
> >
> > iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference

to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in R (Meany) v Harlow DC[2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC [2011] EWCA Civ 1586* at [74–75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC [2009] EWCA Civ 941* at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77–78]

"[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what

> the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."
>
> (ii) At paragraphs [89–90]
>
> "[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014* and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (para [85]):
>
> '….the public authority concerned will, in our view, have to have due regard to the *need* to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'
>
> [90] I respectfully agree….""

84. The issue that arises in this case is not as to the correct legal principles, but whether they were correctly applied by the Secretary of State.

Breach of the PSED

The claimants' case

85. The argument advanced by Mr Westgate (ably supported by Ms Mountfield) is in substance the same as that which was rejected by the Divisional Court. The principal complaint is that the history of the evolution of the policy discloses no focused analysis such as section 149 requires. There was no analysis of disability-related matters. The EIA of June 2012 did not indicate the numbers of disabled persons with housing needs which would not be met under the new regime.

86. At para 83 of his judgment, Laws LJ set out a number of detailed matters which the claimants submitted the Secretary of State should have investigated. I give as an example "(e) the ability of disabled people, and of children and their families, to cope with the effects of the regulation, including difficulties they may face in taking compensatory steps (eg working, taking in a lodger, moving, requesting DHPs)". At para 86, Laws LJ said that these criticisms were "an attempt to persuade the court to 'micro-manage' the policy-making process". They looked very like a list of objections to the policy "under the guise of a litany of matters left unconsidered. That is all but an assault on the outcome—the terms of Regulation B13—rather than the process".

87. Mr Westgate rejects this criticism of his case. He also says that there was no specific consideration by the Secretary of State (or the Divisional Court) of whether the requirements of section 149(1)(b), (3)(a) or (b), (4) or (6) were satisfied. There is no evidence that during the legislative process the Secretary of State even had his attention drawn to his obligation to have due regard to the need to advance equality of opportunity between disabled and non-disabled persons. This is an obligation that is distinct from the obligation to have due regard to the need to eliminate discrimination. The decision-maker cannot give due regard to the need to advance equality of opportunity without having first given informed consideration to what the barriers to equality of opportunity are, and what if anything could be done to address or diminish them. In relation specifically to section 149(6), there was no evidence that the Secretary of State had considered what particular steps he could have taken to meet the needs of disabled persons which were different from those of non-disabled persons.

88. Mr Westgate submits that, even if the minister had a vague awareness that he owed legal duties to the disabled, that would not suffice: see per Elias LJ quoted in *Bracking* at para 77. The Secretary of State was bound to have due regard to the impact of the proposed scheme on disabled persons who, by reason of their disability, had a need for an additional room.

89. Ms Mountfield also submits that, in relation to the needs of those who were not under-occupying and the extent to which DHPs could prevent or mitigate inequality of opportunity, the Secretary of State failed to conduct a sufficiently focused and evidenced consideration of an obviously relevant statutory equality need. There was no evidence of any contemporaneous regard to the circumstances of those disabled persons who were deemed by the bedroom criteria to be under-occupying, but were not in fact under-occupying for disability reasons. The EIA stated in terms that the impact of DHPs had not been assessed.

90. Finally, Ms Mountfield submits that the Secretary of State could not lawfully rely on DHPs to solve the problem without conducting a proper analysis of whether local authorities were to be given the means to do so.

Conclusion on PSED

91. I would reject these submissions. I agree that it is insufficient for the decision-maker to have a vague awareness of his legal duties. He must have a focused awareness of each of the section 149 duties and (in a disability case) their potential impact on the relevant group of disabled persons. In some cases, there will be no practical difference between what is required to discharge the various duties even though the duties are expressed in conceptually distinct terms. It will depend on the circumstances. I am not persuaded that on the facts of this case there was any *practical* difference between what was required by the various duties. I did not understand any such difference to be suggested by Mr Westgate or Ms Mountfield.

92. The history of the evolution of the policy which I have set out at paras 15 to 36 above shows that the Secretary of State well understood that there are some disabled persons who, by reason of their disabilities, have a need for more space than is deemed to be required by their non-disabled peers. The question of how this special need should be accommodated in the proposed new scheme was the subject of wide consultation of interested parties and considered in great detail by the Secretary of State and Parliament. The particular issue of whether (i) there should be sub-categories who were to be excluded from the application of the bedroom criteria (ii) their claims should be dealt with by DHPs or (iii) there should be a combination of these two solutions was considered at great length. So too was the question of whether there would be sufficient money available for DHPs and whether the adequacy of the DHP fund should be kept under review. This was all part of the decision-making process. In my view, it is clear that, in conducting this process, the Secretary of State did have due regard to his statutory duties. It was obvious that he was aware of the serious impact that the bedroom criteria would have on disabled persons who, by reason of their disability, had an actual need for more accommodation than they would be deemed to need by those criteria. That is why so much effort was devoted to seeking a solution to the problem. The PSED challenge is not concerned with the lawfulness or even the adequacy of the solution that was adopted. It is only concerned with the lawfulness of the process. In my view, the process did not breach the Secretary of State's PSED.

Overall conclusion

93. For the reasons that I have set out, I would dismiss this appeal on both issues.

Lord Justice Longmore:

94. The Master of the Rolls (and Laws LJ in the Divisional Court) have set out the detailed evidence of the manner and extent of the consideration given by the Government to the reform of housing benefit for working age claimants who occupy a larger property than warranted by the size of their household while seeking to protect those who are vulnerable and have the highest level of need. That was spelled out in the Budget Statement of June 2010 ("the austerity budget") and should be seen in the context of the Coalition Agreement of 20th May 2010 promoting decentralisation and giving new powers to local councils and communities. I would for myself emphasise:-

i) the memorandum to the Minister of Welfare Reform of 20th August 2010 recognising that there would be social sector tenants who cannot be found alternative accommodation of the right size including those caring full time for a disabled person;

ii) the memorandum of 21st January 2011 considering exemptions for those who cannot work and recommending the use of discretionary housing payments ("DHPs");

iii) the memorandum of 12th August 2011 recognising, in the light of representations made, that there was a case for exempting homes that had had significant adaptation for disability and analysing alternative forms of relief in the form of increasing the sums available for DHPs or granting exemptions based on eligibility for Disabled Band Relief in respect of Council Tax;

iv) the memorandum of 2nd September 2011 recognising that there will be hard cases, apart from those living in homes that had had disability adaptations, and reporting the recommendation of increasing the sums available for DHPs;

v) the memorandum of 29th September 2011 again proposing increases in the sums available for DHPs and explaining the advantages of DHPs, despite the uncertainty for individuals;

vi) the memorandum of 12th January 2012 in response to Lord Best's proposal that the measure should only affect those living in homes with two unneeded bedrooms.

95. All this was before the Welfare Reform Act 2012 received the Royal Assent on 8th March 2012. Thereafter consideration was being given to the precise terms of the 2012 Regulations which are now under challenge. The affirmative resolution procedure applied so that there were opportunities for debate and rejection (although not amendment). The draft regulations were laid before Parliament on 28th June 2012 and made on 3rd December 2012, coming into force on 1st April 2013. For the purpose of the Regulations there had to be both an Impact Assessment and an Equality Impact Assessment ("EIA"). Those are substantial and not unimpressive documents. Paragraphs 42-47 of the EIA discuss in some detail the impact on disabled people and include statements as to the increase in funding for DHPs. A subsequent circular of 4th July 2012 stated in paragraph 67 that the DHP fund existed for those with a compelling case for remaining in their current property.

96. The House of Lords had (I think) the first debate on 15th October 2012; a number of peers spoke. Lord Freud for the government said there was a DHP pot of £165 million for which local authorities could put in bids. He explained that local authorities could look at what was happening in their own areas and could provide appropriate support. The effective Commons debate was the Hansard General

Committee on Delegated Legislation. The Minister explained that, despite extensive consideration being given to an exemption for homes with disability adaptations, the government had decided that it was difficult to define the extent of adaptation for the purpose of any such exemption and that more money would go into the DHP pot for the purpose.

97. On 26th October 2012 the National Audit Office issued a report on managing the impact of housing benefit reform which stated, among many other things, that the Department had put in place a range of support for claimants and recognised that the Department had increased funding for DHPs to support the implementation of reforms. Naturally enough, it added that a robust and transparent process was needed for reviewing the level of funding. In a written statement of 12th March 2013 in a written Ministerial Statement, the Secretary of State said he would:-

> "closely monitor and adjust the implementation of the policy … the ensure that the needs of these groups are effectively addressed in the longer term."

98. In the light of all this I do not see how it can be said that there was a breach of the duty imposed by Parliament in section 149 of the Equality Act 2010 on public authorities to:

> "have due regard to the need to … eliminate discrimination on [and] advance equality of opportunity between persons who show a relevant protected characteristic [such as disability] and persons who do not share it."

The position of the disabled was a vital concern in the minds of policy makers at the Department between the date of the Budget Statement in June 2010 and the making of the Regulations in December 2012 and, for myself, I have little difficulty in accepting that the Department did indeed have due regard to the need to eliminate discrimination since it was consistently addressing the particular position of the disabled in relation to Government policy for reforming housing benefit in relation to claimants who occupied houses larger than warranted by the size of their household. It is not easy to see how a Department implementing that policy can successfully advance "equality of opportunity" for the disabled but the whole point of the policy was that it should apply equally to all people who under-occupied their accommodation and I am unpersuaded by the suggestion that the Department failed in that duty either.

99. It does not, of course, follow from this that there was no breach of Article 14 of the Human Rights Convention but for the reasons given by the Master of the Rolls I am satisfied that the discrimination which undoubtedly existed was justified. I too would dismiss this appeal.

Lord Justice Ryder:

100. I agree with both judgments.

Annex

1. Jacqueline Carmichael (Case CO/2483/2013), born on 1 May 1972, lives with her husband Jayson in a two bedroom flat. He is her full-time carer. She has spina bifida, hydrocephalus, is doubly incontinent, is unable to weight bear, and has recurring pressure sores. She needs a special hospital-type bed in her bedroom with an electronic pressure mattress, specially designed to fit a single hospital bed. She has to sleep in a fixed position. She requires specialist in-bed toileting equipment, medical sheets and incontinence pads. She and her husband cannot share a bed. There is no space for an additional bed in the room.

2. The couple's HB has been reduced by 14%. They have appealed the reduction decision and await a response. They have now been awarded a 6-month DHP which covers the shortfall between HB and rent.

3. Mr Richard Rourke (CO/2488/2013), born on 17 December 1966, is a widower living with his step-daughter Rebecca in a three bedroom bungalow. Rebecca stays in university accommodation during the week in term-time, and over some weekends. Mr Rourke sleeps in one bedroom, Rebecca in another, and the third is used to store equipment. Mr Rourke is a wheelchair user. He has spinal arthritis, sciatica, sleep apnoea, diabetes and hereditary progressive deafness. He needs assistance with basic care tasks, which is provided by a combination of professionals (during the daytime) and local family support (overnight when needed and at weekends). His mobility is decreasing. Although he can sometimes use crutches for short periods indoors he

usually uses a manual wheelchair which has to be pushed. Outdoors he uses a powered wheelchair and a specially adapted Motability vehicle. Rebecca is also a wheelchair user, although she can sometimes walk for short periods. She has Emery Dreifuss Muscular Dystrophy and Supra Ventricular Tachychardia.

4. Mr Rourke's HB has been reduced by 25% on the basis that he is under-occupying by two bedrooms. He proposes to appeal this reduction. He has requested a DHP but that has not yet been decided. In the meantime he has been accruing arrears.

5. Mr Mervyn Drage (CO/2503/2013) is a single man who lives alone in a high-rise tower block, on the site of a former colliery. He has been there for nineteen years. His flat has three bedrooms; but he does not sleep in any of them. They all contain papers which he has accumulated (as does his bath). He has a number of significant mental health problems (depression, anxiety and Obsessive Compulsive Disorder), and various physical difficulties. He is prescribed medication for his depression and receives hospital psychological treatment. These conditions are exacerbated by stress, anxiety and changes to routine. He states that he is very anxious about the prospect of having to move, and disruption to his routines.

6. Mr Drage's HB has been reduced by 25%. He has submitted an appeal and requested that it be deferred pending the outcome of the judicial review. He also requested a DHP and on 29th April 2013 was notified of a decision to make an award for 6 months only, starting from 8 April 2013. This covers the shortfall for one bedroom rather than two. He has increasing rent arrears.

7. JD (CO/2507/2013) lives with her disabled 26-year-old daughter, AD. They occupy a specially adapted three bedroom property where they have lived since 1993. AD has a twin brother who previously lived in the house but has now moved out. The landlord is a housing association. AD has severe physical disabilities, learning disabilities and visual impairment. She has cerebral palsy with quadriplegia and she is registered blind. She has been assessed as having the approximate mental age of a 3-year-old and is reliant on others to make decisions for her. She is doubly incontinent, and needs 24-hour care and support with every aspect of her life. Two carers are required to assist with all transfers, as she uses a hoist but is herself physically unable to assist. She is a permanent wheelchair user and is unable to move without assistance. JD cares for AD full-time, and respite care has been provided for JD in respect of AD.

8. The property was specially constructed to meet AD's needs, with input from the family, an occupational therapist and a property development team. Specific aids include an internal lift, a gradual slope at the front and rear to allow wheelchair access, ceiling hoists in the bathroom and bedroom, an accessible bathroom and a changing bed.

9. The HB in this case was reduced by 14%. JD has appealed. The local housing authority has deferred consideration of the appeal until these proceedings have

concluded. JD has been awarded a six-month DHP until the end of September 2013, but has been informed that the DHP is unlikely to continue thereafter.

10. James Daly (CO/2502/2013) is the father of Rian Lawton-Daly, aged 9. He lives in a two bedroom flat on the ground floor which has level access throughout and also has access to a garden front and back. When Rian was born Mr Daly was living with his partner, Rian's mother. They lived in an owner-occupied property. When Rian was approximately eighteen months old the couple separated and since that time Mr Daly and Rian's mother have shared his care. Rian stays with Mr Daly every weekend and at least one day during the week. He also lives with Mr Daly for part of the school holidays and whenever his mother is away. Rian's mother receives child benefit in respect of him.

11. Rian suffers from spastic quadriplegia, cerebral palsy, epilepsy, learning difficulties, intraventicular haemorrhage and hydrocephalus. He has significant mobility problems (including an inability to use stairs) and other health problems including incontinence. He is assessed as being a full-time wheelchair user, and uses a wheelchair outside the home. Inside he moves by shuffling around on his bottom. He requires assistance with all aspects of daily living.

12. Mr Daly has been informed that his HB was to be reduced by 14%. On 8 April Mr Daly started a temporary seasonal full-time job, and given his current earnings he is not now in receipt of HB. However his job ends in September 2013.