Number: [2013] EWHC (2213)

Case Nos: CO/2502, 2483, 2488, 2494, 2486, 2492, 2491, 2503, 2507, 2482/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2013

Before:

LORD JUSTICE LAWS
MR JUSTICE CRANSTON

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Between:

R (on the application of MA & Ors)	**Claimants**
- and -	
The Secretary of State for Work and Pensions	**Defendant**
- and -	
Birmingham City Council	**Interested Party**
- and -	
(1) The Equality and Human Rights Commission Shelter	**Interveners**
(2) Shelter	

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Mr Martin Westgate QC, Ms Kate Markus, Ms Caoilfhionn Gallagher and Mr Ben Chataway (instructed by Hopkin Murray Beskine, Public Law Solicitors and Leigh Day and Co.) for the **Claimants**
Mr Tim Eicke QC and Mr Edward Brown (instructed by **The Treasury Solicitor**) for the **Defendant**
Mr Jonathan Manning (instructed by the Director of Legal and Democratic Services, Birmingham City Council) for the **Interested Party** and (instructed by Freshfields Bruckhaus Deringer LLP) for the **2nd Intervener**
Ms Helen Mountfield QC (instructed by the Equality and Human Rights Commission) for the **1st Intervener**

Hearing dates: 15-17 May 2013

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LORD JUSTICE LAWS:

INTRODUCTION

1. This is a judicial review challenge, with permission granted by Mitting J on 26 March 2013, directed to changes introduced into the Housing Benefit Regulations 2006 (the 2006 Regulations) by the Housing Benefit (Amendment) Regulations 2012 (the 2012 Regulations). There are ten claimants, all of whom are in receipt of Housing Benefit (HB). Mitting J directed that the cases be set down for hearing by a Divisional Court. He also granted permission to the Equality and Human Rights Commission (EHRC) to intervene by way of oral submissions, and to Shelter Children's Legal Services by way of written submissions. The Birmingham City Council, which is the Housing Benefit Authority in the case of the claimant JD, has appeared as Interested Party.

2. As is well known HB is a means-tested benefit whose purpose is to assist with the cost of renting accommodation. The measures of which complaint is made alter the basis on which maximum HB is calculated in relation to rents in the public sector. They apply to existing as well as new tenancies. They reduce the eligible rent for the purpose of the calculation in cases where the number of bedrooms in the property let exceeds the number permitted by reference to criteria set out in Regulation B13, introduced into the 2006 Regulations by Regulation 5(7) of the 2012 Regulations. The reduction in eligible rent is 14% where there is one excess bedroom and 25% where there are two or more. The Secretary of State estimates that something like £500m will be saved from the HB bill annually. The 2012 Regulations were laid before Parliament on 28 June 2012, made on 3 December 2012, and came into force on 1 April 2013. The affirmative resolution procedure applied. I will set out or describe the relevant legislation below.

3. The challenge is mounted on three grounds. (1) The new measures "are unlawfully discriminatory because they fail to provide for the needs of people in [the position of the claimants]". The claimants are said to "represent a range of individuals who are typical of those who are adversely affected by these changes for reasons relating to disability in a way that violates their Article 14 rights..." (claimants' skeleton, paragraph 2). The reference is to Article 14 of the European Convention on Human Rights (ECHR). (2) The new measures constitute or involve a violation by the Secretary of State of the Public Sector Equality Duty (PSED), imposed by s.149 of the Equality Act 2010. (3) The Secretary of State has unlawfully deployed guidance, in the shape of Circular HB/CTB U2/2013, to prescribe the means of calculating the appropriate maximum HB for certain classes of case. That can only be done by secondary legislation; and in any event the guidance cannot cure the discriminatory effects of the Regulations.

THE LEGISLATION

ARTICLE 14

4. As I shall show the primary ground of judicial review rests on Article 14 of ECHR. I need not set out the material terms of the Human Rights Act 1998, which gives effect in domestic law to the rights guaranteed by the ECHR. 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."

5. Two points on Article 14 are common ground (as they were in *Burnip* [2012] EWCA Civ 629, [2013] PTSR 11, which I must discuss below). First, disability is within the concluding words of Article 14, "other status": see *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634, [2009] UKHRR 1073, to which I must also return. Secondly, HB falls within the ambit of Article 1 of the First Protocol to the ECHR as a "possession": *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311. I need not set out Article 1. The case turns on the application of Article 14.

THE SOCIAL SECURITY STATUTES

6. The material amendments of the 2006 Regulations effected by the 2012 Regulations were made under powers conferred by the Social Security Contributions and Benefits Act 1992 as amended by s.69 of the Welfare Reform Act 2012. S.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".

S.130A provides for the determination of appropriate maximum housing benefit (AMHB). S.130A(2), (5) and (6) are (in part) in these terms:

> "(2) Regulations may prescribe the manner in which the AMHB is to be determined.
>
> (5) The regulations may, for the purpose of determining the AMHB, 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..."

(S.137(2)(j) allows regulations to make provision "for treating any person who is not liable to make payments in respect of a dwelling as if he were so liable".)

7. I should also cite the Child Support, Pensions and Social Security Act 2000. This is the source of the power to allow local authorities to make "discretionary housing payments" (DHPs) which, as I shall show, have an important role in the history which has led to this challenge. S.69(1) 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 EQUALITY ACT 2010

8. As I have indicated s.149 of the Equality Act 2010 introduces the PSED, on which the second ground of challenge is based. The section is cross-headed "Public Sector Equality Duty". It provides in part:

"(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."

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

THE REGULATIONS

9. The relevant provisions of the 2006 Regulations as amended by the 2012 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)...

Regulation 12B makes provision for the determination of eligible rent, but does not itself contain the disputed criteria. In summary 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) [that is, for accommodation in the public rented sector] in accordance with regulation B13". Regulation B13 provides in part:

> "(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;

(c) two children of the same sex;

(d) two children who are less than 10 years old;

(e) a child,

and one additional bedroom in any case where the claimant or the claimant's partner is a person who requires overnight care (or in any case where each of them is)."

10. I should also notice the Discretionary Financial Assistance Regulations 2001, made under s.69 of the Child Support, Pensions and Social Security Act 2000. These empower the grant of DHPs by local authorities. Regulation 2 provides in part:

"(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."

Thus the discretion conferred is a broad one; but it is targeted to HB recipients.

BURNIP [2012] EWCA Civ 629

11. I turn to this case before going further not only because of the central place which (as I shall show) it occupies in the argument, but also because it played its part in the development of the policy ultimately enacted in Regulation B13. The judgments were handed down on 15 May 2012, a little under seven months before the 2012 Regulations were made. The appellants were tenants in the private rented sector. Although there are some differences between the arrangements for public and private rentals, Regulation 13D(3) of the 2006 Regulations, introduced by amending Regulations of 2010 which came into force on 1 April 2011, contains the same bedroom criteria for the private sector as were to be set out in Regulation B13(5) for the public sector. By reason of their disabilities two of the appellants in *Burnip* were assessed as needing the presence of carers throughout the night, and so required two-bedroom flats. But their respective local authorities quantified the HB which was payable in each of their cases by reference to the one-bedroom rate under Regulation 13D. The third, Mr Gorry, lived with his wife and their three children in a four-

bedroom rented house. Two of the children, girls aged 10 and 8, were disabled – one by Down's Syndrome, the other by Spina Bifida. It was therefore inappropriate for them to share a bedroom as able-bodied sisters of those ages would be expected to do. But the County Council provided HB by reference to the three-bedroom rate which would have applied to the family if the girls were not disabled.

12. All the appellants raised claims pursuant to ECHR Article 14. I should say that the proceedings in *Burnip* were by way of statutory appeals from the Upper Tribunal, so that the Court of Appeal had the benefit of concrete findings of fact. I should also notice that although the closing words of Regulation 13D(3) (identical with the closing words of B13(5), allowing for an additional bedroom for an overnight carer) would have covered the cases of the first two appellants and were in force by the time the case reached the Court of Appeal, they had been added too late to help them.

13. As Maurice Kay LJ observed (paragraph 10),

> "[t]he case for the appellants is not that the statutory criteria amount to indirect discrimination against the disabled. It is that, in one way or another, they have a disparate adverse impact on the disabled or fail to take account of the differences between the disabled and the able-bodied."

The appellants, moreover, relied entirely on Article 14; the Disability Discrimination Act 1995 did not feature (paragraph 7).

14. Reasoned judgments were given by Maurice Kay LJ and Henderson J; Hooper LJ agreed with both. The court devotes some discussion to authority in the field of discrimination, notably *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634 to which I have referred in passing and *Thlimmenos v Greece* (2001) 31 EHRR 15, to which I must also return below. Maurice Kay LJ at length concluded (paragraph 19) that "the appellants [fell] within Article 14, subject to justification". It will be convenient to return to the basis for this finding when I confront the arguments in the case. As regards justification Maurice Kay LJ "completely agree[d]" with the judgment of Henderson J.

15. At paragraph 27 Henderson J, dealing specifically with justification, cited *Stec v United Kingdom* (2006) 43 EHRR 47, another case to which I will refer further, and at paragraph 28 noted the submission advanced by counsel for the appellants that "very weighty reasons" (*Stec* paragraph 52) were required to justify the discrimination suffered by them in the present case. He continued:

> "While I would accept that congenital disabilities of the kind suffered by Mr Burnip, Ms Trengove and Mr Gorry's daughters may in principle fall within the category of grounds for discrimination which can be justified only by very weighty reasons, I would nevertheless reject this submission for the same reasons that a similar submission was rejected by this Court in *AM (Somalia)*: see paragraphs 15 to 16 of the judgment of Maurice Kay LJ, and paragraphs 61 to 62 of the judgment of Elias LJ. 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 *AM (Somalia)*, therefore, the proportionality review applicable in the present case must be made by reference to the usual standard, not an enhanced one."

16. It is clear (see paragraph 27, citing paragraph 52 of the *Stec* judgment which I will set out below) that by "the usual standard" Henderson J meant that the claimants had to show that the measure complained of was "manifestly without reasonable foundation".

17. Henderson J conducted a detailed examination of the three appellants' circumstances. After extensive discussion of the judgments in *AM (Somalia)* he concluded (paragraph 65) that "maintenance of the single bedroom rule is not a fair or proportionate response to the discrimination which has been established in cases of the present type". And so the appeals were allowed.

THE FACTS

18. Mitting J directed the parties to 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, since 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 in light of the court's ruling and to assess the particular facts as part of that process. The Annex to this judgment contains an abbreviated account, taken from the detailed summary that has been provided.

19. The other factual dimension, which is critical given the scope of the arguments addressed to us, is the evolution of the policy which at length took the form of the measures under challenge. I should address the salient features of this process at this stage.

EVOLUTION OF THE POLICY

20. The proposed bedroom criteria measure was announced by the government in the June 2010 budget. It is plain from the published budget statement that this and other welfare reforms were part and parcel of the government's deficit reduction strategy, though other justifications, in terms of enterprise and fairness, were also claimed ("reforming the welfare system to reward work" – paragraph 1.31; "tackle welfare dependency and unaffordable spending" – paragraph 1.92). Against that general background I may turn to the evidence concerning the manner and extent of the consideration given by the government, as the prospective policy was elaborated over time, to the needs of the disabled.

(1) OFFICIALS' ADVICE

21. In a submission to the Minister for Welfare Reform of 20 August 2010 it was acknowledged that "[t]here are likely to be a number of social sector tenants who cannot be found suitable alternative social sector accommodation of the right size",

and specific reference is made to "those caring full time for a disabled person...". On 21 January 2011 officials recorded the Minister's agreement that "any exemptions eg because the claimant is unable to work due to a disability should be contingent on their landlord being unable to offer any suitable sized accommodation", and the Minister was asked to consider other groups as possible candidates for exemption. By 12 August 2011 it was being said there was "a strong case for exempting disabled claimants where significant adaptations have been made to their properties"; and it was suggested that the Minister "announce a £20m p.a. increased DHP package for... 2013/14 and 2014/15", funded by an increase in the planned reduction rates from 23% to 25%. At paragraphs 6 – 15 of the officials' paper of 12 August 2011 there is a detailed discussion of the background and the options available (see also Annex A to the paper). It includes the statement (paragraph 9) that "[t]here is a strong case for an exemption from the size criteria measure for disabled people living in adapted accommodation or properties that have been specially suited to their needs". In Annex A the officials canvassed arguments for their recommendation of "an increase to the DHP pot" (DHPs are payable, as Henderson J observed at paragraph 46 of *Burnip*, from a capped fund).

22. From August 2011 onwards there was a consistent view within government that the most workable solution to the difficulties for the disabled arising from the impact of the bedroom criteria was an increase in what could be made available through DHPs. In response to the paper of 12 August 2011, the Minister had asked for more information on the likely reaction of the Treasury and "the lobby" (a shorthand for various interested groups). In a paper of 2 September 2011 officials note that the lobby had singled out those living in significantly adapted accommodation as a group which should be exempted. They indicate (paragraph 4) that they have given consideration to the possibility of exempting this group and other "hard cases", and state:

> "[T]rying to define 'significantly adapted accommodation' for exemption purposes would not be workable. Such an exemption would be difficult and expensive to deliver effectively, especially within Universal Credit. It would either be too broad brush or leave out many other, equally deserving cases. We therefore recommend in our submission of 12 August increasing the DHP pot by £20m in 2013/14 and 2014/15. This approach 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."

The officials note, however, (paragraph 7) that

> "[a] DHP approach is likely to attract criticism for lacking the certainty... that only an exemption would appear to be able to offer in these cases... [T]his approach may produce inconsistencies in the way individual cases are treated across different parts of the country."

At paragraph 8 the officials refer to a survey carried out by them, to which 56 local authorities and housing associations had responded, and which (together with

meetings with "various stakeholders") "is helping to inform our approach to implementation as well as highlighting the pressure points most likely to be raised in the Lords Committee stages of the Welfare Reform Bill". They set out ten key bullet points from the survey. Three of them were as follows:

> "- For those providers questioned there appears to be a shortage of both 1 bed homes and much larger 4+ homes.
>
> - The majority of providers allocate homes to underoccupying households to a certain extent. It is more common in smaller 2 bed homes than bigger homes.
>
> - Most authorities allocate to underoccupiers most commonly for disabled needs and due to lack of suitable stock."

23. On 29 September 2011 officials informed the Minister that the Treasury declined to agree the proposed means of funding the suggested DHP package, and accordingly 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 £25m DHP package to mitigate the impact of this measure in a targeted way". In the same document they report 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, of which the first was "affordability (most of these would significantly erode savings)". Then at paragraph 16 this appears:

> "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 is 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:
>
> - It would enable LAs to provide additional help to claimants based upon a local-level decision about need.
> - 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...
> - We will also allocate this money to local authorities in a way that broadly reflects need in relation to the impact of this measure."

At paragraph 20 of the Annex the officials state that "[b]ased upon average weekly losses from the size criteria, £25m 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."

(2) CHILDREN'S COMMISSIONER'S PAPER

24. In January 2012 the Children's Commissioner (established by the Children Act 2004) published a Child Rights Impact Assessment of the Welfare Reform Bill. I should refer briefly to this given Ms Markus' submissions on s.149 of the Equality Act 2010 and the PSED. In section 2 the Commissioner opines that the proposed reductions in HB in the public sector will have deleterious effects on children:

> "Such penalties HB are likely to have a particular impact on disabled children, where spare rooms may be needed for equipment storage and/or overnight carers, unless they are excluded from the Bill. We understand that the DWP's intention is to make provision for overnight carers where this is required; however, the EIA says that there will be provision for a bedroom for overnight carers for 'the claimant or their partner', but does not mention carers for children. Children waiting for an adoptive family... will also be affected, as will children whose care is shared by separated parents..." [Other examples are given.]

(3) EQUALITY IMPACT ASSESSMENT AND THE JULY AND AUGUST 2012 CIRCULARS

25. In June 2012 the Department for Work and Pensions published an updated Equality Impact Assessment on the proposed size criteria for HB. Paragraph 9 refers to the proposal, as it had become, to add £30m per year to the DHP fund from 2013-14, stating that it was "expected to mitigate some of the impacts of the measure, in particular the effects on disabled people and those with foster caring responsibilities". Paragraphs 20 – 21 describe the Department's ongoing discussions with stakeholders. Paragraphs 22 ff offer a breakdown of the numbers of HB claimants thought likely to be affected (660,000 altogether), the distribution of losses among them (from £5 to £25 and over per week), the numbers who might "float off" HB altogether, tenure types (as between local authority and housing association tenants), regional distribution of those affected, and distribution by reference to family circumstances and gender. There is specific reference to disabled persons, who are accepted (paragraph 42) as "more likely to be affected by the introduction of size criteria", and there is a prediction (paragraphs 43 - 44) that 56% - 63% of those affected will be disabled, depending on the sense attributed to disability. Paragraph 59 describes the Department's plans for monitoring and evaluation of the policy's effects.

26. In July 2012 Circular HB/CTB A4/2012 was issued to local authorities. The background to the 2012 Regulations is explained, and the effect of the changes summarised. Paragraph 9 reacts to the judgments in *Burnip*, which it will be recalled had been handed down on 15 May 2012. The circumstances of the first two

appellants, who needed the presence of carers throughout the night, are dealt with in the Regulations (the closing words of Regulation 13D(3), identical as I have said to B13(5) for those renting in the public sector). The Circular concentrated on the third case in the *Burnip* appeal, that of Mr Gorry:

> "9. Due [*sic*] to [the decision in *Burnip/Gorry*] those whose children are said to be unable to share a bedroom because of severe disabilities will be able to claim [HB] for an extra room from the date of the judgment, 15 May 2012. However it will remain for local authorities to assess the individual circumstances of the claimant and their family and decide whether their disabilities are genuinely such that it is inappropriate for the children to be expected to share a room. This will involve considering not only the nature and severity of the disability but also the nature and frequency of care required during the night, and the extent and regularity of the disturbance to the sleep of the child who would normally be required to share the bedroom. This will come down to a matter of judgment on the facts."

DHPs are addressed later in the Circular. At that stage the extra £30m 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). This follows:

> "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."

Then after describing various means by which affected persons might be able to make up the shortfall caused by the reduction in their HB, this appears:

> "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..."

27. On 1 August 2012 Circular HB/CTB A6/2012 was issued. It was specifically concerned with the *Burnip* case: more particularly with facts such as those of Mr Gorry's appeal. It indicated (paragraph 2) that the Department had sought permission to appeal the decision to the Supreme Court. The advice given in paragraph 9 of HB/CTB A4/2012 was replicated in paragraph 8. Paragraph 7 also had this:

> "When a claimant says that their children cannot share a bedroom, [local authorities] should expect to be provided with sufficient medical evidence to satisfy themselves that these factors [sc. claimed severe disability] are sufficiently weighty

> in the individual case to make it inappropriate for the children to share a bedroom on a continual basis. Only in such circumstances will they be justified in making an exception to the normal application of the size criteria and granting HB on the basis of an additional bedroom."

(4) CIRCULAR HB/CTB U2/2013

28. This Circular was issued on 12 March 2013. As I have foreshadowed it is material to the third ground of challenge (the deployment of guidance to prescribe the means of calculating the appropriate maximum HB). It indicated (paragraph 5) that the Secretary of State did not propose to pursue the appeal (or prospective appeal) in the *Burnip* case. This follows:

> "6. This means that from the date of the Court of Appeal judgment on 15 May 2012, local authorities (LAs) should allow an extra bedroom for children who are unable to share because of their severe disabilities following the guidelines as set out in paragraphs 7 to 10 below.
>
> 7. When a claimant says that their children are unable to share a bedroom, it will be for LAs to satisfy themselves that this is the case, for example, a claim is likely to be supported by medical evidence and many children are likely to be in receipt of Disability Living Allowance (DLA) for their medical condition. In addition LAs must consider not only the nature and severity of the disability, but also the nature and frequency of care required during the night, and the extent and regularity of the disturbance to the sleep of the child who would normally be required to share the bedroom. In all cases this will come down to a matter of judgement on facts of each individual case.
>
> 8. It should be noted that the judgment does not provide for an extra bedroom in other circumstances, for example, where the claimant is one of a couple who is unable to share a bedroom or where an extra room is required for equipment connected with their disability."

(5) THE DHP GUIDANCE MANUAL, APRIL 2013

29. This document of April 2013 contains very full guidance as to the use of DHPs. It reminds authorities (paragraph 1.10) that their DHP funds are cash limited. It reviews the whole scheme. It canvasses the possibility of allowing applications in advance from persons affected by the HB (paragraph 4.5-6), and making an award not limited in time to a disabled claimant likewise affected (5.3). A Good Practice Guide is included in the Guidance. It contains a substantial discussion of the HB. It states:

> "1.10 The Government has provided additional funding towards DHPs following the introduction of the benefit cap. This additional funding is intended to support those claimants affected by the benefit cap who, as a result of a number of

> complex challenges, cannot immediately move into work or more affordable accommodation."

Specific types of case are then enumerated (paragraph 1.11) and carefully discussed, and worked examples are given. I should note these passages:

> "2.5 For claimants living in specially adapted accommodation, it will sometimes be more cost-effective for them to remain in their current accommodation rather than moving them into accommodation which needs to be adapted. We therefore recommend that local authorities identify people who fall into this group and invite a claim for DHPs.
>
> 2.7 The allocation of the additional funding for disabled people broadly reflects the impact of this measure and the additional funding needed to support this group. However, due to the discretionary nature of the scheme, LAs should not specifically exclude any group affected by the removal of the spare room subsidy or any other welfare reform. It is important that LAs are flexible in their decision making."

Other types of case discussed include adopters (paragraph 2.9-11) and foster carers, in particular (paragraph 2.13) carers for two or more unrelated foster children.

30. At paragraph 5.4-5 the Good Practice Guide poses a series of practical questions under two heads, "The household's medical circumstances, health or support needs" and "Other circumstances". The bullet points under the latter head (thirteen in number) demonstrate a series of different cases, none of them necessarily involving disability, in which the claimant may encounter particular difficulty or hardship in seeking alternative accommodation in response to the reduction in his/her HB which the local authority may think it right to consider in deciding whether to make an award of DHP. I will just set out the first two instances:

> "Is the claimant fleeing domestic violence? This may mean they need safe accommodation on an emergency basis so the concept of having time to shop around for a reasonably priced property is not appropriate
>
> Does the household have to live in a particular area because the community gives them support or helps them contribute to the district?"

(6) STATEMENTS IN PARLIAMENT

31. I turn next to the Parliamentary debates on the 2012 Regulations. It will be recalled that the Regulations were subject to the affirmative resolution procedure. On 15 October 2012 in the House of Lords the Parliamentary Under-Secretary of State, Lord Freud, referred to the £30m addition to the DHP fund for 2013-14, of which £5m was to be earmarked for foster carers. Concern was expressed in the debate as to "the dramatic consequences that these regulations will have for disabled people". Lord Freud stated (col. GC485):

> "As noble Lords will remember, the £30 million is divided so that £25 million is to cover people with significant adaptations. We estimate that there are around 35,000 claimants, particularly wheelchair users, who have accommodation adapted to their needs... The core question, raised by [Lord McKenzie and Lady Hollis] was whether there is suitable accommodation. I know it is a concern. Clearly, it varies across the country. This is not about making people move into it. Many will prefer to stay. What will happen in practice is that there will be a very varied effect on individuals. One can tier up the problems and end up with someone in a very difficult position. We had some examples today. This is exactly where we would expect the DHP to come into effect. A lot of people will decide that they will have enough money or that they will be able to take in a lodger or take extra work. Those are the kind of decisions that we expect to happen in the marketplace. There will, of course, be a residue of bigger problems."

32. In the House of Commons on 16 October 2012 the Minister, Mr 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 was very complex. Rather than have a blanket exemption for a ramp or a stair rail, we have allocated money to local authorities [sc. the £30m DHP], which broadly matches what we think would be the cost of protecting people in the circumstances that the hon. Gentleman had described..."

33. At Prime Minister's Questions on 7 March 2013 the Prime Minister stated that "people with severely disabled children are exempt" [sc. from the bedroom criteria]. On 12 March 2013 the Secretary of State, in a Written Ministerial Statement, referred to the DHP Guidance to be issued the following month (and which I have described above) and indicated that he would "closely monitor and adjust the implementation of the policy... to ensure that the needs of these groups [sc. priority groups other than foster carers and armed forces personnel] are effectively addressed in the longer term."

34. I shall have to refer to some other evidence in addressing counsel's submissions, but the materials I have set out suffice to provide an overall picture of the Secretary of State's consideration of the likely impact of the reductions in HB which was to be effected by the 2012 Regulations.

ISSUE (1): DISCRIMINATION

35. As in *Burnip*, the claimants' case on discrimination is founded on ECHR Article 14. That being so Maurice Kay LJ's observation in *Burnip* at paragraph 13 is very much in point:

> "[O]ne of the attractions of Article 14 is that its relatively non-technical drafting avoids some of the legalism that has affected domestic discrimination law. This was recognised by Baroness Hale in *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, at paragraphs 20-25, where she particularly identified the less complicated approach to comparators in Convention law."

36. *AL (Serbia)*, in which this "less complicated approach" was articulated, was an immigration case. I need not describe the facts. At paragraph 22 Baroness Hale cited the judgment in *Stec v United Kingdom* (2006) 43 EHRR 47 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. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

Paragraph 52 of the *Stec* judgment, which was cited by Henderson J in *Burnip* and set out in the judgment of Baroness Hale in *AL (Serbia)*, is also important, but it will be more convenient to note its terms when I come in due course to *Humphreys v HMRC* [2012] 1 WLR 1545, which was much relied on by Mr Eicke QC for the Secretary of State on the issue of justification, should the court find discrimination established. In *AL (Serbia)*, after citing paragraph 51 of *Stec*, Lady Hale continued:

> "23. This instantly makes the article 14 right different from our domestic anti-discrimination laws. These focus on less favourable treatment rather than a difference in treatment. They also draw a distinction between direct and indirect discrimination. Direct discrimination, for example treating a woman less favourably than a man, or a black person less favourably than a white, cannot be justified. This means that a great deal of attention has to be paid to whether or not the woman and the man, real or hypothetical, with whom she wishes to compare herself are in truly comparable situations. The law requires that their circumstances be the same or not materially different from one another.
>
> 24. It will be noted, however, that the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether 'differences in otherwise similar situations justify a different

treatment'. Lord Nicholls put it this way 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 whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.'"

CATEGORIES OF DISCRIMINATION?

37. Despite this apparently unitary approach adopted in Strasbourg, it is plain that the Convention jurisprudence recognises not only direct discrimination but also (see for example *DH v Czech Republic* (2008) 47 EHRR 3) what Maurice Kay LJ described at paragraph 11 of *Burnip* as "a form of discrimination akin to indirect discrimination". There is also what has become known as *Thlimmenos* discrimination ((2001) 31 EHRR 411):

> "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 situations without providing an objective and reasonable justification... However, the Court considers that this is not the only facet of the prohibition of discrimination. 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." (*Thlimmenos* paragraph 44)

38. Notwithstanding these categorisations, the law of discrimination, domestic or European, rests on a single principle: the principle of consistency. Elias LJ at once stated the principle and exposed its different applications in *AM (Somalia)* [2009] EWCA Civ 634: "[l]ike cases should be treated alike, and different cases treated differently. This is perhaps the most fundamental principle of justice" (paragraph 34). Even so, discrimination, including direct discrimination in Article 14 cases, may be justified; and the difference between direct and indirect discrimination (and *Thlimmenos* discrimination) retains a conceptual importance, because it will determine what it is that must be justified. Where the discrimination is direct – where a rule, practice or policy prescribes different treatment for persons in like situations – it is the rule itself that must be justified: the difference in treatment. Where the discrimination is indirect – where a single rule has disparate impact on one group as opposed to another – it is the disparate impact that has to be justified. With

Thlimmenos discrimination, what must be justified is the failure to make a different rule for those adversely affected.

THE CLAIMANTS' CASE (1) – WHICH CATEGORY?

39. In this case Mr Westgate QC for the claimants contends for all three forms of discrimination and submits that in any event there is no justification. Mr Eicke QC for the Secretary of State denies direct discrimination and also (though rather more guardedly, judging by the terms of his skeleton argument at paragraphs 24-48) indirect and *Thlimmenos* discrimination; but then submits that the policy given effect by the 2012 Regulations is in any event well justified.

40. I will summarise the different ways in which the discrimination case is put by Mr Westgate. On direct discrimination, he advances two alternatives. He submits first that while HB is in principle available to meet the whole cost of accommodation needed by a family, by force of Regulation B13 it fails to do so in the case of a disabled person with a need for larger accommodation than B13 allows for. In the alternative Mr Westgate points to the fact that some classes of HB recipients are expressly excluded from the eligible rent reductions, so that they still receive full payment notwithstanding their possession of extra bedroom(s): pensioners, households with a child in the armed forces serving overseas (by an amendment made in 2013), foster carers, cases where an overnight carer is needed and (following *Burnip*) cases where children cannot share a room. To the extent that the claimants are by contrast subject to the eligible rent reductions, they are victims of direct discrimination.

41. On indirect discrimination, the complaint is that it is harder for the claimants to comply with the Regulation B13 criteria than it is for their non-disabled peers. B13 is said to constitute "a general policy or measure that has disproportionately prejudicial effects on a particular group..." (*DH v Czech Republic*, paragraph 175, cf paragraph 184). As for *Thlimmenos*, Mr Westgate submits that because of the claimants' needs the State is obliged to take positive steps to configure the Regulations so as to accommodate their needs.

42. Mr Westgate is concerned to establish direct discrimination if he can because he submits that the bar is set higher for its justification, and I will come to justification in due course. But I think his first alternative is in truth, if he will forgive my saying so, no more than a loaded description of his argument on indirect discrimination: that it is harder for the claimants to comply with Regulation B13 than it is for their non-disabled peers. His second alternative advanced as an instance of direct discrimination is, to say the least, vulnerable to Mr Eicke's submission that the classes of excepted cases are in relevant respects differently placed from the claimants (save, I apprehend, to the extent that the cases of any of the claimants described at paragraphs 11-26 of the Annex may be assimilated to the *Gorry* case).

43. So the case advanced is in reality one of indirect and/or *Thlimmenos* discrimination. In *Burnip*, as I read the judgments, the court made no substantial distinction between these two categories for the purpose of finding discrimination established. At paragraph 10 Maurice Kay LJ summarises the appellants' case as being that "in one way or another, [the statutory criteria] have a disparate adverse impact on the disabled

or fail to take account of the differences between the disabled and the able-bodied". He proceeded to refer to *DH v Czech Republic* and then stated at paragraph 13 that

> "[w]here, as in the present case, a group recognised as being in need of protection against discrimination – the severely disabled – is significantly disadvantaged by the application of ostensibly neutral criteria, discrimination is established, subject to justification".

At paragraphs 14-18 Maurice Kay LJ addresses *Thlimmenos* discrimination. He rejected a submission advanced by Mr Eicke, then as now appearing for the Secretary of State, that *Thlimmenos* was strictly concerned with cases concerning "exclusionary rules" (paragraph 17). At paragraph 18 he stated:

> "I can see no warrant for imposing a prior limitation on the *Thlimmenos* principle. To do so would be to depart from the emphasis in Article 14 cases which, as Baroness Hale demonstrated in *AL (Serbia)* (at paragraph 25), is 'to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification'. I would apply the same approach to a *Thlimmenos* failure to treat differently persons whose situations are significantly different."

Maurice Kay LJ's conclusion – "in my judgment, the appellants fall within Article 14, subject to justification" – immediately follows at paragraph 19.

44. As in *Burnip*, the claimants' real case here is that "in one way or another, [the statutory criteria] have a disparate adverse impact on the disabled or fail to take account of the differences between the disabled and the able-bodied". Is it necessary distinctly to classify the claim as one of indirect or *Thlimmenos* discrimination? On the face of it, the asserted "disparate adverse impact on the disabled" *is* the alleged "[failure] to take account of the differences between the disabled and the able-bodied".

45. In *AM (Somalia)*, however, Elias LJ expressed the view that indirect and *Thlimmenos* discrimination are not different names for the same legal construct. He reasoned as follows:

> "44. This traditional concept of indirect discrimination is not the same concept as treating different cases differently. In the latter, the core of the applicant's complaint is not that a rule is imposing a barrier and cannot be justified; rather, the complaint is that even accepting that the rule can be justified in its application to others, it ought not to be applied to the applicant because his or her situation is materially different, and that difference ought to be recognised by the adoption of a different rule, which may take the form of an exemption from the general rule. The complaint is not that the single rule adopted is inappropriate because discriminatory and unjustified; it is that

> the circumstances require that there should be more than one rule.
>
> 45. However, as with the concept of treating like cases alike, the concept of treating different cases differently may also be the subject of a form of indirect discrimination claim. It may be argued that a rule applied equally in fact fails to have regard to a characteristic related to status, and that persons with that particular characteristic should be subject to a special rule to counter the disadvantage which that characteristic creates. The test for determining whether the applicant is adversely affected by the rule because of some such characteristic is the same as in traditional indirect discrimination claims. *Thlimmenos* itself is such a case...
>
> 46. The traditional concept of indirect discrimination is related to the concept that different cases should be treated differently to this extent: in both the applicant is saying that he or she is adversely affected by a rule which is framed to apply equally but which in fact fails to have regard to a material feature of his or her situation. In the case of traditional indirect discrimination, however, the complaint is that the alleged discriminator could be expected to adopt a different rule which does not have that effect and that it is unreasonable for him not to do so. By contrast, in the case where it is alleged that different cases should be treated differently, it is accepted that the rule itself may serve a legitimate function and be capable of justification in most circumstances but it is contended that a different rule should be adopted for the claimant and those in a similar situation, specifically ameliorating the effect resulting from their special features or characteristics."

46. I would, with great respect, venture to add the following. There is no conceptual difference between the rule, stated by Elias LJ at paragraph 34 of *AM (Somalia)*, that like cases should be treated alike and the rule that different cases should be treated differently. They rest on a single principle: as I have said, the principle of consistency. Indirect and *Thlimmenos* discrimination are closely allied applications of the principle. The former will often involve an assertion that the claimants should be treated differently from others who are covered by the rule complained of: and that is *Thlimmenos* discrimination.

47. Breach of the consistency principle will have different consequences from case to case. If the breach can be justified, then of course the law allows the inconsistency to stand. If it cannot, there are generally two possibilities: (1) the rule, policy or practice giving rise to the breach will be struck down, or (2) it will have to be altered or amended in some way. Either possibility may arise with respect to any of the three forms of discrimination discussed in the cases: direct, indirect, *Thlimmenos.* It depends on what it takes, so to speak, to cure the breach.

48. What, then, is the position here? I think that the claim is best regarded as asserting an instance of *Thlimmenos* discrimination. The contention is that the claimants should

be treated differently – more favourably – than others who are covered by the rule complained of. This is consistent with the approach taken in *Burnip.* The shuttle between indirect and *Thlimmenos* discrimination in that case serves only to underline the close alliance between the two.

THE CLAIMANTS' CASE (2) – IS THLIMMENOS DISCRIMINATION MADE OUT?

49. Mr Eicke submits that on the facts there is no case for imposing, in relation to the HB cap, a positive obligation of more favourable treatment towards any category of persons beyond the very limited class of claimants in the *Burnip* case. The essence of his submission is that there is no such class: at any rate, no such class capable of being objectively defined. The concept of disability will not suffice to afford a definition which would be workable in practice. Mr Eicke referred to paragraph 89 of the witness statement of Beverley Walsh, a team leader in the DWP:

> "Options for broader exemptions for disabled people [sc. than might be made for those in receipt of disability living allowance] were considered but rejected as unacceptable. Providing a blanket exception 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."

50. There are, however, two different ideas in play in this paragraph and they need to be distinguished. One is the cost of adopting "broader exemptions for disabled people". The other is the difficulty of finding a definition sufficiently tight to be workable: "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". Only this latter idea is material to the question whether *Thlimmenos* discrimination is shown; though the former may be relevant on justification. Ms Walsh's reference to the difficulty of definition, as opposed to the issue of cost, recalls what was said by officials in the Department on 2 September 2011:

> "[T]rying to define 'significantly adapted accommodation' for exemption purposes would not be workable... It would either be too broad brush or leave out many other, equally deserving cases..."

51. The court invited Mr Westgate to suggest a draft modification of Regulation B13 which on his argument would not be discriminatory. In response he sought to circumscribe the relevant class of discrimination victims by reference to a need for extra bedroom space arising from the householder's disability. However that

suggestion does not in my judgment ameliorate, at least it does not extinguish, the difficulty of definition: the concept of need caused by disability is too elastic. The impact of Regulation B13 has, and will have, substantially disparate effects as between differently disabled people, as well as between persons with no disability on the one hand and (at least) many of the disabled on the other. Indeed there will be such disparate effects between persons with no disability, whose circumstances differ in other respects. The references in the Good Practice Guide (attached to the DHP Guidance Manual of April 2013) to persons fleeing domestic violence, and those who especially rely on community support in a particular area, demonstrate as much.

52. But the law's response, even in the context of national economic strategy, must not be to consign the many disabled people who will suffer real difficulty to the outcomes of an unfettered political discretion. We are in Article 14 territory. It is helpful to recall what Lady Hale said in *AL (Serbia)* (paragraph 24):

> "[T]he classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether 'differences in otherwise similar situations justify a different treatment'."

As I have said she proceeded to cite Lord Nicholls in *Carson* [2006] 1 AC 173 at paragraph 3:

> "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 whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

53. No doubt the common law would recognise, without the assistance of the Strasbourg jurisprudence, that the circumstances of many disabled persons (and of others who would also be adversely affected by the new HB policy) are a relevant consideration for the Secretary of State to take into account in framing the 2012 Regulations. Now here, in my judgment, there is 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. But the common law would not for that reason absolve the Secretary of State from the duty to consider and take account of the effects of his prospective policy on the disabled. So also Article 14 is not disapplied. The case remains one where the policy has markedly disparate effects between groups of persons, even if the groups have no sharp edges. Because they have no sharp edges, it is a case in which, in Lord Nicholls' words, "the position is not so clear"; but not one where Article 14 does not apply at all. What Article 14 gives in those circumstances is an obligation upon the Secretary of State "to see that the means chosen to achieve [his] aim is appropriate and not disproportionate in its adverse impact".

54. Thus the difficulty of defining the disadvantaged class with any precision, upon which Mr Eicke places understandable emphasis, does not take the case out of Article 14. Given the differential effects of the HB, the law required the Secretary of State to fashion the policy so that its adverse impact was not disproportionate with respect to disabled persons (and others: we are concerned with the disabled) to whom it presented particular difficulties. The concrete question, in my judgment, is whether the refusal to exclude (some) disabled persons from the regime of B13, and the provision made and to be made by way of access to DHPs, constitutes a proportionate approach to the difficulties suffered by such persons in consequence of the HB policy. This is the discipline of *Thlimmenos* on the facts of the case.

55. I should add that this application of *Thlimmenos* discrimination is not, in my judgment, contradicted by decisions such as *Chapman v UK* (2001) 33 EHRR 18 or *Anufrijeva* [2004] QB 1124, cited by Mr Eicke. They were concerned (so far as material) with difficulties arising in relation to Article 8. Here, as I have said, it is common ground that HB falls within the ambit of Article 1 of the First Protocol to the ECHR as a "possession". Moreover Mr Eicke's reliance on these authorities proves too much; if they availed him, they would also undermine the binding *ratio* of the Court of Appeal's decision in *Burnip.*

JUSTIFICATION

(1): LAW

56. This brings me to justification. Now, proportionality has a sharper focus than reasonableness, but it is not an exact idea. Sensible views of its application will differ starkly. How broad a margin of discretion did the Secretary of State enjoy in deciding what would be a proportionate regime by which to introduce the HB cap?

57. Upon this question Mr Eicke placed heavy reliance on the decision of the Supreme Court in *Humphreys v HMRC* [2012] 1 WLR 1545, and I must cite a substantial passage. As Baroness Hale stated at paragraph 1, the distribution of child tax credit discriminated against fathers. The question was whether the discrimination was justified. Lady Hale addressed the test for justification at paragraphs 15-21:

> "15. The proper approach to justification in cases involving discrimination in state benefits is to be found in the Grand Chamber's decision in *Stec v United Kingdom* (2006) 43 EHRR 1017... [In that case] women suffered [a] reduction in [particular] benefits earlier than men because they reached state pension age at 60 whereas men reached it at 65.
>
> 16. The Court repeated the well-known general principle that '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' (para 51). However, it explained the margin of appreciation enjoyed by the contracting states in this context (para 52):

‘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”.’

17. The phrase ‘manifestly without reasonable foundation’ dates back to *James v United Kingdom* (1986) 8 EHRR 123, para 46, which concerned the compatibility of leasehold enfranchisement with article 1 of the First Protocol. In *Stec*, the Court clearly applied this test to the state’s decisions as to when and how to correct the inequality in the state pension ages, which had originally been introduced to correct the disadvantaged position of women... The Grand Chamber applied the *Stec* test again to social security benefits in *Carson v United Kingdom* (2010) 51 EHRR 13, para 61, albeit in the context of discrimination on grounds of country of residence and age rather than sex.

18. The same test was applied by Lord Neuberger (with whom Lord Hope, Lord Walker and Lord Rodger agreed) in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311, which concerned the denial of income support disability premium to rough sleepers. Having quoted para 52 of *Stec* he observed, at para 56, 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 went on to say that it was not possible to characterise the views taken by the executive as ‘unreasonable’. He concluded (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.’

19. Their Lordships all stressed that this was not a case of discrimination on one of the core or listed grounds and that this might make a difference. In *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, both Lord Hoffmann and Lord Walker drew a distinction between discrimination on grounds such as race and sex (sometimes referred to as 'suspect') and discrimination on grounds such as place of residence and age, with which that case was concerned. But that was before the Grand Chamber's decision in *Stec*. 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 *Stec* and *Runkee*, they must, as the Court of Appeal observed (para 50), apply a fortiori to the indirect sex discrimination with which we are concerned.

20. The reality is that, although the rule does happen to be indirectly discriminatory against fathers, the complaint would be exactly the same if it did not discriminate between the sexes. Mothers who share the care of their children for a shorter period each week while living on subsistence level benefits have exactly the same problem. The real object of the complaint is the discrimination between majority and minority shared carers. It is quite likely that the Strasbourg Court would regard this as another 'status' for the purpose of article 14, because they have taken a broad view of what that entails. But this reinforces the view that they would apply the 'manifestly without reasonable foundation' test of justification. In fact, the appellant did not argue for anything other than the test established in *Stec* and *RJM*.

21. It is unnecessary for us to consider to what extent the test under the ECHR is different from the test in EU law. EU law requires that, in order to justify indirect sex discrimination, the state has to show that the rule in question is a suitable and necessary means of achieving a legitimate social policy aim which is unrelated to discrimination on the prohibited ground. In choosing the measures capable of achieving the aims of its social and economic policy, the state has a broad margin of discretion, although it cannot frustrate the implementation of a fundamental principle such as equal pay for men and women: see *R v Secretary of State for Employment, Ex p Seymour-Smith* (Case C-167/97) [1999] ECR I-623 and [1999] 2 AC 554. The Court of Appeal in this case thought that the two tests would not lead to materially different outcomes and in particular that

> the Court of Appeal in *Hockenjos* would have reached the same conclusion under the ECHR as they did under EU law (para 53)."

58. Mr Westgate cited a welter of other cases. Some applied a "weighty reasons" approach on the particular facts. He submitted that this case lacks the element of high policy which characterised *Humphreys.* I think with respect that that is an unrealistic position to take. The engine of the HB is not only the saving of public funds, though where (as here) that is proposed to be done in the context of a major State benefit, it might be thought high policy enough. But there is also a strategic aspiration to shift the place of social security support in society. So much is plain from the published budget statement of June 2010, to which I have briefly referred. The aspiration is contentious. It is elementary that the judges have no public voice for or against it. Its relevance is only that it puts the case even more firmly into the realm of high policy than might be demonstrated by the text of *Humphreys.* The virtue of proportionality, undiminished by the Secretary of State's wide margin of appreciation, is that consideration of the policy's effects on the specially disadvantaged cannot be treated (as I put it in a different context in *SS (Nigeria)* [2013] EWCA Civ 550, paragraph 42) as a mere token or a ritual. And this, moreover, marches with the PSED, to which I will come.

59. Ms Mountfield QC for the EHRC sought to distinguish *Humphreys* as being "a case about the ambit of a rule, not a case as to whether an unadjusted brightline rule could be justified at all..." (skeleton paragraph 64); but a distinction between a rule's ambit and the possibility of its adjustment seems to me to be permeable, to say the least. However Ms Mountfield also submits, perhaps more pointedly, that in *Humphreys* there was no dispute but that *some* brightline rule was needed (paragraph 56). But I do not understand it to be contended in this case that the Secretary of State was not entitled to adopt a brightline rule: the question is whether a putative class – those needing extra bedroom space by reason of disability – should have been excluded from the rule.

60. In my judgment *Humphreys* plainly states the test – "manifestly without reasonable foundation" – to be applied for the ascertainment of the Secretary of State's margin of discretion in the present case.

61. Relevant to the breadth of the Secretary of State's margin of discretion is a citation by Mr Westgate from Lord Hope's speech in *Re G* [2009] 1 AC 173, an appeal from Northern Ireland which was concerned with the exclusion of a couple from consideration as adoptive parents on the ground only that they were not married. At paragraph 48 Lord Hope said:

> "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 (Pro Life Alliance) v British Broadcasting Corporation* [2003] UKHL 23; [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."

How are we to understand Lord Hope's approach to the place of social policy in public decision-making? Where it is in play, does it tell for or against a broader margin of discretion in the hands of the primary decision-maker? Generally, it tells in favour. But there will be cases, especially those concerned with discrimination by reference to characteristics such as race or sexual orientation which civilised opinion condemns as a basis of legal distinctions, where the courts will have a clarion voice. Discrimination on grounds of individual status (such as marriage) is also likely to demand robust judicial direction. This case is not within those categories. The wide margin remains; in context, it is a function of democratic rule.

62. Though the wide margin remains, it is important to have in mind that what has to be justified for the purpose of Article 14 (at least in a case like this) is not the policy as a whole but the relevant difference in treatment. So much was common ground. I note in particular the reference by Ms Mountfield to the decision of the Supreme Court in *Quila* [2012] 1 AC 621, [2011] UKSC 45, in which the court held that it is not enough for a decision-maker in a field of sensitive public policy to draw attention to a particular pressing social problem and pray that in aid as an intrinsic justification for the measures adopted to address it. This is certainly so with respect to the discrimination issue here. As I have said the concrete question is whether the refusal to exclude (some) disabled persons from the regime of B13, and the provision made and to be made by way of access to DHPs, constitutes a proportionate approach to the difficulties suffered by such persons in consequence of the HB policy.

(2): FACT

63. Given this approach, has the Secretary of State justified Regulation B13?

64. Mr Westgate subjected the HB to a forensic analysis of its motives, and submitted that in light of it there was no sufficient justification. Mr Manning for the Birmingham City Council submitted that the Secretary of State's recourse to the DHP regime, even with extra funding, could not constitute a proportionate approach to the plight of the disabled. Ms Mountfield submits that the "bright-line" rule in Regulation B13 is not rationally linked to the aim of avoiding State subsidy for tenants of under-occupied property.

65. I think with respect that the positions taken by Mr Westgate and Ms Mountfield overlook or underestimate the strategic aims of the policy: not only to save public funds, but also to shift the place of social security support in society. More specifically, there are some factual disputes. Mr Eicke by no means accepts all the

factual points taken in the witness statement of Mr Gibbs, Assistant Director of Revenues and Benefits at the Birmingham City Council. Mr Gibbs states at paragraph 27:

> "The £3.77m provided by the Government is not adequate to meet the shortfall caused by the social sector size criteria, a total of £11.5m."

And at paragraph 29:

> "Whilst the increase in DHP funding will be helpful in managing the impact of the social sector size criteria, the funding will not compensate for the total loss of housing benefit income to claimants in Birmingham."

66. Mr Eicke points to a Table published by the DWP in January 2013 showing that Birmingham's overall DHP limit for 2013/14 (including the government's contribution of £3,770,701) is £9,426,753, about £2m short of Mr Gibbs' figure of £11.5m; a figure which, Mr Eicke submits, takes no account of those tenants who will get work or sub-let rooms and so forth. That may be right. Plainly the number cannot be precisely quantified.

67. At the end of his submissions at the hearing Mr Manning identified four particular points. (1) DHP could not "make up the difference" between uncapped HB and the effects of the cap. (2) There was an inconsistency between the policy of "localism" and, for example, paragraphs 2.4 – 2.11 of the Good Practice Guide (included in the April 2013 DHP Guidance Manual) setting out a general steer for the use of DHPs. (3) Insufficient funds have been made available so as to boost DHP provision to the point where it will have "the necessary impact". (4) There will be a rise in the numbers who qualify as homeless – "already at crisis stage" (Mr Gibbs, paragraph 51). Their right to temporary accommodation (in relation to which HB is not capped) may actually increase HB expenditure.

68. On the second of these points – "localism" – it is to say the least difficult to see how a criticism of the thrust or emphasis of passages in a guidance document can constitute a legal objection, based on proportionality, to the scope of Regulation B13. But in any case I do not think the point is well made. I repeat for convenience paragraph 2.7 of the Good Practice Guide:

> "The allocation of the additional funding for disabled people broadly reflects the impact of this measure and the additional funding needed to support this group. However, due to the discretionary nature of the scheme, LAs should not specifically exclude any group affected by the removal of the spare room subsidy or any other welfare reform. It is important that LAs are flexible in their decision making."

This does not suggest any commendation of over-centralised rigidity, if that is the criticism.

69. Points (1), (3) and (4) raise issues of judgment in a context where anything like certainty of outcomes is unattainable, and the Secretary of State is not required to pretend to its attainment. Fact and law surely both dictate that the Secretary of State, if the adverse impact of his recourse to DHPs is not to be condemned as disproportionate with respect to disabled persons, must show that in developing the policy he has directed a "proper and conscientious focus" upon the goal of avoiding discrimination, being "clear precisely what the equality implications [of the policy's impact] are". But that is how Elias LJ described fulfilment of the PSED in *Hurley* [2012] EWHC Admin 201, paragraph 78. As I have said, in this case justification and the PSED march together. That will not always be so. However where the discrimination issue is to be resolved, as here, by the requirement of a proportionate judgment, its discipline and that of the PSED are very close. Both demand an informed and conscientious appreciation of the difficulties facing the persons or group adversely affected by the prospective measure. If that has been done, the PSED duty will have been fulfilled; and, most likely, a proportionate decision arrived at.

70. Accordingly I will return to the Secretary of State's substantive claim of justification in addressing the PSED. Before doing so I should indicate that this alignment of Issues (1) and (2) does not dilute the application of the *Humphreys* test – "manifestly without reasonable foundation" – for the Secretary of State's margin of discretion. The discipline imposed by the PSED lies (as I will show) in the required quality of the decision-making process. Proportionality also requires the discriminatory effects of the prospective decision to be properly considered. If they are, the decision will not be struck down unless it is, indeed, "manifestly without reasonable foundation".

ISSUE (2): THE PUBLIC SECTOR EQUALITY DUTY

(1) PRINCIPLE

71. S.149 of the Equality Act 2010 requires public authorities (including, of course, the Secretary of State) to have due regard to the need to achieve the goals identified in the section. "Due regard" is the "regard that is appropriate in all the circumstances": *R (Baker) v Secretary of State for Communities and Local Government* [2009] PTSR 809 at paragraph 31 *per* Dyson LJ as he then was (addressing s.71 of the Race Relations Act 1976, whose wording is effectively the same as the material provisions of s.149(1)). But the duty – and this is "vital" (*ibid.*) – is *not* to achieve a particular result. It is with respect helpful also to notice the full passage from the judgment of Elias LJ in *Hurley*, to which I referred above:

> "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."

Elias LJ also said this (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 Employment v Tameside*

> *Metropolitan Borough Council* [1977] AC 1044 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 that 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. But none of this is necessary if the public body properly considers that it can exercise its duty with the material it has."

Ms Markus also draws attention to the EHRC Technical Guidance, chapter 5 of which emphasises the importance of a "sound evidence base" for the purpose of public decisions which engage the s.149 duty.

72. Accordingly I accept without cavil the submission made in writing for the claimants (skeleton paragraph 141), citing *Hurley* and also *Harris v London Borough of Haringey* [2011] PTSR 931 at paragraph 40, that "consideration of equality in general is insufficient to amount to 'due regard' to the relevant statutory needs. The duty involves analysis of the relevant material with the specific statutory considerations in mind". It is plain that the PSED sets an important standard for public decision-making. Where the protected characteristics specified in s.149 of the 2010 Act are potentially affected by a forthcoming public measure, the decision-maker is obliged to conduct a rigorous examination of the measure's effects, including due enquiry where that is necessary. He does not, however, have to undertake a minute examination of every possible impact and ramification: *Bailey v London Borough of Brent* [2011] EWCA Civ 1586, *per* Pill LJ at paragraphs 77-83 and Davis LJ at paragraph 102. "The courts must ensure that they do not micro-manage the exercise" (*Greenwich Community Law Centre* [2012] EWCA 496 *per* Elias LJ at paragraph 30).

73. As I have indicated the duty of due regard is not a duty to achieve a particular result. The courts will not administer s.149 so as in effect to steer the outcome which ought in any particular case to be arrived at. The evaluation of the impact on equality considerations of a particular decision clearly remains the responsibility of the primary decision-maker: *Hurley* paragraph 78 cited above; *Baker* paragraph 34 ("[u]ltimately, how much weight she gave to the various factors was a matter for her planning judgment"), *Brown v Secretary of State for Work and Pensions* [2008] EWHC Admin 3158 paragraph 82 ("the weight to be given to the countervailing factors is a matter for the public authority concerned, rather than the court, unless the assessment by the public authority is unreasonable or irrational"). HHJ Keyser QC, sitting as a deputy judge of the High Court in *Copson* [2013] EWHC Admin 732 was right to observe at paragraph 57(4) that "[t]he public sector equality duty is not a back door by which challenges to the merits of decisions may be made".

74. So, as I have said, the discipline of the PSED lies in the required quality, not the outcome, of the decision-making process. This is well borne out by the learning; but in my judgment it reflects a more general constitutional balance. Much of our modern law, judge-made and statutory, makes increasing demands on public decision-makers in the name of liberal values: the protection of minorities, equality of treatment, non-discrimination, and the *quietus* of old prejudices. The law has been enriched accordingly. But it is not generally for the courts to resolve the controversies which this insistence involves. That is for elected government. The cause of constitutional rights is not best served by an ambitious expansion of judicial territory, for the courts are not the proper arbiters of political controversy. In this sense judicial restraint is an ally of the s.149 duty, for it keeps it in its proper place, which is the process and not the outcome of public decisions. I would with respect underline what was said by Elias LJ at paragraph 78 in *Hurley*, rejecting a submission for the claimants that it was for the court to determine whether appropriate weight has been given to the duty: "it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

BREACH OF THE PSED?

75. The question, then, is whether the Secretary of State conducted a rigorous examination of the prospective effect of Regulation B13, including due enquiry to the extent that that was necessary.

76. Ms Markus (following Mr Westgate) submitted – and this was her "key point" – that the history of the policy's evolution disclosed "nothing like the focussed analysis which s.149 requires". There was no due regard to B13's failure to confront the difficulties of those who need larger accommodation, nor to the Regulation's impact on children. There was, she said, no analysis of disability-related matters. The Equality Impact Assessment of June 2012 did not indicate the numbers of disabled persons with housing needs which would not be met under the new regime. It did not address the implications of the measure for disabled people, or (in particular) for those with mental and learning difficulties.

77. Ms Markus referred to paragraph 118 of Ms Walsh's witness statement as exemplifying the Secretary of State's failure to get to grips with such problems:

> "118. The government considered this category of disabled people carefully prior to making the Regulations. Subsequent discussions between government officials and MENCAP have highlighted that some claimants with mental health issues who are under-occupying their home may find it difficult to consider moving from a property that they have occupied for some time because of the support group that has been formed around them. In addition this group are less likely to be able to find work, increase hours of work or take in a lodger."

So far as the complaint is that this states a problem while saying nothing about solving it, I think it only fair to note what follows:

> "119. It is important not to view HB in respect of this category in a vacuum. People who have mental health needs, including

> those with complex learning disabilities, will receive a multi-disciplinary assessment of their health and social care needs. This will usually involve the input of one or more health professionals and a social worker, depending on the needs of the individual and their family carers.
>
> 120. [Local authorities] have additional responsibilities for people with mental health issues..."

And more details follow.

78. Ms Markus also placed considerable reliance on the United Nations Convention on the Rights of Persons with Disabilities (CRPD), and the United Nations Convention on the Rights of the Child (UNCRC). Neither has been incorporated into the law of the United Kingdom. There is some discussion of the former by Maurice Kay LJ in *Burnip* at paragraphs 19-22. A number of the Convention's provisions are cited including Article 4, which obliges States Parties to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs or practices that constitute discrimination against persons with disabilities". At paragraph 21 Maurice Kay LJ observes that "[i]n the recent past, the Strasbourg Court has shown an increased willingness to deploy other international instruments as aids to the construction of the ECHR". At paragraph 22 he states:

> "If the correct legal analysis of the meaning of Article 14 discrimination in the circumstances of these appeals had been elusive or uncertain (and I have held that it is not), I would have resorted to the CRPD and it would have resolved the uncertainty in favour of the appellants."

79. Ms Markus submits that the UNCRC plays a like interpretative role, and in particular underlines the need for the Secretary of State properly to consider and confront the material submitted by the Children's Commissioner, to which I have made some reference.

80. In my judgment some caution is required as regards the use to be made of unincorporated international conventions. The constitutions of many of the States Parties to the ECHR provide for the automatic incorporation of an international treaty into domestic law upon its being entered into by the appropriate government agency. The constitution of the United Kingdom does not; such a treaty only has effect in municipal law if an Act of Parliament so provides. I certainly accept that under our law an unincorporated treaty may be deployed as an aid to construction of an ambiguous statute to whose subject-matter it is relevant (so much has been clear at least since *Garland v British Rail Engineering* [1983] 2 AC 751); but care is needed to ensure that such a treaty is not seen as a source of substantive domestic legal rights. The point is important because the executive government, which enters into treaties in the name of the Crown, is not generally a source of law save where it exercises powers delegated by Parliament.

81. As regards the interpretation of the ECHR, thus including Article 14, we are of course enjoined by s.2 of the Human Rights Act 1998 to take account of the Strasbourg jurisprudence, and that will include cases which address the use of international

treaties. But in this case it is as I have said common ground that disability is within the concluding words of Article 14, "other status"; and I have held, moreover, that on the facts of this case Article 14 requires the Secretary of State to justify Regulation B13 as a proportionate measure. I do not see that the CRPD and the UNCRC have anything to say on top of this. And on justification, nothing in those treaties, as it seems to me, can properly qualify the approach set out in *Humphreys* which (as Lady Hale stated at paragraph 15) is based on the Strasbourg decision in *Stec*.

82. The true direction of Ms Markus' reliance on the CRPD and the UNCRC is to add muscle to the s.149 duty. But s.149, not least given its analysis in the authorities, is not ambiguous.

83. Ms Markus' overall submission as to the reach of the Secretary of State's duty under s.149 in the circumstances of this case is summarised at paragraph 163 of the claimants' skeleton, to which she referred in her submissions in court. It is there averred that the Secretary of State should have conducted a rigorous investigation, assisted by due enquiry, of matters such as these:

> "(a) the difficulties facing disabled people in living independently, receiving the support and care that they require, and maintaining family life;
>
> (b) recognising that the impact on disabled people for these purposes was not limited to those with physical disabilities but also included those with mental health issues or learning disabilities;
>
> (c) the importance of the needs of disabled people for particular accommodation including with rooms which are not permitted by the regulation, and the disadvantages experienced by them if they are in accommodation which is too small or unsuitable;
>
> (d) the circumstances in which children or their families might need rooms not permitted by the regulation, the needs of the children arising from those circumstances, and the disadvantages experienced by them if they are in accommodation which is too small or unsuitable;
>
> (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 (e.g. working, taking in a lodger, moving, requesting DHPs);
>
> mitigation of any disadvantages identified;
>
> (f) whether and to what extent the above are outweighed by the objectives of the Defendant in making the regulation."

84. Ms Markus submits that the duty was not fulfilled. She levels particular criticism at the Equality Impact Assessment of June 2012 which, she says, demonstrates a failure of due enquiry and analysis over the range of matters which should have been

examined. She submits also that the debates in Parliament "do not evidence due regard". I have summarised the Equality Impact Assessment at paragraph 25.

85. I have set out the substance of the documentation showing the progress of the Secretary of State's consideration of the new policy from the budget of June 2010 through to 2013, and I will not repeat particular materials. Mr Eicke relies on the overall effect of the whole corpus of evidence. He submits that the Equality Impact Assessment, and the debates in Parliament, plainly evince regard for the need to eliminate discrimination. He says the Secretary of State has expressly considered the needs of certain categories of disabled persons, though not every conceivable category. As regards the extra funds available for DHPs, Mr Eicke submits that reasonable provision has been made and the Secretary of State is not obliged to provide for something akin to an indemnity against the needs of every affected disabled person. He says that Ms Markus' real complaint is that the Secretary of State has not secured the elimination of any adverse impact of the HB cap upon disabled persons; but he has not, and is not, required to achieve such a result.

86. In my judgment Ms Markus' criticisms are misplaced. They amount to an attempt to persuade the court to "micro-manage" the policy-making process. But on authority (*Greenwich Community Law Centre* [2012] EWCA 496 *per* Elias LJ at paragraph 30) that is precisely what the courts are not to do. As Mr Eicke put it (skeleton paragraph 61), it is not the court's task "to prescribe fact-specific issues which [the Secretary of State] is obliged to consider in any given case in order to satisfy the court in relation to his PSED". Ms Markus' case on the facts, though she would certainly disavow it, looks very like a list 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. In my judgment the PSED was fulfilled; and the effects of the HB cap were properly considered in terms of the discipline imposed by the requirement of proportionality. In those circumstances the refusal to exclude (some) disabled persons from the regime of B13, and the provision made and to be made by way of access to DHPs, will constitutes a proportionate approach to the difficulties suffered by such persons in consequence of the policy unless it was manifestly without reasonable foundation.

88. But the measure is plainly not manifestly without reasonable foundation. For reasons I have given, the absence of a 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, does not take the case out of Article 14. But it is a very powerful factor upon the question of justification. In *Burnip* (or rather *Gorry*) the Court of Appeal was faced with a discrete group, exemplified by Mr Gorry's daughters: families with children who could not share a bedroom by reason of their disabilities. The court concluded that such persons suffered unlawful discrimination by the application of the private sector provisions equivalent to B13. But I do not accept that that approach can be applied here, where there is no such discrete group. The Secretary of State had, of course, nevertheless to consider carefully what steps to take in relation to disabled persons, and others, who would or might face real difficulties arising out of the cap – even though they could not practically be defined as a class. His provision of extra funding for DHPs and advice and guidance on its use cannot be said to be a disproportionate approach to the difficulties which those persons faced.

ISSUE (3): CIRCULAR HB/CTB U2/2013

89. This part of the case was substantially the concern of the Birmingham City Council. Mr Manning submitted (skeleton argument paragraph 11) that the court should give guidance as to the "status and validity" of Circular HB/CTB U2/2013 relating to the calculation of benefit so as to allow for an extra room in certain cases involving severely disabled children.

90. It is plainly right (and uncontested) that a Departmental circular is not a lawful vehicle with which to prescribe the means of calculating the AMHB for any class of case. That can only be done by secondary legislation. It is also plainly right that the Secretary of State is obliged by the decision in *Burnip/Gorry* to provide by Regulations that there should be no deduction of HB where an extra bedroom is required for children who are unable to share because of their disabilities: this was the *Gorry* case.

91. No such Regulation has yet been made; the Secretary of State is relying for compliance with the Court of Appeal's judgment on the administration of DHPs by local authorities along the lines of what is said in Circular HB/CTB U2/2013. That state of affairs cannot be allowed to continue. Not only because it is an inadmissible means of prescribing AMHB; also because the local authorities possess a statutory discretion as to how they deploy DHP, yet the Secretary of State is proceeding on the basis that his Circular will be followed. I was dismayed to read this in paragraph 64 of Mr Eicke's skeleton argument:

> "The [Secretary of State] is entitled to rely upon guidance regarding the effect of the *Gorry* decision pending a decision on *whether* and at what point in time to introduce regulations" (my emphasis)

The Secretary of State has no business considering *whether* to introduce regulations to conform HB provision with the judgment in *Gorry*. He is obliged to do so. In fairness Mr Eicke accepted in terms that that was so in his oral submissions, and told us that drafting was "under consideration".

92. I have considered whether relief should be granted so as now to require the Secretary of State to make new Regulations. It is more than fourteen months since the judgments in *Burnip/Gorry* were delivered. However if the drafting of new Regulations is now imminent, subject to my Lord's views I would not grant relief today.

93. Meantime, local authorities retain their discretion as to the administration of DHPs. It is plainly open to them to follow the Secretary of State's Circular, but compliance with *Burnip/Gorry* is not their legal responsibility. If for good reason an authority found that at some particular juncture its DHP funds should be distributed in such a way that not all *Gorry* families were covered, that would put the Secretary of State in factual as well as legal disregard of the Court of Appeal's judgment. I assume that new Regulations will be made very speedily.

MR JUSTICE CRANSTON:

94. I agree.

MA & Ors
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. The remaining cases concern children.

11. The A family (CO/2482/2013) consists of a husband (MA), wife (RA) and their two sons aged 12 (SA) and 10 (TA). TA is disabled, having severe and complex neurodevelopmental difficulties. He is severely autistic with profound emotional, behavioural and learning disabilities, associated with significant challenging behaviour including screaming episodes and physical aggression. He has limited speech and communication. He finds change difficult and cannot tolerate others moving his possessions. His sleep is very disturbed, even when he is medicated; he wakes frequently in the night and needs attention. He is strong and violent and frequently attacks SA. TA's psychiatrist considers that there would be increased risk of physical harm to SA were the boys sharing a room.

12. The family lives in a three bedroom bungalow which has been rented from their local authority since early 2012. Under the local authority's allocation scheme a family of this size would usually be assessed as requiring a two bedroom property (brothers aged 10 and 12 would be expected to share a bedroom), but the family was nevertheless assessed as requiring an additional bedroom, a ground floor property and a garden for reasons arising from TA's disabilities, and his, SA's and their parents' consequent needs.

13. MA was informed of a reduction in HB of 14%. He appealed against the decision and requested a DHP. He has now been informed by the local authority that he has been "granted an extra bedroom allowance due to your child's disability needs" and his HB has been recalculated to cover the full amount of rent due from 1 April 2013.

14. The H family (CO/2491/2013) consists of a husband (SM), wife (SH), SH's son RH (aged 6), and the couple's daughter KH (aged 2). They live in a two-bedroom property on the third floor of a block served by an unreliable lift. RH has a rare brain disorder, Joubert's Syndrome, and other disorders including severe developmental delay. Although aged 6 he is still in nappies, cannot walk, and cannot dress, wash or feed himself. He uses a gastronomy tube. He can crawl, and uses a walker. He has a buggy and will eventually progress to a wheelchair. He can be aggressive in particular to his younger sister KH.

15. It is said that RH needs his own bedroom because of his disturbed sleep, his bulky equipment, his need for space in his bedroom for his personal care needs to be tended to, and the risks he poses to his younger sister. There is also a need for a property which is either adapted or built for wheelchair use, or can be so adapted. The current home is not suitable for a wheelchair and the doors are not wide enough for the walker. The only toilet is in the bathroom, there is no walk-in shower, and bathing RH is very difficult.

16. SH has applied for rehousing and has been given medical priority by the local authority for a move to a three-bedroom property on the ground floor. The local authority's usual standard for a family with two children under ten is two bedrooms, but they have assessed the family as needing an extra bedroom. The family presently lives in accommodation which is too small to meet their needs. They do not therefore have any decision concerning reduction in HB against which to appeal, and it is not possible for them yet to request DHPs.

17. The IT family (CO/2494/2013) consists of IT, the single mother of a son, JY, aged 9, and a daughter, BW, aged 4. They live in a three bedroom property rented from the local housing authority. They were offered this property in October 2011 following an assessment which concluded that they required three bedrooms by reason of JY's behavioural and mental health issues, including the risk of violence from JY to BW. The location is unknown to Mr W, IT's former partner who physically abused her and JY.

18. JY has been diagnosed with ADHD and PTSD. He needs treatment for trauma, having been subjected to abuse and violence by Mr W and witnessed his violence to his mother, and the death of his own father. He is assessed as needing his own bedroom. He experiences a high degree of distress. His behaviour is unpredictable and violent. He receives weekly treatment at the Homerton Hospital. He breaks objects frequently. He likes to be alone in his own room where he plays violent games. He has previously attacked BW, his younger sister. She would not be safe sharing a room with him overnight.

19. IT was told that her HB would be reduced by 14% but she has not yet received an appealable decision. She will be entitled to HB by reference to a three bedroom property when JY turns 10 (in less than one year). Although there is at present no reduction in her HB, she has requested DHPs, but has not yet had a decision.

20. The N family (CO/2492/2013) consists of a single mother (PN) and her two children, TR, a boy aged 8, and ToR, a girl aged 5. They occupy a three bedroom ground floor property with a garden in the social rented sector. The family became homeless in 2010 having fled very serious violence from PN's ex-partner. They were provided with permanent accommodation at their present address in October 2011. It was allocated to them on the basis of a local authority assessment concluding that they need three bedrooms, a ground floor property and a garden because of the disability-related needs of TR, and the need for ToR to have her own room away from her brother. TR has an autistic spectrum disorder, ADHD, developmental delay and suffers from seizures. His sleep is disordered. He suffers from enuresis (bedwetting). He requires constant supervision. He is also hypersensitive to noise. When he wakes in the night his mother usually has to stay with him to keep him calm. The family has been assessed as requiring a three bedroom property as the children require their own rooms owing to TR's autism. They also need a garden given the difficulties TR faces in playing safely in public spaces, and interacting with other children.

21. PN has been informed that her HB would be reduced by 14%, but has not yet received an appealable decision. She has asked for a DHP in advance of the likely deduction to her benefit, but was informed by telephone in mid-April that the DHP request need not be processed yet as her HB had not yet been reduced.

22. The T/G family (CO/2486/2013) consists of two parents – the father GH and the mother AT – and their two boys, AG aged 5 and HG aged 2. GH and AT are joint tenants of a one bedroom property let to them by a housing association. The accommodation is unsuitable for a number of reasons including its size, disrepair, an infestation of mice, and its location on the top floor of an unlifted block. The family has applied to the local authority for alternative accommodation. They have been assessed as requiring a three bedroom property with ground floor access, given high priority for rehousing under the local allocation scheme, but the local housing authority has also informed them that HB will not pay the full rent for such a property as of 1 April 2013.

23. AG has autistic spectrum disorder, and HG has Down's Syndrome. AG has an assessed need for his own bedroom for reasons related to his autistic spectrum disorder and the risks he poses to his brother. The family has a heightened need for separate bedrooms because of the conflicting needs of the two disabled brothers. HG is affectionate towards AG and does not understand AG's behaviour towards him (which results from his autism). AG has since HG's birth been aggressive and on occasions violent towards HG. His behaviour is very difficult for his parents to manage. HG has been independently assessed by a paediatrician and health visitor as requiring additional space because of equipment needs arising from his Down's Syndrome. The family has at present no appealable decision and no basis for requesting a DHP.

24. 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.

25. 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.

26. 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.