



13 November 2019

**THE COURT ORDERED** that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of his family in connection with these proceedings.

## PRESS SUMMARY

**RR (Appellant) v Secretary of State for Work and Pensions (Respondent)**  
**[2019] UKSC 52**  
*On appeal from [2018] UKUT 355 (AAC)*

**JUSTICES:** Lady Hale (President), Lord Reed (Deputy President), Lady Black, Lord Briggs, Lady Arden

### BACKGROUND TO THE APPEAL

On 9 November 2016 the Supreme Court gave judgment in a series of judicial review claims concerning Regulation B13 of the Housing Benefit Regulations 2006, which governed the removal of the spare room subsidy, otherwise known as the ‘bedroom tax’ (*R (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 (*Carmichael SC*)). It declared that where there was a ‘transparent medical need for an additional bedroom’, which was not catered for in regulation B13 (5) and (6), there was unjustified discrimination on the ground of disability, contrary to article 14 of the European Convention on Human Rights (‘the Convention’).

Regulation B13 was amended in 2017 by Parliament to reflect the ruling, but this was not retrospective. The principal question arising in this appeal is the effect of the Supreme Court’s decision in *Carmichael SC* on decision-makers in the housing benefit system – local authorities, and the First-tier Tribunal (‘FTT’) and the Upper Tribunal (‘UT’) hearing appeals from local authority decisions – in claims relating to periods before the amendment. A second issue is whether account should be taken of any discretionary housing payments (‘DHPs’) received by the claimant during the period, if the deduction to housing benefit should not have been applied.

RR lives with his severely disabled partner in a two bedroomed social housing property for which he claims housing benefit. They require separate bedrooms because of her disabilities and her need to accommodate medical equipment and supplies. In 2013 his local authority applied the discount to his housing benefit required by Regulation B13. He appealed to the FTT which found that he had suffered unjustified discrimination. To avoid this discrimination the FTT held that regulation B13(5)(a) should be read so as to apply to persons in RR’s position, pursuant to s 3 of the Human Rights Act 1988 (‘HRA’).

The respondent Secretary of State appealed to the UT. The appeal was stayed while a similar appeal by Mr Carmichael proceeded to the UT and then to the Court of Appeal. The UT held that the FTT’s reading of regulation B13(5)(a) was impermissible but reached the same result by holding that the decision to make a deduction from Mr Carmichael’s housing benefit was a clear breach of his Convention rights, contrary to s 6(1) HRA (*Carmichael UT*). The Court of Appeal reversed that

decision. The stay in RR's case was then lifted and the Secretary of State's appeal was allowed by the UT. The UT granted RR a 'leapfrog certificate' under s 14A Tribunals, Courts and Enforcement Act 2007, enabling him to appeal directly to the Supreme Court.

## JUDGMENT

The Supreme Court unanimously allows the appeal against the local authority's decision. It orders that RR's housing benefit is to be recalculated without making the under-occupancy deduction of 14%, in order to avoid a breach of RR's rights under the Convention, contrary to s 6(1) HRA. Lady Hale gives the only reasoned judgment.

## REASONS FOR THE JUDGMENT

It is not unconstitutional for a public authority, court or tribunal to disapply a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the HRA, which is an Act of Parliament [27]. The HRA draws a clear and careful distinction between primary and subordinate legislation, both in s 6 (the requirement for public authorities to act compatibly with Convention rights) and in s 3 (the interpretative obligation) [28]. Primary legislation which cannot be read or given effect compatibly with Convention rights must still be given effect under the exception in s 6(2), but this exception does not extend to subordinate legislation, where there is no primary legislation preventing removal of the incompatibility [29].

The courts have consistently held that, where it is possible to do so, a provision of subordinate legislation which results in a breach of a Convention right must be disregarded, if it is possible to do so without affecting the statutory scheme [18-23, 30]. A decision-maker must find that a claimant who is unjustifiably discriminated against is entitled to the housing benefit he would have received if the discrimination had not occurred [30]. Otherwise the local authority or court would be acting in a manner which s 6 HRA declares to be unlawful [32].

On the question of whether any DHPs received by the appellant should be deducted from the housing benefit to which he is entitled as a result of this decision, the parties were agreed as to the position. The appeal concerns the initial decision made by the local authority to make a deduction under regulation B13 to the appellant's housing benefit. At that stage no question of DHPs could have arisen and the only question was entitlement to housing benefit. It is for the local authority to consider whether there are any steps which they can or wish to take to recover any DHPs [33-34].

It follows that the Supreme Court should make the same order as the UT made in *Carmichael UT* for the same reason as the UT gave in that case [35].

*References in square brackets are to paragraphs in the judgment*

## **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

<http://supremecourt.uk/decided-cases/index.html>