DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC122/14/00710, made on 7 April 2015 at Bolton, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. History and background

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal – Judge Durance – that regulation B13 of the Housing Benefit Regulations 2006 was discriminatory against the claimant. The judge handled the case with evident care, both legally and procedurally. In the course of the proceedings, he added the Secretary of State as a party and gave directions to ensure that relevant evidence was before the tribunal. He also consulted other relevant publicly available material.

B. The facts

2. These are the facts found by the tribunal. The claimant lives in a house with three bedrooms. She occupies one; another is permanently occupied by her son. The third is occupied from time to time by someone placed with her under an adult placement scheme. The claimant has been vetted, trained and approved under that scheme to receive adults into her home to provide one-to-one support in respect of their disabilities. This may be on an emergency basis, for respite, or as a longer-term arrangement. She has provided this service for over 20 years.

C. The relevant legislation

3. Regulation B13 of the Housing Benefit Regulations 2006 is the provision commonly but inaccurately known as the bedroom tax. It provides for a reduction in the maximum rent for each bedroom that is not required by various categories of persons listed in regulation B13(5). Regulation B13(6)(b) then provides in effect for disregarding any room occupied by a 'qualifying parent or carer'. That expression is defined by regulation 2(1) as meaning

> a person who has a bedroom in the dwelling they occupy as their home additional to those used by the persons who occupy the dwelling as their home and who—

(a) has a child or qualifying young person placed with them as mentioned in regulation 21(3) who by virtue of that provision is not treated as occupying their dwelling; or

(b) has been approved as a foster parent under regulation 27 of the Fostering Services (England) Regulations 2011 or regulation 28 of the Fostering Services (Wales) Regulations 2003 or as a kinship carer under regulation 10 or a foster carer under regulation 22 of the Looked After Children (Scotland) Regulations 2009 but does not have a child or qualifying young person placed with them and has not had a child or qualifying young person placed with them for a period which does not exceed 52 weeks; …

D. The First-tier Tribunal's reasoning

4. The judge was deciding this case in 2015, so the decision of the Supreme Court in *R (Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58 was not available. After conducting a thorough investigation into evidence relevant to the issues, he allowed the appeal. Having found the facts, he summarised the relevant caselaw. He then referred to the Discretionary Housing Payment Guidance Manual, picking out that foster carers (approved or prospective) would be allowed an extra room and that one of the express objects was to support the work of foster carers. He then analysed and rejected the various arguments that had been presented and rejected them. I have not set out his detailed analysis. His decision has to be read as a whole.

E. The Secretary of State's manifestly without reasonable foundation argument

5. The Secretary of State's grounds of appeal argued that the First-tier Tribunal had been wrong to decide that this test was satisfied. I reject that argument. There is no doubt that the judge applied the correct test. He expressly referred to it. As to the judge's analysis, I find it compelling. For the reasons I give in this case, I have not found any error of law in the judge's application of this test

F. The Secretary of State's disability discrimination argument

6. The Secretary of State's grounds of appeal argued that the claimant's case could not succeed, because she was not herself disabled. That is irrelevant. The First-tier Tribunal did not deal with it that way. The case involves disability, but only as a factual background. The claimant needs a bedroom for when adults are placed with her and they are placed with her because of their disabilities. But the tribunal's discrimination analysis was not based on those disabilities; it was based on a comparison with the position of foster carers. Disability is not the only basis for discrimination. That seems obvious to me. If authority is needed, I note that regulation B13 has been subject to challenge on other grounds than disability without any issue ever being taken by the Secretary of State that only disability discrimination would suffice. See the numerous cases involving

arguments that the claimant needed a bedroom in order to exercise shared care of a child.

G. The Secretary of State's analogy argument

7. The Secretary of State's grounds of appeal argued that there was no analogy between foster carers and someone taking adults under a placement scheme. There are certainly differences, but that does not show that the situations are identical. There is specific legislation that applies to foster carers and it does not cover adult placement scheme. But that is the starting point for the discrimination argument, not a reason why it should be rejected. Fostering may be more likely to be short-term than a placement, but that does not seem to be to affect the judge's analysis. Fostering can certainly be of varying lengths, just as the adult placements may be. I do not have evidence in support of the Secretary of State's assertion as a general proposition. Foster children may have no say in where they saty, but the same may be true of adults depending on their mental capacity.

8. Finally as part of this argument, the Secretary of State argued that a claimant who had a further bedroom that was not occupied under the scheme would still be subject to a reduction under regulation B13. That is right, but so what?

H. The Secretary of State's double payment argument

9. The Secretary of State argued that there cannot be discrimination because the adult placed with the claimant may be entitled to housing benefit on their own account. In those circumstances, so the argument goes, the local authority would be liable to pay housing benefit in respect of that room to both the claimant and to the adult placed with her.

10. I reject that argument. It fails on the facts. The evidence before the First-tier Tribunal was that the persons placed with the claimant did not make any payment to her. When someone was living with her, the claimant claimed housing benefit in her own right. She was not allowed to sublet.

11. Moreover, the Upper Tribunal has no power on an appeal to quash a regulation for violating the Human Rights Act 1998. All that this tribunal can do is to disapply it: *Chief Adjudication Officer v Foster* [1993] AC 754. That power only applies to someone who is a victim: section 7(1) and *Langley v Bolton Metropolitan Borough Council* reported as *R(H) 6/05*. The claimant would be a victim when the room was standing empty, but not when it was occupied. Accordingly, the regulation would not be disapplied when an adult was placed with her and receiving housing benefit. It would only be disapplied at other times. That is why the Secretary of State's argument does not work.

I. The Secretary of State's Carmichael argument

12. Finally, the Secretary of State argued that this case was analogous to claims that were dismissed by the Supreme Court in *R (Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58. I reject that argument.

13. The Secretary of State relied on the Supreme Court's reasoning in respect of the *Disabled persons* cases. The Court dealt with these at [50]-[55]:

> 50. The other claimants in MA are James Daly, Mervyn Drage, JD and Richard Rourke.
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> 51. Mr Daly occupies a two-bedroom property. His severely disabled son, Rian, stays with him regularly, but he is not within the list of those who qualify for a bedroom under Reg B13(5) because he spends less than half his time with his father. This has nothing to do with the fact of his disability. Mr Daly may have a powerful case for a DHP award, so that he can continue to pay his rent from state benefits for Rian's sake, but I accept the Secretary of State's argument that he has no proper basis for challenging the HB and DHP structure on equality grounds.
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> 52. Mr Drage is the sole occupier of a three-bedroom flat, which is full of accumulated papers. He suffers from an obsessive compulsive disorder. His hoarding of papers is no doubt connected to his mental illness, but that is very far from showing that he has a need for three bedrooms. It is not unreasonable for his claim for benefit to cover his full rent to be considered on an individual basis under the DHP scheme.
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> 53. JD lives with his adult daughter, AD, who is severely disabled, in a specially constructed three-bedroom property. They have no objective need for that number of bedrooms. Because the property has been specially designed to meet her complex needs, there may be strong reasons for JD to receive state benefits to cover the full rent, but again it is not unreasonable for that to be considered under the DHP scheme.
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> 54. Richard Rourke and his step-daughter live in a three-bedroom property. One of the bedrooms is used for the storage of equipment. It is another example of a case where it is not unreasonable for Mr Rourke's claim for benefit sufficient to cover the whole of the rent to be considered on an individual basis under the DHP scheme.
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> 55. I would therefore dismiss the claims of the MA claimants, other than Mrs Carmichael, that they have suffered unlawful disability discrimination.

14. The flaw in the Secretary of State's argument is to be found in paragraph 55. The Court rejected the argument based on *disability* discrimination. That was how the case was presented and it did not deal with any other form of discrimination. The First-tier Tribunal did not decide this case on the basis of disability discrimination.

15. The Secretary of State also relied on the Supreme Court's reasoning in respect of the *Sanctuary schemes* cases. The Court dealt with these at [56]-[66]:

> 56. A and her son live in a three-bedroom house. A has said in a witness statement that when she moved there she only needed a two-bedroom property, but that there was a shortage of two-bedroom properties and she accepted the offer of a three-bedroom property. This was prior to the events giving rise to her need for protection under the sanctuary scheme, which led

to its adaptation to provide a high level of security, but the adaptations did not involve using the third bedroom. There is no objective need for her to have three bedrooms, one of which is unoccupied, but she is understandably loath to move (even if suitable alternative accommodation could be found and made appropriately secure), because she has lived in her present property for many years, she knows her neighbours well and she feels safe where she is. Those are powerful reasons, but they have nothing to do with the number of bedrooms. Many other people may have very strong reasons for continuing to live in a larger property than they currently need in terms of size.

57. The Court of Appeal said in A's case that while it had great sympathy with the Secretary of State's arguments for saying that it fell into the broad class for which DHPs were appropriate, *Burnip* obliged the court to hold otherwise (paras 54 to 55). Like *Burnip*, A fell into an easily recognisable class few in number.

58. I have already said that I do not see the likely number of people affected as a critical factor in itself (para 42). To favour those in a small group with strong societal reasons for staying in a bigger property than they need over those in a larger group with equally strong or possibly stronger reasons would be truly irrational. The distinction between *Burnip* and A is that in *Burnip* there was a transparent medical need for an additional bedroom, whereas A has no need for a three-bedroom property. A's case for staying where she is, strong as that case would appear to be, has nothing to do with the size of the property; Mr Burnip's case had everything to do with the size of the property and its ability to accommodate a carer.

59. Notwithstanding my considerable sympathy for A and other women in her predicament, I would allow the Secretary of State's appeal in A's case. I add that for as long as A, and others in a similar situation, are in need of the protection of sanctuary scheme housing, they must of course receive it; but that does not require the court to hold that A has a valid claim against the Secretary of State for unlawful sex discrimination.

60. Lady Hale has reached a different conclusion. She considers that Reg 13B operates so as to discriminate against women such as A who are victims of gender-based violence, in breach of their rights under article 14 taken with article 8 of the ECHR. Lady Hale's starting point is that while A has no need for more bedroom space than is allowed for under Reg B13(5), she has a different type of need, that is, a need to stay where she is because it has been adapted as part of a scheme to provide her with a safe haven. Lady Hale says that her case cannot be equated with other people who may have a compelling case for staying where they are, because even if such people have a status for the purpose of article 14, their cases would need individual evaluation (para 78). I agree that not everybody who could make out a strong case for remaining where they are could necessarily be fitted into a relevant "status". An everyday example would be a person who lives close to and is the primary carer for an elderly parent, who is dependent on that

person for being able to continue to live in the elderly parent's own home. Whether the parent would be able to bring himself or herself within articles 8 and 14 in such circumstances would be debatable. But the carer may be able to show a powerful case that there is a need for her to live where she does, even if she happens to have a spare bedroom; and that, leaving aside humanitarian considerations, the cost of state care for the parent would be likely far to exceed any saving by reducing the carer's HB. I agree also with Lady Hale about the need for individual evaluation, and it was this consideration which primarily led the Secretary of State to decide that cases of need for reasons unconnected with the size of the property should be dealt with through the DHP scheme.

61. Take also the case of JD and AD (referred to in para 53). Just as in A's case, their property has been specially adapted to provide AD with an environment where she can live in safety. Lady Hale's observation (in para 76) that because of its special character, it will be difficult (if not impossible) for her to move elsewhere and would certainly put the State to further expense may equally be said of AD, but the court is unanimous that it is not unreasonable for JD and AD's need for housing benefit to be considered under the DHP scheme, notwithstanding the differences between HB and DHP to which Lady Hale has referred in para 77 AD's disabilities are at the severe end of the spectrum, but there can be degrees of disability, and the alterations to a property to accommodate the person's needs may be on a larger or smaller scale. These are matters which the Secretary of State may legitimately say require individual evaluation.

62. Such examples could be multiplied, but the point remains the same. It was recognised from the time that Reg B13 was mooted that there will be some people who have a very powerful case for remaining where they are, on grounds of need unrelated to the size of the property. For reasons explained in the evidence (to which I have referred in para 40), it was decided not to try to deal with cases of personal need unrelated to the size of the property by general exemptions for particular categories but to take account of them through DHPs.

63. Lady Hale has observed that it has not been demonstrated that there would be insuperable practical difficulties in drafting an exemption from Reg B13 for victims of gender-based violence who are in a sanctuary scheme and who need for that reason to stay where they are. In her witness statement on behalf of the Secretary of State in A's case, Ms Walsh drew an analogy between adaptations made to properties for persons with disabilities and adaptations made under sanctuary schemes. She made the point that the type of adaptations made and their cost is likely to vary from case to case, and by implication that they may be more easy or less easy to replicate. These factors would be relevant in considering the strength of the case for saying that the person concerned needs to stay where they are. A herself has emphasised that she regards the support of neighbours and family as critical, and that may well be so. But that is a personal factor

which may not necessarily apply, or apply to the same degree, to other victims of domestic violence. It is also a factor which may apply as strongly to the elderly or persons with disabilities.

64. So while I agree that there would have been no insuperable practical difficulty in drafting an exemption from the size criteria for victims of gender violence who are in a sanctuary scheme and who need for that reason to stay where they are, deciding whether they really needed to stay in that particular property would at least in some cases require some form of evaluation. I leave aside the question debated in the evidence about whether some people in a sanctuary scheme might safely be able to make use of a spare room by taking in someone else such as a family member. Likewise I do not suppose that there would be insuperable practical difficulties in drafting exemptions to meet other categories of people who may justifiably claim to have a need to remain where they are for reasons unconnected with the size of the accommodation, but this would again require an evaluative process.

65. Lady Hale considers that there is a further point of distinction between A's case and AD's case in that the state has a positive duty to provide effective protection to victims of gender-based violence. I do not think it necessary for present purposes to go into a comparative analysis of the duty of the state to A and AD, because I do not see that the duty to victims of gender-based violence mandates the means by which such protection is provided. A has not established that the adoption of Reg B13 has deprived her, or is likely to deprive her, of a safe haven.

66. Ultimately, whether the Secretary of State could practicably have adopted a different approach is surely not the test. I have understood the court to be unanimous that the test is that laid down in *Humphreys*, to which I have referred. Applying that test, and recognising the need for careful scrutiny, I do not consider that the approach taken by the Secretary of State was manifestly without reasonable foundation.

16. The flaw in the Secretary of State's argument is that in those cases the claimant did not have an objective need for a bedroom. That is not the case here. In this case, the claimant has a bedroom and needs it when she has an adult placed with her. This is a case about bedrooms; the sanctuary cases were not.

J. Conclusion

17. The First-tier Tribunal found that the Housing Benefit Regulations 2006 were manifestly without foundation in so far as they required persons in the claimant's position to be subject to a reduction on account of a 'spare' bedroom. I have considered the Secretary of State's arguments that that decision involved the making of an error in point of law, but I have not been able to find one.

18. I have been concerned whether the claimant had a status for the purpose of Article 14. I re-read the Court of Appeal's judgment in *Francis v Secretary of State for Work and Pensions* reported as *R(IS) 6/06*. The Court there decided

that adoption and a residence order were analogous. In doing so, the Court also considered whether the claimant had a sufficient status. It is clear that why the Court rejected the Secretary of State's argument that she did not, but less clear why it accepted the claimant's argument that she had. Be that as it may, although the case is binding on me, I do not find in it anything that is determinative of the status issue in this case. In the end, though, I have not had to reach a final conclusion because the Secretary of State has never taken this issue.

Signed on original
on 04 October 2017

Edward Jacobs
Upper Tribunal Judge