DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to dismiss the appeal by the Appellant.

The decision of the First-tier Tribunal sitting at Bradford East on 8 August 2013 under file reference SC240/13/04504 does not involve any error of law. The First-tier Tribunal's decision stands.

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

REASONS FOR DECISION

Introduction

1. This appeal is concerned with whether limiting the Appellant's housing benefit ('HB') to the one-bedroom shared accommodation rate of the local housing allowance ('LHA'), as mandated by regulation 13D(2) of the Housing Benefit Regulation 2006 ('the 2006 Regulations'), unlawfully discriminated against her on the grounds of disability contrary to Article 14 of the European Convention on Human Rights in conjunction with Article 1 of the First Protocol and the principle in ***Thlimmenos v Greece*** **[2001] 31 EHRR 411**.

Factual Background

2. The Appellant was born on 16 September 1982. She suffers from chronic fatigue syndrome and, as a consequence, uses an electric wheelchair when outside, and occasionally when indoors. At all times material to this appeal, the Appellant lived in a privately rented studio flat and was in receipt of the mobility component of Disability Living Allowance ('DLA') at the higher rate, but had not been awarded the care component of DLA at any rate.

3. As the Appellant lived in self-contained accommodation and was over the age of 25 (and so was not a 'young individual' within the meaning of regulation 2(1) of the 2006 Regulations), between 29 June 2011 and 1 July 2012, the Appellant was entitled to and paid HB at the one bedroom <u>self-contained</u> accommodation rate of the LHA.

4. On 13 January 2012, the First Respondent wrote to the Appellant and informed her that as a consequence of the changes brought in by the Housing Benefit (Amendment) Regulations 2011, she now fell to be treated as a 'young individual' (the upper age limit having been extended from 25 to 35) and that as none of the relevant exceptions applied, she would only be entitled to and paid HB at the one bedroom <u>shared</u> accommodation rate of the LHA as mandated by regulation 13D(2) of the 2006 Regulations.

5. On 22 June 2012, the First Respondent issued a formal decision limiting the Appellant's HB to the one-bedroom shared accommodation rate (£57.73 per week) from 2 July 2012. As the Appellant was liable to pay rent at the rate of £325 per calendar month, she was faced with a circa £75 shortfall each month.

6. On 4 July 2012 the Appellant made an application for discretionary housing payments ('DHPs') under the Discretionary Financial Assistance Regulations 2001. It appears that the application for DHPs was refused, but the papers do not contain any formal decision letter. It further appears that a subsequent application for DHPs was successful as the First Respondent has confirmed that the Appellant received DHPs between 27 May 2013 and 9 February 2014.

Relevant Statutory/Regulatory framework

7. HB is a means-tested benefit provided under section 130 of the Social Security Contributions Act and Benefits Act 1992 and subordinate regulations. Its purpose is to assist with the cost of renting accommodation. The amount of any HB falls to be determined in accordance with the provisions of the 2006 Regulations. For present purposes, it is not in dispute that as at the date of the relevant decision (namely, 22 June 2012): (i) regulation 11(1)(c) provided that the Appellant's 'maximum' HB was to be calculated by reference to the amount of her 'eligible rent' determined in accordance with regulations 12D, 13C and 13D; (ii) regulation 12D(2) provided that the Appellant's 'eligible rent' was the 'maximum rent'; and (iii) regulation 13C provided that the Appellant's 'maximum rent' was to be determined in accordance with regulation 13D.

8. As at 22 June 2012:

   (i) The relevant parts of regulation 13D provided as follows:

   13D.— Determination of a maximum rent (LHA)

   (1) Subject to paragraph (3) to (11), the maximum rent (LHA) shall be the local housing allowance determined by the rent officer by virtue of article 4B(2A)2 or (4) of the Rent Officers Order which is applicable to—

   a. the broad rental market area in which the dwelling to which the claim or award of housing benefit relates is situated at the relevant date; and

   b. the category of dwelling which applies at the relevant date in accordance with paragraph (2).

   (2) The category of dwelling which applies is—

   a. the category specified in paragraph 1(1)(a) of Schedule 3B to the Rent Officers Order (one bedroom shared accommodation) where—

   i. the claimant is a young individual who has no non-dependant residing with him and to whom paragraph 14 of Schedule 3 (severe disability premium) does not apply; or

   …

   (ii) Regulation 2 provided that, subject to certain exceptions (which are not relevant to this appeal), *'young individual'* meant *"a single claimant who has not attained the age of 35 years…"*.

(iii) The relevant parts of paragraph 14 of Schedule 3 provided as follows:

14.— Severe Disability Premium

(1) The condition is that the claimant is a severely disabled person.

(2) For the purposes of sub-paragraph (1), a claimant shall be treated as being a severely disabled person if, and only if—

a. in the case of a single claimant, a lone parent or a claimant who is treated as having no partner in consequence of sub-paragraph (3)—

i. he is in receipt of attendance allowance, or the care component of disability living allowance at the highest or middle rate prescribed in accordance with section 72(3) of the Act; and

ii. subject to sub-paragraph (4), he has no non-dependants aged 18 or over normally residing with him or with whom he is normally residing; and

iii. no person is entitled to, and in receipt of, a carer's allowance under section 70 of the Act in respect of caring for him;

…

9. Again, it is not in dispute that, as the Appellant was under the age of 35, living alone and not in receipt of attendance allowance or the care component of DLA at the highest or middle rate (and so was not to be treated as a 'severely disabled person'), her 'maximum rent' fell to be capped at the one bedroom shared accommodation rate of the LHA in accordance with regulation 13D(2).

10. Finally, as at 22 June 2012, the relevant parts of regulation 2 of the Discretionary Financial Assistance Regulations 2001 (made under section 69 of the Child Support, Pensions and Social Security Act 2000) provided as follows:

2.— Discretionary housing payments

(1) Subject to paragraphs (2) and (3) and the following regulations, a relevant authority may 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.

…

Policy Background to Regulation 13D(2)

11. The Explanatory Memorandum to the Housing Benefit (Amendment) Regulations 2011 explains the policy background and aims of regulation 13D(2) and the increased upper age limit in the definition of 'young individual' (§§7-8). In summary, the principle that people aged under 25 in the private rented sector should have their housing benefit limited to the one-bedroom shared accommodation rate was introduced in 1996. The rationale for this was to avoid a situation where those in receipt of HB could afford a level of accommodation that they would not be able to maintain were they employed. It also reflected the fact that sharing accommodation is common among younger people. From 1 January 2012 the upper age limit for the one-bedroom shared accommodation rate was increased from 25 to 35. This was done in order to: (i) help reduce HB expenditure; (ii) ensure greater fairness - ensuring that those receiving HB do not have an advantage over those who are not on benefit, and that they have to make similar choices about what they can afford; (iii) ensure that HB rules reflect the housing expectations of people of a similar age not on benefits; and (iv) remove a potential work disincentive. Expenditure on HB had increased from £11 billion in 2000/2001 to £21.5 billion by 2010/2011 and the increase in the upper age limited was expected to save about £200 million per year. It was also noted that over one third of single 25 to 34 year olds potentially affected by the increased age limit already lived in shared accommodation. Representations were made to exclude a number of groups of individuals who might not be able to share accommodation or would find it difficult to do so - including those with substance abuse problems, mental and other physical health problems and needs. However, rather than making a number of varied exemptions which could apply to those who could, in fact, live in or find suitable shared accommodation, the government considered that payments through the DHP scheme were an appropriate and fair way of supporting those in vulnerable situations who did fall within any of the existing exemptions. DHPs offered greater flexibility and allowed individual needs to be evaluated on a case by case basis at the local level by those with a better understanding of local conditions.

Discrimination: Legal Framework

12. Article 14 provides as follows:

Prohibition on Discrimination

The enjoyment of the rights and freedoms set forth in [the] 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.

13. Article 1 of the First Protocol provides as follows:

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2. *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

14. It is well established, and it does not appear to be in dispute, that: (i) disability falls within the concluding words of Article 14, 'other status'; and (ii) HB falls within the ambit of Article 1 of the First Protocol as a 'possession' (***Burnip and others v Secretary of State for Work and Pensions*** **[2012] EWCA Civ 629** §8).

15. In ***Thlimmenos*** the European Court of Human Rights ('ECtHR') stated as follows:

    "44. The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of 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 in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

16. ***Thlimmenos*** type discrimination arises where the state fails to take measures to recognise that persons in significantly different situations ought to be treated differently.

17. In ***Stec v United Kingdom*** **(2006) 43 EHRR 47** the ECtHR explained that discrimination will only be unlawful if it is without 'objective and reasonable justification':

    "*51. A difference in 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."*

18. However, the ECtHR went on to explain that states enjoyed a margin of appreciation in this context:

    "*52…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."*

19. In ***Humphreys v Revenue and Customs Commissioners*** **[2012] 1 WLR 1545** Lady Hale confirmed that *"[t]he 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…*" (§15).

20. Finally, it is well established, and does not appear to be in dispute that, in a discrimination case, what must be justified is the difference in treatment (or disparate impact) - it is not enough to show that the underlying policy is justified (***A v Secretary of State for the Home Department*** **[2004] UKHL 56; [2005] 2 AC 68** §68 and ***Burnip*** §26). This is a substantive question and not merely a process question. In

other words, it is a question that the court must decide for itself – the court cannot simply ask whether the Secretary of State gave consideration (or adequate consideration) to the question of justification for the difference in treatment (***R(TD, AD and Patricia Reynolds) v Secretary of State for Work and Pensions*** **[2020] EWCA Civ 618** §§51-53).

The Appeal to the First-Tier Tribunal

21. The Appellant appealed the Decision to the First-tier Tribunal ('FtT'). The Appellant did not seek to argue that she did not fall within the terms of regulation 13D(2). Rather, relying on ***Burnip***, the Appellant argued that regulation 13D(2) ought not be applied to limit her HB to the one-bedroom shared accommodation rate on the grounds that: (i) as a wheelchair user she faced significantly more difficulties than an able-bodied person in securing shared accommodation within the confines of the one-bedroom shared accommodation rate as there were far fewer suitable wheelchair accessible properties for shared occupation available on the market; (ii) this meant that regulation 13D(2) had a disparate adverse impact on disabled persons and/or failed to take account of the differences between disabled persons and able-bodied persons (e.g. by providing a suitable exception for wheelchair users); (iii) accordingly, limiting her HB to the one-bedroom shared accommodation rate in accordance with regulation 13D(2) discriminated against her on the grounds of disability contrary to Article 14 ECHR and the principle in ***Thlimmenos***; and (iv) the discrimination was not objectively and reasonably justified and so was unlawful.

22. The FtT found that as a wheelchair user, the Appellant had been discriminated against contrary to Article 14 ECHR and the principle in ***Thlimmenos***. The FtT stated as follows (Statement of Reasons ['SoR'] §13):

"*13… I accept that [the Appellant] as a wheelchair user is discriminated against in accordance with both traditional indirect discrimination and the Thlimmenos principle. By reason of her disability she requires a particular type of accommodation which will provide her with level access; suitable storage for her wheelchair, etc. and for this reason is placed at a particular disadvantage in securing appropriate accommodation from the available stock of properties to rent at the shared accommodation rate. It seems to me that this approach is consistent with both Burnip and R(MA)*."

23. However, the FtT found that the discrimination was justified, and so dismissed the appeal. As the FtT's findings on 'justification' are the central focus of this appeal, it is useful to set out that part of its reasons in full (SoR §§14-19):

"14. The regulations in relation to the shared accommodation rate distinguish those claimants entitled to the severe disability premium (i.e. those entitled to the middle or higher rates of the care component of disability living allowance) and other "young individuals". *The Secretary of State has therefore taken account of the needs of a specific group of disabled persons. In the case of R(MA) the Court reiterated the appropriate test for ascertainment of the Secretary of State's margin of discretion as being "manifestly without reasonable foundation"…*

15. In R(MA) the question was posed: "whether the refusal to exclude (some) disabled persons from the regime [i.e. the spare room subsidy]… and the provision made and to be made by way of access to [discretionary housing payments] constitutes a proportionate approach to the difficulties suffered by such persons in consequence of the [housing benefit] policy."… The Court, decided… that the refusal to exclude some disabled persons from the regime and provisions made for access to discretionary housing payments constituted a proportionate response to the

difficulties faced by such person[s] and that it was "plainly not without reasonable foundation"…

16. Further, the court distinguished Burnip from the claimants in R(MA) on the basis that the Court of Appeal was faced with a discrete group of persons who all required an extra bedroom and thus were discriminated against unlawfully by the application of the provisions. The court was unwilling to apply that [principle] to the applicants in R(MA) because there was no such discrete group and that this is 'a very powerful factor upon the question of justification." As mentioned above, I accept on balance that [the Appellant] is discriminated against but I had some trouble fitting her into a discrete group. It is not so much, for example, the number of bedrooms she is entitled to which is the problem but the availability of suitable accommodation. In Burnip, therefore, the group was discrete – all claimants required any additional bedroom. It is not so clear for [the Appellant].

17. It seems to me that the [principles] in R(MA) apply equally in relation to [the Appellant]. It is not easy to define a discrete group into which she fits other than that of a wheelchair user who requires an extra cash benefit to enable her to access suitable accommodation and store her electric wheelchair. The court in R(MA) recognised the fact that the Secretary of State has sought to ameliorate the difficulties faced by disabled persons generally in relation to access to suitable accommodation by the provision of discretionary housing payments and that this was not a disproportionate approach to the provision of extra support for disabled persons.

18. Further, to dis-apply the regulations in accordance with [the Appellant's] situation would take the matter outside of Mr Justice Henderson's comments in paragraph 64 of Burnip:

> *"…there is no question of a general exception from the normal bedroom test for disabled people of all kinds. The exception is sought for only a very limited category of claimants, namely those whose disability is so severe that an extra bedroom is needed for a carer to sleep in… such cases are […] likely to be relatively few in number, easy to recognise, not open to abuse, and unlikely to undergo change or need regular monitoring."*

19. Accordingly it follows that I am satisfied that any discrimination is justified…"

The Appellant's Initial Grounds of Appeal and Permission

24. By a letter dated 19 September 2013, Irwin Mitchell Solicitors, then acting on behalf of the Appellant, lodged grounds of appeal in which they asserted that the FtT had erred in finding that the discrimination was justified. The Appellant relied on two grounds of appeal, namely that the FtT erred in (i) its approach to the issue of justification and proportionality; and (ii) finding that the Appellant did not fit into a 'discrete group' Permission to appeal was granted by the FtT on 26 September 2013.

The History of the Proceedings before the Upper Tribunal

25. By order dated 3 December 2013, the Upper Tribunal proposed that the present appeal be stayed pending the Court of Appeal handing down judgment in ***R(MA) v Secretary of State for Work and Pensions***. Before a formal stay was ordered, on 21 February 2014, the Court of Appeal handed down judgment in ***MA*** (**[2014] EWCA Civ 13**).

26. As the appellants in ***MA*** had applied for permission to appeal to the Supreme Court, by order dated 22 July 2014, the present appeal was stayed pending the outcome of any further appeal in ***MA***.

27. On 9 November 2016, the Supreme Court handed down judgment in ***MA*** (which by that stage had become known as ***R (Carmichael and Rourke) v Secretary of State for Work and Pensions***) and further joined appeals (**[2016] UKSC 58**).

28. By order dated 8 November 2017, the stay on the present appeal was lifted and the Appellant was given permission to file amended or additional grounds of appeal.

29. By letters dated 18 and 19 December 2017, Kirklees Citizens Advice and Law Centre (now acting on behalf of the Appellant) lodged further submissions in support of the Appellant's appeal - as opposed to amended or additional grounds of appeal.

30. By order dated 11 January 2018 (i) the First Respondent was ordered (amongst other matters) to confirm whether the Appellant had been entitled to DHPs at any time; (ii) the Second Respondent ('the Secretary of State') was ordered to respond to the appeal; and (iii) the Appellant was given permission to reply thereafter.

31. By email sent on 13 June 2018, the First Respondent confirmed that the Appellant had been in receipt of DHPs for the period 27 May 2013 to 9 February 2014.

32. On 12 July 2018, the Secretary of State lodged submissions in response to the appeal.

33. By letter and Form 3 dated 1 August 2018, Kirklees Citizens Advice and Law Centre confirmed that the Appellant continued to rely on her earlier submissions (as set out in the letters dated 18 and 19 December 2017) in reply.

34. In the meantime, permission had been granted for further appeals to the Supreme Court in a series of related cases (under case reference ***RR v Secretary of State for Work and Pensions*** **UKSC 2018/0224)**. By an order dated 30 April 2019, the present appeal was again stayed pending the outcome of the appeal in ***RR***.

35. On 13 November 2019, the Supreme Court handed down judgment in ***RR***.

36. By order dated 21 November 2019, the stay on the present appeal was again lifted and the Appellant was ordered to set out the current grounds of appeal on which she relied, and the Secretary of State was ordered to provide a response.

37. By letter dated 20 January 2020, Kirklees Citizens Advice and Law Centre confirmed that the Appellant continued to rely upon her earlier submissions as set out in the skeleton argument lodged for the appeal before the FtT and the letters dated 18 and 19 December 2017.

38. By letter dated 20 March 2020, the Government Legal Department confirmed that the Secretary of State wished to rely on her earlier submissions dated 12 July 2018.

The Appellant's Current Grounds and Submissions

39. The Appellant's submissions as set out in the letters from Kirklees Citizens Advice and Law Centre dated 18 and 19 December 2017 are somewhat unclear and difficult to follow. In particular, Kirklees Citizens Advice and Law Centre have largely cross referred to the submissions made in the skeleton argument lodged for the appeal

before the FtT (as opposed to the submissions made in the original grounds of appeal to the Upper Tribunal) and have not sought to expressly identify any errors of law in the FtT's determination by reference to the Supreme Court's decision in ***Carmichael.***

40. Doing the best I can and taking into account the matters set out in the skeleton argument lodged for the appeal before the FtT, the original grounds of appeal to the Upper Tribunal (as set out in Irwin Mitchell Solicitors' letter dated 19 September 2013), and the letters dated 18 and 19 December 2017 from Kirklees Citizens Advice and Law Centre, it appears that the Appellant submits as follows:

    (i) The FtT erred in determining the issue of justification by reference to whether the disparate adverse impact of regulation 13D(2) on wheelchair users and/or the failure to provide a different rule/exception for wheelchair users (i.e. the difference in treatment) was 'manifestly without reasonable foundation' as opposed to whether the same was 'objectively and reasonably justified'. In other words, the FtT applied the wrong test.

    (ii) The FtT erred in following the approach of Laws LJ in ***R(MA) v Secretary of State for Work and Pensions and others*** **[2013] EWHC 2213** and treating the requirement of proportionality as having been satisfied simply because the Secretary of State had had 'due regard' to the needs of disabled people. By doing so, the FtT erroneously equated proportionality with the duty to have 'due regard'.

    (iii) The FtT erred in finding that the Appellant did not fall into a 'discrete group' This error led the FtT to follow the approach in ***MA*** and conclude that the difference in treatment was justified. As the Appellant fell within a discrete group, the FtT ought to have followed the approach in ***Burnip*** and found that the difference in treatment was disproportionate and therefore unjustified – the Supreme Court's decision in ***Carmichael*** does not alter that position.

    (iv) The FtT erred in finding that the availability of DHPs was sufficient justification for the difference in treatment, in circumstances where the Court of Appeal in ***Burnip*** had rejected such an argument in the context of regulation 13D(3) of the 2006 Regulations.

    (v) The Appellant's medical condition would be aggravated if she were required to live in shared accommodation and, as such, in accordance with ***Carmichael***, the Appellant has a 'transparent medical need' for single occupancy one-bedroom accommodation.

The Respondent's Submissions

41. By brief written submissions dated 12 July 2018, the Secretary of State submits that the appeal must be dismissed for the following reasons:

    (i) In the context of the 'disability' ***MA*** cases, the Supreme Court concluded in ***Carmichael*** that the size criteria provisions of regulation B13 of the 2006 Regulations were lawful as any difference in treatment was justified. It took this view on the basis that it was not unreasonable for the circumstances of individual HB applicants to be considered on a case by case basis under the DHP scheme. It follows that any challenge by the Appellant to the analogous provisions of regulation 13D must, inevitably, fail.

(ii) Further and in any event, following the Court of Appeal's decision in ***Secretary of State for Work and Pensions v JC and Sefton Council* [2018] EWCA Civ 548**, even if it were found that the application of regulation 13D(2) gave rise to unlawful discrimination, the FtT and/or the Upper Tribunal had no power or jurisdiction to disapply regulation 13D(2). It follows that the appeal must, inevitably, be dismissed.

The Court of Appeal's decision in *Burnip*

42. In ***Burnip*** the Court of Appeal dealt with 3 appeals concerning the impact of a cap imposed by regulation 13D(3) of the 2006 Regulations on HB in cases of deemed under-occupation of privately rented property, on those with disabilities. In the first two appeals (Burnip and Trengrove), the appellants were adults with disabilities who required the presence of an overnight carer and so each required a two-bedroom property. However, as overnight carers did not fall within the definition of 'occupier', regulation 13D(3) limited the maximum HB to the one-bedroom rate. The third appeal (Gorry) concerned a family with three children, two of whom were of the same sex but suffered from severe disabilities which made it inappropriate for them to share a bedroom and so the family required a four-bedroom property. However, as the two disabled children were under the age of 10 (and so were expected to share a bedroom), regulation 13D(3) of the 2006 Regulations limited the family's maximum HB to the three-bedroom rate.

43. The court held that in each case there had been discrimination contrary to Article 14. Maurice Kay LJ stated that where "*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 §13).

44. The court also went on to hold that the discrimination in each case was not justified. Henderson J stated that:

"*65…I am satisfied that the 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 that the defence of justification therefore fails…"*

45. In arriving at that conclusion, Henderson J recognised that DHPs had a valuable role to play but did not consider that they provided an adequate response to the problem in the types of case with which the court was concerned:

"46…Discretionary housing payments were in principle available as a possible way of bridging this gap, but they cannot in my judgment be regarded as a complete or satisfactory answer to the problem… taken by themselves, they cannot come anywhere near providing an adequate justification for the discrimination in cases of the present type."

46. Henderson J, however, emphasised that he was not suggesting a general exception from the normal bedroom test for disabled people. The exception, he said, was sought only for a very limited category of claimants, namely those whose disability was so severe that an additional bedroom was needed for a carer to sleep in, or in cases such as the third case where separate bedrooms were needed for children with severe disabilities. Henderson J observed that such cases were, by their nature, likely to be relatively few in number, easy to recognise, not open to abuse and unlikely to undergo change or need regular monitoring (at §64).

The Supreme Court's decision in *Carmichael*

47. In ***Carmichael*** the Supreme Court was primarily concerned with the impact of a cap on HB in cases of deemed under-occupation of social sector housing on those with disabilities – this time under regulation B13 of the 2006 Regulations. Regulation B13 is analogous to the provisions of regulation 13D but applies to determine the 'maximum rent' in the 'social sector' (i.e. for accommodation in the public, as opposed to private, rented sector). Lord Toulson adopted Laws LJ's detailed description of the policy background to regulation B13 and the social housing size criteria changes to the HB regime as set out at §§20-33 in ***MA*** and summarised it as follows:

    "16… In summary, as part of its policy for curbing public expenditure the Government aimed to ensure that social sector tenants of working age who were occupying premises with more bedrooms than they required should, wherever possible, move into smaller accommodation. It was recognised at an early stage that a policy based purely on numbers of rooms and occupants would cause problems for some with disabilities, and there was a debate within government and Parliament about how such problems should be addressed. The Government initially decided that, rather than creating general exceptions for persons with disabilities (or certain categories of persons with disabilities), their needs should be met as necessary through a scheme of discretionary housing payments based on individual assessments."

48. By the time the matter reached the Supreme Court, the proceedings involved appeals from two judgments of the Court of Appeal involving a total of seven appellants. In each case, HB had been reduced in accordance with the under-occupancy rules in regulation B13. The facts of each of the individual cases are set at Appendix 1 of the Supreme Court's judgment and need not be repeated here.

49. In both the ***MA*** appeal (Carmichael, Rourke, Drage, JD and Daly) and the appeal involving Mrs Rutherford, the Court of Appeal had accepted that regulation B13 had a discriminatory effect on some people with disabilities. However, in the ***MA*** appeal the Court of Appeal had held that the difference in treatment was justified whereas in the appeal involving Mrs Rutherford, it took the view that the reasoning in ***Burnip*** applied and so the it was not justified. The key issue in the Supreme Court was, therefore, whether the discriminatory effect of regulation B13 was justified.

50. The Court first addressed the test to be applied when determining the issue of justification in cases involving discrimination in state benefits. Having reviewed the authorities, it held that there was no good reason to depart from the 'manifestly without reasonable foundation' test. Lord Toulson stated as follows:

    "32. The fundamental reason for applying the manifestly without reasonable foundation test in cases about inequality in welfare systems was given by the Grand Chamber in Stec (para 52). Choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities…

    36. I will come on to consider the group of people who have a particular medical need for an additional bedroom, but the argument which I am presently considering goes too far… The broad question which faced the Secretary of State in relation to Reg B13 and its potential impact on those with disabilities was whether to try to deal comprehensively with all problems of those who have any kind of disability (including social needs not dissimilar to those of other groups) within the precise rules of the regulation, or whether to accommodate them by a linked system of

discretionary benefits. This is in my view a clear example of a question of economic and social policy, integral to the structure of the welfare benefit scheme, and it would not be appropriate to depart from the court's normal approach…

38. …It follows that in this case the courts have applied the correct test…."

51. The Court then went on to consider whether the Court of Appeal had misapplied the 'manifestly without reasonable foundation' test. In particular, whether, as a matter of principle, the availability of DHPs could justify a reduction of HB to which a disabled person would otherwise be entitled but for regulation B13. The Court considered the policy objectives and reasons for not providing a general exemption for disabled persons from regulation B13, but instead making up any shortfall on a case by case basis through the DHP scheme where it would inappropriate to expect someone with a disability to move and concluded that the decision to structure the overall scheme in that way was reasonable (and so was not 'manifestly without reasonable foundation'). Lord Toulson stated as follows:

"40. The impact of Reg B13 on those with disabilities was considered by the government and Parliament in depth. This is apparent from Laws LJ's resume of the evolution of the policy (appendix 2). The reasons for the decision not to apply a general exemption from Reg B13 for those suffering from disabilities, but instead to make good the shortfall in cases where it would be inappropriate to expect someone with a disability to move house (or make good the shortfall by other means such as taking a lodger), were also explained in witness statements by Beverley Walsh… The essential point she made was that the impact of Reg B13 on those with disabilities was not uniform, but depended to a large degree on the nature and extent of their disabilities, as well as on their personal and social circumstances (such as whether they relied heavily on a local support network and whether suitable alternative accommodation was available, particularly if their present accommodation had been adapted to meet their individual needs). Some with disabilities would be significantly affected by the cap based on bedroom criteria; others would be no more affected than someone without disability.

41. In MA the Divisional Court and the Court of Appeal concluded after careful scrutiny that the Secretary of State's decision to structure the scheme as he did was reasonable. In general terms I agree. There was certainly a reasonable foundation for the Secretary of State's decision not to create a blanket exception for anyone suffering from a disability within the meaning of the Equality Act (which covers anyone who has a physical or mental impairment that has a more than minimal long term effect on the ability to do normal daily activities) and to regard a DHP scheme as more appropriate than an exhaustive set of bright line rules to cover every contingency."

52. However, the Court noted that "*there were some people who suffer from disabilities such that they have a transparent medical need for an additional bedroom. Burnip and Gorry were in that category"*. In such cases "*where the individuals' medical condition was easy to recognise and gave rise to the need for a separate bedroom, there was no reasonable cause to apply the same cap on HB as if the bedrooms were truly under-occupied"* (per Lord Toulson §42).

53. Lord Toulson went on to draw a distinction between cases in which (i) a disabled person's need to remain in an existing property is connected to a transparent medical need for an additional room; and (ii) the need is not so connected and so requires 'individual evaluation' on a case by case basis (§58, 60, and 61). Lord Toulson explained that as individual needs and circumstances would vary from case to case,

the government had decided that such cases should be dealt with on a case by case basis under the DHP scheme rather through a general exemption and he did not consider that this approach was 'manifestly without reasonable foundation':

"61…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 regulation 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… 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…

66. I do not consider that the approach taken by the Secretary of State was manifestly without reasonable foundation."

54. Lord Toulson made clear that the position was not altered by the mere fact that an applicant for HB fell into a "*recognisable class few in number*" (§58) and/or that there would be no "*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*" (§64). He remained of the view that such cases, by their very nature, would "*require an evaluative process"* (§64).

55. The Court then went on to consider each of the 6 'disability' cases on their individual facts and circumstances.

56. Mrs Carmichael could not share a bedroom with her husband because of her disability and so had a transparent medical need for an additional bedroom. Her position was directly comparable with the children in Gorry. Whilst regulation B13(5)(ba) was introduced to address the problem in Gorry, it is confined to "*a child who cannot share a bedroom"* and did not apply to an adult couple who could not share a bedroom. There was no reasonable justification in treating adults and children, with essentially the same needs, differently.

57. Mrs Rutherford's grandson required an overnight carer because of his disabilities and so had a transparent medical need for an additional bedroom. The Rutherfords' position was directly comparable with that in Burnip. Whilst regulation B13(6)(a) addressed the problem in Burnip, it did not extend to a child who required overnight care. Again, there was no reasonable justification in treating adults and children, with essentially the same needs, differently.

58. The fact that DHPs could make up any shortfall (such that Mrs Carmichael and Mrs Rutherford would not potentially suffer any financial loss per se) did not justify "*the different treatment of children and adults in respect of the same essential needs with the same regulation"* (per Lord Toulson at §48).

59. However, the Court dismissed the appeals in the other 4 'disability' cases (Rourke, Drage, JD and Daly) on the grounds that there was no transparent medical need for the additional bedroom(s). Each case required an individual evaluation of the need to remain in the existing property and it was not unreasonable for the claims to cover

the full rent to be addressed on a case specific basis under the DHP scheme (§§ 51-54).

Is '*manifestly without reasonable foundation'* still the correct test?

60. In ***R(DA) and R(DS) v Secretary of State for Work and Pensions*** **[2019] UKSC 21** the Supreme Court was concerned with the lawfulness of provisions relating to the revised benefits cap under the Welfare Reform and Work Act 2016, limiting the total amount of benefits payable in one claim. It was argued that the cap discriminated against a variety of claimants.

61. By a majority decision, the Court once again affirmed that when determining the issue of justification in cases involving discrimination in state benefits, the sole test was whether the discrimination was 'manifestly without reasonable foundation'. Having carefully reviewed all the relevant authorities, Lord Wilson stated:

    "65… in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, ***the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it.****"*

    and later Lord Carnwath stated:

    "110… the application of the ['manifestly without reasonable foundation' test] should be regarded as ***beyond "future doubt****"* (emphasis added).

62. However, the applicability of the 'manifestly without reasonable foundation' test in state benefit cases was called into question by the first chamber decision of the ECtHR in the case of ***JD and A v United Kingdom*** **[2020] H.L.R. 5** (JD and A being two of the unsuccessful appellants in ***Carmichael***)**.** At paragraph 83, the ECtHR stated that:

    "For the purposes of Article 14 , a difference of treatment based on a prohibited ground is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised"…"

63. The ECtHR went on to disavow the 'manifestly without reasonable foundation' test in cases involving Article 1 of Protocol 1 and Article 14 except where the relevant provision is a transitional measure designed to correct historic inequalities:

    "*87. In the context of Article 1 of Protocol 1 alone, the Court has often held that in matters concerning, for example, general measures of economic or social strategy, the States usually enjoy a wide margin of appreciation under the Convention… and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".*

    88. However, as the Court has stressed in the context of Article 14 in conjunction with Article 1 Protocol 1 , although the margin of appreciation in the context of general measures of economic or social policy is, in principle, wide, such measures must nevertheless be implemented in a manner that does not violate the prohibition of discrimination as set out in the Convention and complies with the requirement of proportionality… in that context the Court has limited its acceptance to respect the legislature's policy choice as not "manifestly without reasonable foundation" to

circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality…

89. Outside the context of transitional measures designed to correct historic inequalities, the Court has held that given the need to prevent discrimination against people with disabilities and foster their full participation and integration in society, the margin of appreciation the States enjoy in establishing different legal treatment for people with disabilities is considerably reduced… and that because of the particular vulnerability of persons with disabilities such treatment would require very weighty reasons to be justified…"

64. It is worth noting that, even applying the 'weighty reasons' test, the ECtHR went on to dismiss JD's complaint on the basis that the discriminatory impact of regulation B13 was justified – the availability of DHPs "*…amounts to a sufficiently weighty reason to satisfy the court that the means employed to implement the measure had a reasonable relationship of proportionality to its legitimate aim. Accordingly, the difference in treatment identified in the case of the first applicant was justified*" (§102).

65. In ***Secretary of State for the Home Department v R (Joint Council for the Welfare of Immigrants) and Others*** **[2020] EWCA Civ 542** the Court of Appeal considered the different tests set out in ***DA and DS*** and ***JD and A*** (in the immigration context) and held that "*[i]nsofar as JD and A differs from the jurisprudence in the Supreme Court cases to which I have referred,* ***we are bound by the latter***" (emphasis added) (§133).

66. Bean LJ and Cavanagh J took a similar view in ***Workers Union of Great Britain v HM Treasury*** **[2020] EWHC 1554 (Admin)** (in the context of a challenge to decisions made by the Government during the COVID-19 pandemic in relation to the availability of financial support through statutory sick pay and the Coronavirus Job Retention Scheme):

"59. In the case of DA the Supreme Court decided that decisions of the Government about the scope and level of welfare benefits cannot be impugned under the ECHR unless they are ['manifestly without reasonable foundation']. A Chamber of the Strasbourg court took a somewhat different view in JD & A in the context of alleged discrimination on the basis of disability and gender; ***but the decision of the Supreme Court remains binding on us and all domestic courts****."* (emphasis added).

67. McCloskey LJ took a similar view in the Northern Ireland Court of Appeal in ***Stach v DfC and DWP*** **[2020] NICA 4** (in the context of an amendment to the Housing Benefit Regulations (Northern Ireland) 2006 which prevented EU citizens seeking employment in Northern Ireland from obtaining housing benefit):

"74. …In passing, the very recent consideration of this issue by a Chamber of the ECtHR, in JD & A v The United Kingdom…a 5/2 majority decision, did not feature in the parties' arguments. The majority confined the "manifestly without reasonable foundation" test to contexts where "…an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality" (at [88])… Our decision in this case is made in a context shaped by Section 3(1) of the Human Rights Act ***and the doctrine of precedent whereby this court is bound by the decision in DA****."* (emphasis added)

68. I also note that in ***TD, AD and Patricia Reynolds*** (judgment handed down on 12 May 2020) the Court of Appeal appears to have had no hesitation in agreeing (in the context of state benefits) that:

    "63. It was common ground before us that the applicable test in law is whether the difference in treatment is "manifestly without reasonable foundation": see R (DA) v Secretary of State for Work and Pensions…"

69. In my view, it is clear from the above decisions, that unless and until the Supreme Court decides otherwise, the 'manifestly without reasonable foundation' test remains the sole test when determining the issue of justification in cases involving discrimination in state benefits.

Does 'proportionality' have any role to play?

70. In the pre-***DA and DS*** case of ***R(C) v Secretary of State for Work and Pensions*** **[2019] 1 WLR 5687** Leggatt LJ noted (in the context of state benefits) that (i) according to settled case law of the ECtHR, the question whether there is an 'objective and reasonable justification' for discrimination is to be judged by whether it pursues a 'legitimate aim' and there is a 'reasonable relationship of proportionality' between the aim and the means employed to realise it; and (ii) in domestic law proportionality is to be assessed by asking (amongst other questions) "*whether the impact of the right's infringement is disproportionate to the likely benefit of the impugned measure*", or putting it another way "*whether a fair balance has been struck between the rights of the individual and the interests of the community"* (§84).

71. Leggatt LJ then referred to the 'manifestly without reasonable foundation' test and noted that it was common ground that that was the correct test. However, he noted that it was not immediately clear how the 'manifestly without reasonable foundation' test "*relates to the assessment of proportionality that the court must undertake"* (§89). He sought to answer that question by stating that:

    "89…the explanation may be that the court is required to ask whether the difference in treatment is manifestly disproportionate to a legitimate aim. This would accord with the statement of the European Court in Blečić v Croatia (2005) 41 EHRR 13 , para 65, that it will accept the judgment of the domestic authorities in socio-economic matters "unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued ".... It also reflects how the Supreme Court applied the test in the recent case of In re McLaughlin [2018] UKSC 48; [2018] 1 WLR 4250 , at paras 38-39 (Baroness Hale) and para 83 (Lord Hodge)" (original emphasis).

72. Leggatt LJ then went on to determine the appeal by asking whether the difference in treatment arising from the relevant measure was manifestly disproportionate to its legitimate aim (and therefore 'manifestly without reasonable foundation'):

    "158… Applying the relevant legal test, I do not consider that a court can properly conclude that the difference in treatment imposed by the two child limit is manifestly disproportionate to the legitimate aims pursued."

73. Whilst Lord Wilson made clear in ***DA and DS*** that in the context of state benefits, *"the sole question is whether [the discrimination] is manifestly without reasonable foundation"*, in ***TD, AD and Patricia Reynolds*** Singh LJ referred to ***DA and DS*** and §89 of Leggatt LJ's judgment in ***C*** and also proceeded to determine that 'sole

question' by asking whether the difference in treatment arising from the relevant measure was 'manifestly disproportionate' to its legitimate aim:

"92. I have come to the conclusion, that in the present context, ***the difference in treatment was manifestly disproportionate*** *in its impact on these Appellants having regard to the legitimate aim which the Respondent sought to achieve****. It was therefore manifestly without reasonable foundation.****"* (emphasis added)

74. This approach was also adopted by McAlinden J in the Northern Ireland High Court in the very recent case of ***In the matter of an application by Lorraine Cox for leave to apply for Judicial Review*** **[2020] NIQB 53** (judgment handed down on 7 July 2020). Having referred to Lord Wilson's judgment in ***DA and DS*** and Singh LJ's judgment in ***TD, AD and Patricia Reynolds*** (referring, in turn, to §89 of Leggatt LJ's judgment in ***C***) McAlinden J stated that:

"91. If and when it comes to the assessment of the justification put forward by the respondents for the difference in treatment in this case, I shall apply the ['manifestly without reasonable foundation'] test and in applying that test I shall consider whether the difference in treatment is manifestly disproportionate to the legitimate aim pursued…"

75. In light of the above authorities, whilst the sole legal question is whether the difference in treatment is 'manifestly without reasonable foundation', the answer to that question is to be found by considering whether the difference in treatment arising from the relevant measure is 'manifestly disproportionate to its legitimate aim'. If it is manifestly disproportionate, it is manifestly without reasonable foundation, and vice versa.

76. In practice, this will normally require the court or tribunal to consider the overall structure of the relevant scheme and the measures employed to implement it (including, in particular, any measures put in place to mitigate the adverse impact of the scheme), and then assess whether, in the context of the scheme as a whole, the adverse impact on any particular group of individuals is manifestly disproportionate. Simply asking whether the difference in treatment is 'disproportionate' will not suffice. There is a difference between something being 'disproportionate' and 'manifestly disproportionate'. 'Manifestly' clearly denotes a higher threshold.

Discussion

77. Having found that regulation 13D(2) had a disparate adverse impact on disabled persons in the Appellant's position and so discriminated against the Appellant, the FtT moved on to consider whether the discrimination was justified. The Appellant argues that the FtT erred in determining the issue of justification by asking whether the adverse impact of regulation 13D(2) on disabled persons in the Appellant's position (i.e. the difference in treatment) was 'manifestly without reasonable foundation'. She submits that there were two separate questions to be addressed: firstly, whether the difference in treatment was 'objectively and reasonably justified' (i.e. whether it was proportionate); and secondly, and only if it was found to be proportionate, whether regulation 13D(2) should nonetheless be disapplied because the difference in treatment was 'manifestly without reasonable foundation'. The Appellant further argues that whilst the FtT referred to proportionality, it erred in treating the requirement of proportionality to be satisfied simply because the Secretary of State had had 'due regard' to the needs of disabled people.

78. The Appellant's arguments are flawed. Firstly, as explained earlier in this decision, the sole legal question when determining the issue of justification in cases involving discrimination in state benefits is whether the difference in treatment is 'manifestly without reasonable foundation'. However, in order to answer that question the court or tribunal must ask itself and determine whether the difference in treatment is 'manifestly disproportionate to its legitimate aim'. It is not a two-stage process involving separate and independent questions as submitted by the Appellant. Secondly, it is clear that the FtT did not determine the issue of justification by simply asking whether the difference in treatment was 'manifestly without reasonable foundation' and/or by treating the requirement of proportionality to be satisfied simply because the Secretary of State had had 'due regard' to the needs of disabled people. The focus of the Appellant's argument before the FtT was that (i) the adverse impact of regulation 13D(2) on disabled persons in the Appellant's position was disproportionate and so the discrimination was not justified; and (ii) the availability of DHPs was insufficient to render it proportionate. The FtT clearly recognised that that was the key issue that it had to determine and that it involved a proportionality assessment (§14 and 15 SoR). Understandably, however, as the law had not yet been clarified, the FtT did not approach the proportionality question by asking itself whether the adverse impact of regulation 13D(2) on disabled persons in the Appellant's position (i.e. the difference in treatment) was 'manifestly disproportionate to its legitimate aim'. Instead, the FtT adopted the approach taken in ***MA*** and determined the appeal by, in effect, asking whether the decision to structure the scheme so as not to provide a general exclusion for disabled persons in the Appellant's position from regulation 13D(2) but, instead, make provision for them by way of DHPs on a case by case basis, meant that, overall, the adverse impact of regulation 13D(2) was proportionate (see §§15 and 17 SoR). In other words, rather than ask whether the difference in treatment was 'manifestly disproportionate', the FtT asked whether it was 'proportionate'. In doing so, the FtT did not ask itself the correct question.

79. I am, however, satisfied that in the context of this particular case, the FtT's failure to ask the correct question was not material. Such a failure would only have been material if I were satisfied that, had it asked itself the correct question, the FtT could properly have concluded that that the adverse impact of regulation 13D(2) on disabled persons in the Appellant's position was 'manifestly disproportionate to its legitimate aim' (and so was 'manifestly without reasonable foundation'). Having considered the competing arguments and the relevant authorities, I am satisfied that (i) the adverse impact of regulation 13D(2) on disabled persons in the Appellant's position was not 'manifestly disproportionate to its legitimate aim'; and (ii) the FtT could not properly have concluded otherwise.

80. I have identified the aims of Regulation 13D(2) (in particular in the context of the increase of upper age limit in the definition of 'young individual' from 25 to 35) at §11 above. In so far as the selection of these aims involves decisions about what policies are necessary or desirable to secure the social and economic wellbeing of the country, such as the decision that savings are needed in the amount spent on welfare benefits, those policy choices are ones that Parliament and an elected government are clearly entitled to make and are, therefore, legitimate. I do not take the Appellant to have, at any stage, suggested otherwise.

81. The Explanatory Memorandum to the Housing Benefit (Amendment) Regulations 2011 also explains that the Secretary of State gave consideration to whether specific exemptions should be made for varying groups of individuals who might not be able to share accommodation or would find it difficult to do so (e.g. those with substance abuse problems, mental and other physical health problems and needs). However,

ultimately it was decided that rather than trying to carve out a variety of general exemptions which might end up applying to those who could, in fact, share accommodation, the appropriate and fair way of supporting those who might not be able to share accommodation was through the DHP scheme. DHPs offered greater flexibility and allowed individual needs to be evaluated on a case by case basis at the local level by those with a better understanding of local conditions. This approach was, for all intents and purposes, identical to that taken by the Secretary of State in relation to regulation B13 (see §47 above).

82. In ***Carmichael*** the Supreme Court held that the approach taken by the Secretary of State in relation to regulation B13 was not 'manifestly without reasonable foundation' (see §51 above). As set out previously, the Supreme Court reached that conclusion by drawing a distinction between cases in which (i) a disabled person's need to remain in an existing property is connected to a transparent medical need for an additional room; and (ii) the need is not so connected and so requires 'individual evaluation' on a case by case basis (e.g. the need to remain arises because the property has already been adapted in some way, because of its specific location, because of a need for support from neighbours and family living close by, because of a lack of suitable and/or affordable alternative properties, etc). Lord Toulson explained that as individual needs and circumstances would vary from case to case, it was not 'manifestly without reasonable foundation' for the overall scheme to be structured in a manner whereby such cases should be dealt with on a case by case basis under the DHP scheme rather through general exemptions. Lord Toulson also made it clear that the position was not altered by the mere fact that an applicant for HB fell into a 'discrete group' or that it would not have been difficult to draft an appropriate exemption (see §54 above). Applying the approach taken by Leggatt LJ in ***C*** and Singh LJ in ***TD, AD and Patricia Reynolds*** and looking at it through the prism of proportionality, it can be said that the adverse impact of regulation B13 on those with disabilities was not 'manifestly disproportionate to its legitimate aim' (and so was not 'manifestly without reasonable foundation').

83. Applying the approach in ***Carmichael*** to regulation 13D(2), the key issue is whether the need of a disabled person in the Appellant's position (i.e. a wheelchair user) to remain in an existing property is connected to (i) a transparent medical need for single occupancy one-bedroom accommodation (i.e. a transparent medical need which prevents them from sharing a bedroom); or (ii) some other reason which requires 'individual evaluation' on a case by case basis. In the Appellant's case, I am satisfied that it is the latter. When applying for DHPs the Appellant stated that, despite her best efforts, she had been unable to find suitable wheelchair accessible shared accommodation in the Bradford area and that without additional discretionary payments (which would permit her to remain in her current accommodation), she would be forced to move into accommodation which was unsuitable for wheelchair users or fund the shortfall from her already limited income (see the Appellant's detailed statement at section 5 of the Application Form dated 4 July 2012). Similarly, before the FtT the Appellant asserted that as a wheelchair user she faced significantly more difficulties than an able-bodied person in securing shared accommodation within the confines of the one-bedroom shared accommodation rate as there were far fewer suitable wheelchair accessible properties for shared occupation available on the market in the Bradford area and generally. These are precisely the types of issues which require 'individual evaluation' on a case by case basis. In ***Carmichael***, Lord Toulson highlighted and accepted the Secretary of State's evidence that "*the impact of Reg B13 on those with disabilities was not uniform, but depended to a large degree on the nature and extent of their disabilities, as well as on their personal and social circumstances (such as whether they relied heavily on a local support network and whether suitable alternative accommodation*

was available, particularly if their present accommodation had been adapted to meet their individual needs). Some with disabilities would be significantly affected by the cap based on bedroom criteria; others would be no more affected than someone without disability". In my view, the position is no different in respect of the impact of regulation 13D(2) on disabled persons in the Appellant's position.

84. I note that in its letter dated 19 December 2017, Kirklees Citizens Advice and Law Centre asserts that the Appellant's medical condition would be aggravated if she were required to live in shared accommodation and, as such, in accordance with ***Carmichael***, the Appellant has a transparent medical need for single occupancy one-bedroom accommodation. I reject this argument. Firstly, the Appellant has not herself asserted that she 'cannot' live in shared accommodation and/or that her medical condition would be aggravated if she were required to do so. Secondly, there is no medical evidence to support the assertion. Thirdly, and perhaps most significantly, the extent to which the Appellant's medical condition would be aggravated is precisely the type of issue which would require an 'individual evaluation' on a case by case basis and so is better suited to consideration under the DHP scheme rather through a general exemption.

85. I am, therefore, satisfied that in the context of the scheme as a whole and, in particular, in light of the availability of DHPs on case by case basis, the adverse impact of regulation 13D(2) on the Appellant and those in her position is not 'manifestly disproportionate to its legitimate aim'. It is therefore not 'manifestly without reasonable foundation'.

86. It follows that the FtT's failure to ask the correct question does not amount to a material error of law.

Conclusion

87. For the reasons set out above, I conclude that the decision of the FtT does not involve any material error of law. I therefore dismiss the appeal (Tribunals, Courts and Enforcement Act 2007, section 11).

Signed on the original
on 7 October 2020

Shakil Najib
Deputy Judge of the Upper Tribunal