



**FIRST-TIER TRIBUNAL**

**SOCIAL ENTITLEMENT CHAMBER**

Held at Wakefield

on 18 June 2014

Before Tribunal Judge PA Barber

Appellant: Mr K Gresham	Tribunal Ref. SC008/13/08128  NI No YT 59 77 50 C
-------------------------	---

Respondent: Kirklees Council
------------------------------

**STATEMENT OF REASONS FOR DECISION**

**This statement is to be read together with the decision notice issued by the tribunal**

1. By a decision on the 9 March 2013 the respondent restricted Mr Gresham's entitlement to housing benefit by 14% from the 1 April 2013 in relation to a property at 25 Boothroyd Green, Dewsbury WF13 2RQ.
2. Mr Gresham attended the hearing with his representative, Mr Dewhirst from Kirklees Law Centre, together with his wife. The Local Authority was represented by Ms Rowland, a Presenting Officer.
3. Mr and Mrs Gresham live in a two bedroom property adapted for the purpose of providing disabled facilities. They were provided with this property on the basis of the household's need for disabled facilities.
4. Some 40 years ago, Mrs Gresham fell down the stairs and broke her back. Since that time she has had significant disabilities including bilateral sciatica and immense pain. She also suffers from incontinence and as a result of previously living in a property with stairs they were moved by the Local Authority to their current property, a bungalow. Mr Gresham is not able to sleep with his wife as a result of her pain and discomfort. He sleeps in the second bedroom in their flat and will attend to his wife at night if she requires attention. He told me that ideally he would like to sleep in the same bedroom but due to the size of the rooms it is not possible to get another bed into either of them. He did tell me that occasionally he will sleep with his wife but most of the time he is in the spare bedroom.
5. The property they occupy is ground floor with a low ramp up to the back door. The doorways are widened for the use of a wheelchair and there is a level access walk-in shower.

Appellant: Mr Gresham	Tribunal Ref: SC008/13/08128 Date of Hearing: 18 June 2014
-----------------------	---

6. Mrs Gresham is in receipt of higher rate of the mobility component and highest rate of the care component of disability living allowance. Mr Gresham receives carer's allowance for looking after his wife. Mr Gresham told me and I completely accept this to be accurate, that his job is "24/7" he has to attend to all of his wife personal activities of daily living, such as pushing her around in her wheelchair, dressing and undressing her, helping her get to the toilet and attending her in the shower, amongst other things.
7. I was told that Mr and Mrs Gresham are in receipt of discretionary housing payments and that these have been paid back to April 2013 when regulation B13 came into force. They however have to bid on one bedroom properties but there are no suitable properties and any one bedroom property will require adaptation for the use of a wheelchair and a bedroom large enough to fit two beds. That is to say, ironically, a bedroom with probably more floor space than the combined floor space of the two bedrooms they currently have. Their current flat does have a small living room and kitchen, neither of which would be appropriate if this were a one bedroom flat, for Mr Gresham to sleep in.
8. I took evidence in relation to the dimensions of the rooms, but for the purpose of deciding this appeal I do not recount my findings here, except to say that everything Mr and Mrs Gresham told me was accepted as accurate and truthful.
9. Notwithstanding the fact that it appears Mr and Mrs Gresham are in receipt of discretionary housing payments and accordingly might be considered to come within the facts of *Rutherford* for the reasons given in the generic Statement of Reasons I cannot see how the discretionary housing payments policy of Kirklees Council "plugs the gap" in relation to their claim to housing benefit and the effect of regulation B13.
10. Firstly, they are required to bid on alternative properties, none of which are suitable and all of which will require considerable adaptation and eventually may well be unsuitable for them. Having met Mrs Gresham it would not be reasonable for her, for reasons of her disability, to sleep in a single bed and the scope for a one bedroom property being available with a bedroom large enough for two beds and disabled facilities, it seems to me is slim.
11. Secondly, as is made clear in the generic Statement of Reasons, the discretionary housing policy is predicated on the assumption that the payment of DHPs will be time limited and of short duration. This must cause unnecessary distress to Mr and Mrs Gresham in a way which was not the case in *Rutherford*. In that case there was more confirmation that the payments would continue and there was no requirement for look for alternative "cheaper" accommodation.
12. In those circumstances Mr and Mrs Gresham's position is different to that of Mr and Mrs Rutherford.
13. On the basis of these findings of fact and my views expressed in the generic Statement of Reasons, I allow the appeal.

The above is a statement of reasons for the Tribunal's decision, under rule 34 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

<b>Appellant: Mr Gresham</b>	<b>Tribunal Ref: SC008/13/08128</b>
	<b>Date of Hearing: 18 June 2014</b>

Signed Tribunal Judge: **Phillip Barber** *Phillip Barber* Date: **24 July 2014**

*Statement issued to*

Appellant on: }  
Respondent on: } 28/7/14

Typist:



**FIRST-TIER TRIBUNAL**

**SOCIAL ENTITLEMENT CHAMBER**

Held at **Wakefield**

on **4, 19, 11, 18, 19 June 2014**

Before Tribunal Judge **Phillip Barber**

<b>Appellant: Various Appellants</b>	<b>Tribunal Ref. Various Tribunal references</b>
	<b>NI No Various</b>
<b>Respondent: Kirklees Council</b>	

**STATEMENT OF REASONS FOR DECISION**

**This statement is to be read together with the decision notice issued by the tribunal**

**Introduction**

1. I have tried to keep this statement of reasons as short as possible. It relates to a number of appeals I heard over the course of a number of days. I have set out below my judgment on the state of the law relating to regulation B13, otherwise known as the "spare room subsidy" or the "bedroom tax" in the main body of this document. All of the appeals relate to decisions by the same Local Authority, Kirklees who have offered, through their representative, Ms Kate Rowland their view of the legislative provisions and how I should approach the appeals. With the exception of one appeal, all of the appellants have been represented by Ms Rachel Ingleby from Kirklees Benefits Advice Service. One appeal was represented by Kirklees law Centre.
2. Both parties anticipated taking this matter to the Upper Tribunal subject to any relevant authoritative guidance already being in place and as I said at the outset I saw my main role in these proceedings was to find appropriate facts in relation to each case and to decide each of them on the basis of the law as I find it. The facts of each case are set out in the appendix under the respective reference numbers for each appeal. They are not copied generally to all of the appellants for reasons of confidentiality.
3. During the course of the hearings I also heard extensive submissions on the law and I had the opportunity to review a number of First-tier Tribunal decisions which had been referred to me by Ms Ingleby. All of those First-tier Tribunal decisions were in favour of the claimants and I have therefore not had the benefit of decisions which were against the claimants where a full statement of reasons has been provided. Those decisions are not binding upon me but I have taken them into account in my deliberations and dealt with them briefly below.
4. All of the appellants for one reason or another occupy accommodation which the Local Authority has determined is larger than they need in terms of the number of bedrooms

Appellant: Various Housing Benefit Appeals	Tribunal Ref: Various references Date of Hearing: Various Dates
--	--

available to them. The representatives for each of the appellants contends that I should not apply the regulations in their stark form but by dint of various rights under the European Convention on Human Rights I have the power to ameliorate the effect of the regulations upon certain groups of claimants by the addition of exceptions. The various appeals have been split into the following categories of claimant (some claimants fall into more than one category):

- a. Those couples who for health/disability reasons are unable to share a bedroom;
  - b. Those claimants who have either no DLA or the wrong type of DLA to qualify for an exception;
  - c. Those claimants who are unable to move on the grounds of health/disability;
  - d. Those claimants who have an additional room but there is a dispute over whether this room is properly classified as a "bedroom" either because it is not nor can be used as a bedroom or because it is too small;
  - e. Those claimants who have an "Article 8" right and who for reasons of their mental health, for example, will have an interference with that right unless the additional housing benefit is paid.
5. The legislative provisions are now well known and were introduced into the Housing Benefit Regulations 2006 from the 1 April 2013. They affect a large number of social rented sector claimants. In Kirklees Council alone, the respondent to these appeals, there are 1739 tenants who are subject to a reduction in their housing benefit. This is from a housing stock of some 16,469 tenants. Just over 10% of all tenants. Surprisingly, only a small fraction of those affected have appealed. In total Kirklees have had 70 appeals proceed to the First-tier Tribunal. Turning to the provisions.

Legislative provisions

6. Regulation B13 of the Housing Benefit Regulations 2006 provides that a local authority must determine a limited rent to which a claimant is entitled by applying a set formula. The formula requires the local authority to determine the rent that a claimant would otherwise be entitled to (the eligible rent), and then reduce that eligible rent by a percentage dependent upon the number of bedrooms in excess of those required, that the claimant is deemed to have. One extra bedroom results in a reduction of 14%; two or more extra bedrooms results in a reduction of 25%. There is also provision for apportioning that amount as between two or more persons liable to make payments in respect of the dwelling.

7. Regulation B13(5) provides as follows:

"The claimant is entitled to one bedroom for each of the following categories of person whom the relevant authority is satisfied occupies the claimant's dwelling as their home (and each person shall come within the first category only which is applicable)-

- (i) a couple (within the meaning of Part 7 of the Act);
- (ii) a person who is not a child;
- (ba) a child who cannot share a bedroom;
- (iii) two children of the same sex;
- (iv) two children who are less than 10 years old;
- (v) a child.

8. Sub-regulation (6) provides:

Appellant: Various Housing Benefit Appeals	Tribunal Ref: Various references Date of Hearing: Various Dates
--	--

"the claimant is entitled to one additional bedroom in any case where  
(i) a relevant person is a person who requires overnight care;...

- 9. Relevant person is defined (so far as is relevant) in sub-regulation (9) to mean the claimant or the claimant's partner.
- 10. "Child" is defined in regulation 2 as a person under the age of 16.
- 11. "Couple" is defined in regulation 2 as a "man and woman who are married to each other and are members of the same household"; or a man and woman who are not married to each other but are living as husband and wife". Not relevant to any of the issues in these appeals but there are provisions relating to persons of the same sex who are civil partners or are living together as civil partner.
- 12. A "person who requires overnight care" is defined, again so far as is relevant to the issues in these appeals, in regulation 2 as a person in receipt of attendance allowance or the middle or highest rate of the care component of disability living allowance; or someone who has "provided the relevant authority with such certificates, documents, information or evidence as are sufficient to satisfy the authority" that they require overnight care.
- 13. In addition to the requirements in paragraph 12 above, the relevant authority also has to be satisfied that that person "reasonably requires, and has in fact arranged, that one or more people who do not occupy their home the dwelling to which the claim or award for housing benefit relates should-
  - (i) be engaged in providing overnight care...
  - (ii) regularly stay overnight at the dwelling for that purpose; and
  - (iii) be provided with the use of a bedroom in that dwelling additional to those used by the persons who occupy the dwelling as their home..."

The case law

14. Needless to say these provisions have been the subject of extensive judicial scrutiny by the upper courts already. But it is fair to say that the state of the law is far from clear. This is apparent when one considers the First-tier Tribunal decisions already made in favour of claimants. As will be apparent from what I say later in this Statement of Reasons, it also seems to me that there is also a significant amount of conflict between the provisions insofar as they discriminate against disabled persons and how far the use of discretionary housing payments goes to justifying such discrimination.

Burnip

15. *Burnip v Birmingham City Council and others* [2012] EWCA Civ 629 concerned three separate challenges to the size criteria restrictions in place under the provisions relating to the determination of a maximum rent for the purposes of the private rented sector: the local housing allowance. All three challenges were successful in that the provisions in their un-amended form discriminated against those families who required an extra bedroom because of disability and within the family, two children were unable to sleep in the same bedroom. The appeals were also successful because of the discriminatory effect upon those adults who required overnight care as a result of a disability. As a result amendments were made to the

Appellant: Various Housing Benefit Appeals	Tribunal Ref: Various references Date of Hearing: Various Dates
--	--

provisions relating to both the private rented sector and the social rented sector to exclude from the reduction a child who cannot share a bedroom and a relevant person requiring overnight care.

R(MA & Others) v SSWP

16. In *R(MA and Others) v SSWP* [2013], a challenge by way of judicial review, the Court of Appeal defined the issue (in paragraph 38) as whether regulation B13 "discriminates against disabled persons such as the claimants on the grounds of their disability; and if so (ii) whether the discrimination is justified."
17. In paragraph 39 of the Judgment, the Master of the Rolls expresses the view that "Regulation B13, if read in isolation and without regard to the DHP Scheme, plainly discriminates against those disabled persons who have a need for an additional bedroom by reason of their disability as compared with otherwise comparable non-disabled persons who do not have such a need....[following a number of examples]... In short, the bedroom criteria define under-occupation by reference to the objective needs of non-disabled households, but not by reference to the objective needs of at least some disabled households. This demonstrates that on any view Regulation B13 discriminates on the grounds of disability."
18. On the issue of justification the Court held as follows (paragraph 60): "...despite the fact that we should (i) apply the manifestly without reasonable foundation test and (ii) exercise considerable caution before interfering with the scheme approved by parliament, we are obliged to scrutinise carefully the reasons advanced by the Secretary of State in justification of his scheme... That is particularly important since we are dealing with a vulnerable group (disabled persons) and the discrimination is closely connected with their disabilities."
19. The Court sets out its views on the issue of justification in paragraphs 71 through to 75 of the judgment. There are four strands to the issue of justification as follows: (1) in contrast to the situation in *Burnip* the court in *R(MA)* was concerned with a broad category of disabled persons requiring to be excluded from the bedroom criteria who were not likely to be limited in number and relatively few and easy to recognise; (2) the Secretary of State was "entitled to take the view that it was not practicable to add an imprecise class of persons (those who need extra bedroom space by reason of disability) to whom the bedroom criteria should not apply."; (3) the fact that "the nature of a person's disability and disability-related needs may change over time (even over a period of a few weeks)." Thus increasing the administrative time and costs associated administering a scheme significantly thus the greater degree and flexibility of DHPs would be more appropriate; and (4) "DHPs are administered by local authorities who are accountable locally for the money they spend..", whereas housing benefit is covered almost 100% by the Secretary of State. Local Authorities are thus subject to more financial discipline in relation to DHPs than housing benefit.
20. The Court addresses separately the case of the claimants, Carmichael<sup>1</sup>, who were in the position of requiring an additional bedroom as they were unable to share a bed due to Mrs Carmichael's disability and the fact that the bedroom was not large enough for an additional bed. As a result of the *Burnip* amendments the scheme subsequently enabled a child who was unable to share a bedroom as a result of a disability to have an additional bedroom but no amendments were made for adults in a similar position. The view of the Court was that it did "not accept that the differential treatment of adults and children is irrational or that there is

<sup>1</sup> Who were incidentally successful at First-tier Tribunal level

Appellant: Various Housing Benefit Appeals	Tribunal Ref: Various references Date of Hearing: Various Dates
--	--

no objective and reasonable justification for it. The best interests of children are a primary consideration... For that reason alone, the Secretary of State was entitled to decide to provide a greater degree of protection for children than for adults who are in the materially similar situation of having a disability-related need for an additional bedroom."

Rutherford

21. *Rutherford v Secretary of State for Work and Pensions and Pembrokeshire County Council* [2014] EWHC 1613 (Admin) is a further challenge to the lawfulness of the scheme. It is surprising in that at first sight it is almost indistinguishable from the matters addressed in *R(MA)*. In fact the point was made in paragraph 36 of the judgment that there is "limited scope for this Court to contribute anything in addition to the authoritative statements of principle that have been provided by the Court of Appeal in *Burnip* and *MA*". The Court however went on to consider the individual circumstances of the claimants who required an additional bedroom for an additional overnight carer for a disabled child in their household. That was an issue not addressed in *R(MA)*. It is also apparent from the judgment of the Court that the decision can remain fact specific in relation to individual claimants.

22. At paragraph 48 the Judge, Stuart-Smith J. points out:

"MA is binding on this Court. Accordingly, the Claimants' case cannot succeed unless there are valid grounds for distinguishing their claim from the claims being advanced in MA. Burnip too is binding on this court, with the same consequence. The effect of Burnip and MA taken together is that, while a scheme including the use of DHPs as the conduit for payment may be justifiable, it will not be justified if it fails to provide suitable assurance of present and future payment in appropriate circumstances. For my part, I see no conflict of principle between Burnip and MA on this point; and it is apparent that the Court of Appeal in MA also saw none."

23. At paragraph 51 of the judgment and clearly important to the issues in the case the Judge makes 5 findings of fact in relation to the issue of DHPs arising from evidence which the Judge finds was not before the Court of Appeal in the *Burnip* case. In particular he finds the following:

- a. "the intention of the scheme as a whole is that DHPs should be used to plug the gap where, if Regulations B13 were to be viewed and applied in isolation, a person with an ascertained need for an additional bedroom would otherwise be the subject of discrimination on the grounds of disability.
- b. It has not proved necessary to increase the monies available for the Pembrokeshire DHP fund and in fact Pembrokeshire under spent.
- c. Disabled persons living in specially adapted accommodation had specifically been identified in the Good Practice Guide as being a category for whom DHPs should be allocated.
- d. The Good Practice Guide also identified those who have a health problem thus restricting the choice of housing as those requiring an additional bedroom on the grounds of health problems "as groups meriting consideration";



Appellant: Various Housing Benefit Appeals	Tribunal Ref: Various references
	Date of Hearing: Various Dates

e. The award of DHPs by Pembrokeshire Council to the Claimants, had "plugged the gap and continues to do so. They have suffered and suffer no financial detriment as a consequence of being funded in part by the DHP conduit..."

24. The claimants argued that the discretionary nature of DHPs meant that they had no adequate financial assurance for the future that payment would continue. However on this point the Judge held that this "appears to me entirely to ignore the practicalities of the situation. Pembrokeshire is obliged to exercise its discretion in accordance with public law principles and Human Rights legislation. It is also as a matter of public law obliged to have regard to the guidance to which I have referred. That being so, no basis has been advanced on which Pembrokeshire could properly have exercised its discretion to deny the full DHPs that it has awarded in this case...". The Court accordingly concluded that there was "adequate assurance that the Claimants will continue to benefit from awards of DHPs to plug the gap that would otherwise exist. It the scheme or other circumstances were to change materially, different considerations might apply; but they do not apply now."

25. Finally at paragraph 63 the Court holds that even if "I had been persuaded that the facts of the present case compelled the conclusion that the Regulation was unlawful, I would have taken the view that it was neither necessary nor desirable in the interests of justice to grant a discretionary remedy in the circumstances where the scheme seeks to promote a legitimate policy objective and does so without any financial detriment to the Claimants and without imposing any substantial residual discriminatory burden upon them."

Discussion on the Law

26. *Burnip* was a statutory appeal and is binding upon the Tribunal. *R(MA)* was a challenge by way of judicial review and again is binding upon the Tribunal. *Rutherford* was concerned with the facts of that case but was again an application for judicial review. On the facts as the learned Judge found them in *Rutherford*, regulation B13 was not discriminatory, but it is clear that the issue of the payment of DHPs was important. The discretionary nature of DHPs was not a bar but the fact that they were paid, will continue to be paid and "plug the gap" meant that the scheme as a whole in relation to the facts in *Rutherford* applying the principles set out in *R(MA)* were not "inappropriate" nor "disproportionate in its adverse effect<sup>2</sup>."

27. As I understand the state of the law at present if, on the facts of any individual case, it can be demonstrated that DHPs do not "plug the gap" then that would amount to unjustifiable discrimination by the relevant local authority. As I understand the law, notwithstanding the existence of a national DHP scheme, each local authority as a public body is subject to the requirement not to discriminate on the grounds of health or disability. It seems to me, therefore that it is necessary to consider the issue of the administration of DHP payments by Kirklees Council and I do so now under a general heading of findings of fact.

The Kirklees DHP Scheme

28. Kirklees Council have had a DHP policy in place since 20 June 2001. It was amended on the 2 August 2013 seemingly some months after the coming into force of Regulation B13. The policy lists a number of "Qualifying Criteria" in paragraph 4 and sets out the following:

4.1 Initial considerations

<sup>2</sup> *Rutherford* para. 61

Appellant: Various Housing Benefit Appeals	Tribunal Ref: Various references
	Date of Hearing: Various Dates

- a) DPHs are a short term temporary measure. They are not and should not be considered as a way round any current or future entitlement restrictions set out within the housing and council tax benefit legislation
- b) We aim to use DHP payments to provide targeted assistance to families where no alternative cheaper accommodation is available, in particular large families what are no longer entitled to the 5 bedroom LHA rate
- c) We aim to use DHP payments to provide assistance to tenants subject to size restrictions, who have shared care arrangements/joint residency orders for children, who for housing benefit purposes are not included in their household, and who are facing hardship.
- .....
- h) We aim to use DHP payments to provide targeted assistance to tenants of social housing where they occupy an adapted property that meets the needs of a disabled person.

29. None of the other initial considerations are terribly relevant, dealing with rent arrears, moving costs and such like.

30. The policy makes it clear that the mobility component of disability living allowance is to be disregarded but that other income and capital which is generally disregarded in relation to social welfare benefits is to be included in a claimant's available resources, DLA care component, for example.

31. Under paragraph 4.4 various "exceptional circumstances" are posited by way of questions and so for example the policy asks:

- x) Would anything make it difficult for the customer to look for, or secure, cheaper accommodation? This might include factors such as the customer's age and health.
- y) Has the property been adapted to cater for a disabled customer's needs, or the needs of a family member who is disabled? If so, what adaptations have been made, why are they necessary, what would be the consequence for the customer or family member of living in an un-adapted property?
- aa) Does the customer, or any family member, have health problems which would be made worse by moving to alternative accommodation? If so, what?

32. Section 5 of the policy provides as follows:

5.1 As DHPs are a short term [its emphasis] measure we will make an award for up to 6 months (i.e. between 1 – 6 months) depending on the customers circumstances on case by case basis. We may consider a longer award if the tenant is making a contribution to any rental shortfall. Any further award up to a maximum of 12 month may be made only in exceptional circumstances. Officers will need to have regard for the council's financial funding limit. [reproduced accurately]

5.2 Any considerations to extend between 6-12 month award must be authorised by a senior manager with recommendations from a team manager. These exceptions might be appropriate for example where a property has been specifically adapted to meet the needs of a disabled person. Officers will need to have regard for the council's financial funding limit.

Appellant: Various Housing Benefit Appeals	Tribunal Ref: Various references
	Date of Hearing: Various Dates

5.9 As this is a discretionary service NO right of appeal exists. However, applicants or the authorised representative can request that the decision under the scheme be reviewed.

33. I took evidence about the working of the scheme relating to each of the individual appellants and those findings of fact are contained in the appendix to this Statement of Reasons. However, generically I was told by both the Appellants' representative and the Respondent that it is Kirklees policy not to pay a discretionary housing payment unless a claimant has registered with Choose and Move (Kirklees' housing allocations scheme) in order to identify a property that would not be caught by Regulation B13. However, I am not sure how certain this is as I was told of at least one appellant who had been granted a DHP without registering on Choose and Move. However, on balance I am satisfied that this was a policy requirement in place at the date of the decisions which I am obliged to consider. Especially given that most of the appellants told me that they had had to register to find alternative accommodation. It is possible that some fell through the net, so to speak.

34. It was also the case that despite being entitled to housing benefit a number of appellants were excluded from DHPs as their income was too high when disability living allowance payment was taken into account.

35. A great deal of judicial consideration was taken up in the above case law on the Good Practice Guide. I have been able to consider both the 2013 and 2014 editions of this Guide and they do not differ to any relevant extent. In my view the Kirklees policy fails to address the requirements of both of the editions of the Good Practice Guide in significant and important respects in relation to disabled persons affected by regulation B13 as follows:

- a. It is quite clear that the Kirklees policy is time limited and designed to be of short-term duration. This is made clear throughout the terms of the Policy and is the first initial consideration in section 4. This is contrary to paragraphs 5.1 through to 5.3 of the Good Practice Guide. It must be the case, and I had evidence to this effect, that the time limiting nature of the approach of Kirklees, coupled with the requirements to register on Choose and Move, had and still has a significant detrimental effect on claimants and their families. This causes unnecessary distress and suffering for persons who have to contend on a daily basis with pain and discomfort.
- b. There is no general reference in the policy to the situation envisaged in paragraph 2.8 of the Good Practice Guide and no indication that DHPs will be other than a short term provision whilst a family attempts to secure alternative accommodation under Choose and Move. This was clear from both evidence I heard and upon consideration of the policy.
- c. The blanket requirement that a claimant's disregarded income is taken into account as an available resource. The Good Practice Guide does envisage the possibility that this may be necessary at paragraph 5.3 but does make the observation "bearing in mind its intended purpose". It seems to me that requiring a claimant to utilise entitlement to disability living allowance care component, a benefit designed to help cover the additional costs associated with a disability, to additionally cover the shortfall in housing benefit entitlement, is grossly unfair and discriminatory in effect.

Appellant: Various Housing Benefit Appeals	Tribunal Ref: Various references
	Date of Hearing: Various Dates

36. In short, therefore, I cannot see how the operation of DHPs by Kirklees Council "plugs the gap" for the majority of appellants who appeared before me. If anything the operation of the policy creates unnecessary distress to disabled persons living in accommodation subject to regulation B13 and does not provide a safeguard against the clear discriminatory effect of that regulation. That said, at least one appellant had received DHPs to cover all of the difference but that was the exception, on the whole almost all of the appellants had not received DHP payments to cover the whole of their eligible rent.

37. It may have been possible to excuse the Respondent to some extent by reference to the fact that I am concerned with decisions made many months ago when the policy had not been properly worked through in line with the Good Practice Guidance but even the April 2013 version of the Good Practice Guidance addresses the same issues as set out in paragraph 35 above and Kirklees have had ample opportunity to bring their policy and practices up to a standard which met the policy objectives of the Good Practice Guide.

First-tier Tribunal Decisions

38. I have had produced a number of First-tier Tribunal decisions from various parts of the country. They all, in one way or another, find against the operation of regulation B13. However, a number of them were decided before the Court of Appeal in *R(MA)* and most of them do not go into any great detail about the reasons for their decision. It is also apparent that they are all fact specific and no general approach can really be gleaned from them. Of special consideration, however is the thoughtful and well reasoned decision in the Glasgow appeal under reference SC100/13/11351 which gave particular reference to the issue of DHPs and, applying *Burnip* (although referred to as *Gorry* in the decision), found that the operation of the DHP scheme by Glasgow Council did not justify the discrimination inherent in regulation B13.

Conclusion on discrimination

39. I have found the higher court cases are hard to reconcile. As I have already mentioned *Burnip* is a statutory appeal and went from the Tribunal to Upper Tribunal before an appeal to the Court of Appeal. In *Burnip* Judge Howell QC in the Upper Tribunal held that there was no discrimination in relation to the scheme relating to claimants in the private rented sector and that decision was followed in the separate cases of *Trengrove* and *Gorry*. *R(MA)* relates to the operation of the scheme under the same regulation as the one I am concerned with, regulation B13. However, that case was a challenge by way of judicial review to the legality of the regulation. *Sutherland* was a fact specific judicial review application which decision went against the claimants on the basis that there was an effective operation of a DHP policy by Pembrokeshire Council in line with the Good Practice Guidance.

40. Taking these cases I the round, it has to be the case that there is scope, therefore for the First-tier Tribunal to consider the operation of the DHP policy at a local level and in line with the facts of individual cases. If the operation of the scheme at a local level fails to ameliorate the discrimination inherent in regulation B13 then neither *R(MA)* nor *Sutherland* are to the point and instead *Burnip* must be preferred.

41. As will be clear from what I have already stated above, it seems to me that the operation of the DHP scheme by Kirklees Council fails to address the discrimination and accordingly,

Appellant: Various Housing Benefit Appeals	Tribunal Ref: Various references
	Date of Hearing: Various Dates

even though the regulation and DHP provision on a national level cannot be said to be unlawful if *R(MA)* is to be followed, they clearly are on a local level when the facts sit more comfortably with those in *Burnip* as is the case in relation to a large number of the appeals before me.

- 42. Further it is clear that requiring a couple, for example, who for reasons of disability or health are unable to share a room, to bid on one bedroom properties will never solve the problem of the discriminatory effect of regulation B13.

The Remedy on the Discrimination Point

43. My approach will affect different claimants in different ways and I address this in the appendix. However, I understand from the respondent that in the event that my decision is against their argument that there is no unlawful discrimination then they will continue to pay discretionary housing payments to all of the appellants regardless of whether they are applying to Choose and Move. I do not know whether this will also mean that those who are currently unable to access DHPs as a result of income excess when DLA, for example, is taken into account will also be brought within the DHP scheme. For this reason it is appropriate to consider the issue of a remedy rather than leave it to the Upper Tribunal where these appeals are likely to proceed.

44. It seems that the preferred approach to this issue amongst the First-tier Tribunal decisions I had available, is to read into regulation B13 additional exceptions in order to eradicate the discriminatory effect in relation to each individual claimant. I do not have the power to direct Kirklees to amend its Discretionary Housing Payment policy and make payments in line with the Good Practice Guide and so I must fall back on considering how regulation B13 can be made to work for those claimants who are being discriminated against and are suffering financial loss as a result of that discrimination.

45. There is reference in a number of First-tier Tribunal decisions to the House of Lords decision in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 and reference is made to this case in 2013/14 edition of Volume III Social Security Legislation; Rowland, M and White, R. In particular paragraph 124 of the opinion of Lord Rodger is particularly relevant:

"124. Sometimes it may be possible to isolate a particular phrase which causes the difficulty and to read in words that modify it so as to remove the incompatibility. Or else the court may read in words that qualify the provision as a whole. At other times the appropriate solution may be to read down the provision so that it falls to be given effect in a way that is compatible with the Convention rights in question. In other cases the easiest solution may be to put the offending part of the provision into different words which convey the meaning that will be compatible with those rights. The preferred technique will depend on the particular provision and also, in reality, on the person doing the interpreting"

46. Regulation B13 is subordinate legislation and it seems to me that I can read in to it provisions which will exclude from the operation of this regulation those persons who are subject to discrimination which is not ameliorated by the operation of an effective DHP policy. This would have the effect of removing the discrimination faced by a number of the appellants.

Appellant: Various Housing Benefit Appeals	Tribunal Ref: Various references
	Date of Hearing: Various Dates

Couples who are Unable to Share a Bed and cannot have two Beds in the same Bedroom

47. Accordingly for those couples who clearly require an additional bedroom on the grounds of health and/or disability I will read into regulation B13 an additional exception based on this fact. These appeals include, for example, the severely disabled woman who for reasons of extensive pain is unable to share a bed with her husband and who would otherwise have nowhere to sleep if they were to be afforded a one bedroom flat. There are a number of similar cases.

Overnight Carer Appeals for Adults

48. A number of cases related to the situation where a disabled person required an overnight carer but they were either in receipt of no DLA or the wrong level of DLA. It was agreed that these cases are fact specific and accordingly I have made findings of fact in the Appendix in relation to each of these where relevant and they do not fall to be decided under the general principals in this Statement of Reasons. I have been able to make separate findings as to whether they come within the definition of "person who requires overnight care" in regulation 2 of the Housing Benefit Regulations 2006.

Those Appellants who are unable to move as a result of a Disability

49. I found that the general principals identified above could also be applied effectively in relation to this class of appellant. As these cases were limited I have dealt with the issues more specifically in the appendix.

50. It seems to me that requiring a person who for reasons of their mental or physical health is unable to "downsize" to affordable accommodation and thus have to pay the additional cost of their accommodation just because it now has more bedrooms that they reasonable require discriminates on the grounds of their disability.

51. I have found and I apply this in the individual appeals, however that it is only in exceptional circumstances that a claimant will have a disability of such a degree that they are unable to move to more affordable accommodation which will not be subject to the effects of regulation B13.

Size of Room and use of Room

52. I am not impressed with either of these arguments. The size criteria in section 326 of the Housing Act 1985 envisages that a living room would be available as sleeping accommodation (see sub-paragraph 2(b)) and so its application in relation to regulation B13 is negligible.

53. In any event I am satisfied that all of the rooms available for sleeping in, in all of the appeals, constitute a bedroom within the meaning of regulation B13. That is not to say that some of them (at least one) are not available as a bedroom due to a material change of use to a bathroom by the additional of bathroom facilities and the inclusion of a central heating boiler. Although there is nothing in the Housing, Health and Safety Rating Scheme which indicates that a boiler should not be placed in a bedroom I find that this fact combined with the incorporation of bathroom facilities in this room in agreement with the Local Authority (who fitted the boiler and sanctioned the fitting of the bathroom facilities)

Appellant: Various Housing Benefit Appeals	Tribunal Ref: Various references Date of Hearing: Various Dates
--	--

has materially changed the room from a bedroom to a bathroom. However, it seems to me that the definition of bedroom is a wide definition and it will only be in limited and exceptional circumstances as I have already described that a room which has been designated as a bedroom and which could be slept in is in fact now to be regarded as some other type of room by this tribunal.

54. Accordingly I do not need to deal with the case law on this issue which the Local Authority drew to my attention.

55. However, apart from this I could not really find that any of the other arguments put forward in relation to room size (the inclusion of a bulk head in a room, for example) really altered its character from that of bedroom to something else. All of the rooms were large enough to fit in a single bed, at least, and all of the properties had other bedrooms which were larger.

Article 8 Arguments

56. Ms Ingleby made submissions on the argument that regulation B13 not only contravened Article 14 when read in line with Article 1 of the First Protocol but it also contravened Article 8 ECHR in that it interfered with a claimant's right to a private and family life and home. I was referred to an unreferenced immigration case: *Bensaid v UK* 06/02/2001 where it was argued that the applicant's expulsion to Algeria would leave him (and he suffered from schizophrenia) with inadequate medical treatment, threatening his physical and moral integrity. But I could not, on the basis of the facts of any of the appeals put forward as pointing to giving rise to a contravention of Article 8, find that there had been any contravention of Article 8. Insofar as I can read into Article 8 the rights enshrined in Article 14 there is no material difference to the points made in relation to Article 1 of the First Protocol and Article 14 dealt with above. Insofar as this is a free standing challenge based exclusively on Article 8 I bear in mind that Article 8(2) provides that interference can be sanctioned where it is "in accordance with the law and is necessary in a democratic society in the interests of.....the economic well-being of the country...". Given findings in *MA* and *Sutherland* in particular on the issue of justifiability I cannot see for one minute on the basis of the arguments put before me how there is any scope for a challenge under Article 8.

57. Accordingly I do not need to deal with the issue of Article 8 in any more detail.

Overall Conclusion

58. It conclusion, therefore and in relation to the various arguments put to me I have decided as follows on the law.

59. There is scope for this First-tier Tribunal to examine at a local level the way in which the DHP scheme operates and is operated by the Local Authority in relation to individual claimants. In the event that it operates in a way which is more akin to the situation in *Burnip* than in *R(MA)* or *Sutherland* then a First-tier Tribunal can decide that there has been a contravention of Article 14 when read in line with Article 1 of the First Protocol.

60. Where necessary I have implied into regulation B13 an exception relating to each of the appellants who have been successful in their appeal. I have simply identified which

<b>Appellant:</b> Various Housing Benefit Appeals	<b>Tribunal Ref:</b> Various references
	<b>Date of Hearing:</b> Various Dates

appellants are successful and what the result should be. In some cases it will be to pay the full eligible rent, in others it will be to reduce the percentage reduction from 25% to 14%.


61. I do not accept the arguments relating to room size in all of the appeals and reject this aspect of the appeals.

62. I have made distinct and separate findings of fact in the appendix in relation to whether any particular appellant comes within the definition of "person who requires overnight care" in regulation 2 of the 2006 regulations.

63. I only partially accept the arguments in relation to material change of use to hold that there are circumstances where I can accept that a bedroom as defined by the Local Authority is in fact no longer a bedroom. However, these are strictly limited and the fact that a claimant now uses what could be a bedroom for other purposes would not prevent it from remaining a bedroom.

64. In relation to Article 8, I have dealt with this shortly as I do not think it takes the matter any further. It seems to me clear that regulation B13 applies a policy intent which apart from discrimination on the grounds of disability (i.e. Article 14) comes fairly and squarely within the scope of Article 8(2). The issues are therefore the same as those applicable to Protocol 1 of the First Protocol.

The above is a statement of reasons for the Tribunal's decision, under rule 34 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.

Signed Tribunal Judge: Phillip Barber 		Date: 23 July 2014
Statement issued to	Appellant on:	} 28/7/14
	Respondent on:	
	Typist:	