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Bedroom tax:

Tribunals and Reviews and Appeals, oh my!

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This is not a comprehensive approach to all of the legal issues, challenges and known decisions concerning the bedroom tax. There are far too many. My list of known First Tier tribunal cases [1] is now up to about 50 or so, and those are just the ones that have reached me by one route or another. There have been three Upper Tribunal decisions and of course the major Administrative Court and Court of Appeal cases.

What I will do is pick out some of the key legal themes and approaches that have emerged in the last 18 months, across the higher courts, and the tribunals, with examples, and look at some of the more interesting decisions.

The picture is, to say the least, a confused one. Non-binding FTT decisions are varying wildly, in outcome, reasoning and sadly, in quality of reasoning. While the DWP appears to have won the higher court cases so far, it has actually left their position on the lawfulness of the bedroom tax regulations at the mercy of the discretion of local authorities, something that has been picked up by the tribunals.

I am not going to explain the bedroom tax regulations, how they operate or the various exemptions and exceptions that have been put in place. I am taking it as read that this audience is familiar with that.

1. Article 14 Disability discrimination in the High Court and Court of Appeal. Justification, DHP and a perilous position.

The main legal challenges to the bedroom tax have been in the Administrative Court, and then to the Court of Appeal. As such, they have been challenges to the operation of the Regulations and policy, rather than to specific decisions (although those have been involved). I won't rehearse the history of these cases, but I will draw out the main findings of relevant Court of Appeal and Administrative Court decisions, as far as these go to the legal standing of the bedroom tax regulations.

MA & Ors, R (on the application of) v The Secretary of State for Work and Pensions [2014] EWCA Civ 13 has been the main case. This concerned some 10 disabled claimants. The central issues in the Court of Appeal were

i) whether the regulations discriminated against disabled people without justification, as a breach of Article 14 of the European Convention on Human Rights, read together with Article 1 Protocol 1.
ii) Whether the regulations were introduced in breach of the Secretary of State's Public Sector Equality Duty, section 149 Equality Act 2010.

[1] http://nearlylegal.co.uk/blog/bedroom-tax-ftt-decisions/

As we all know, the Claimants were unsuccessful. However, what is significant for the current and future legal position of the bedroom tax regulations is why the Claimants were unsuccessful.

The argument on the PSED failed on the basis of the history of the evolution of the policy, which apparently demonstrated that the Secretary of State understood that there were disabled people affected, and this received substantial consideration, including in Parliament. The evolution of the policy on DHPs showed this attention.

The Article 14 position was more complicated. The Court of Appeal (as the High Court before it) found that there was indeed a discriminatory effect of the policy on disabled people such as the claimants. . The question then was whether the discriminatory effect could be justified, was there an objective and reasonable justification?

In the High Court, the court had found that the DHP scheme, with the additional funds and DWP guidance, amounted to a fair and proportionate response to the discrimination. In the Court of Appeal, the Claimants pointed to the Court of Appeal finding in *Burnip v Birmingham City Council* [2012] EWCA Civ 629 (an LHA case), that DHP was not sufficient to remedy the discrimination, being discretionary, unpredictable in duration and intended to be short term, and could not be relied upon to cover any shortfall in rent.

The Court of Appeal disagreed, finding that the position had changed since *Burnip*. There had been an additional allocation of funds to the DHP pot, and the DWP had made repeated suggestions that the fund would be monitored and topped up if necessary.

In addition, *Burnip* concerned clearly identifiable categories of disability. The broad range of claimants in *MA* meant that no precise class of persons could be adequately defined to give an exception to the regulations. (We will come to the specific case of Mrs Carmichael below, but in that specific case, the Court of Appeal found that it was reasonable to treat adults and children differently, requiring a higher degree of protection for children. Thus the finding on children unable to share a room through disability in *Burnip* was distinguished).

So, the DHP scheme represented a justification for the discriminatory effect of the policy.

What was not considered in *MA & Ors* was whether the individual claimants were actually in receipt of DHP.

This is where matters took an interesting, if predictable turn in *Rutherford & Ors v Secretary of State for Work And Pensions* [2014] EWHC 1613 (Admin). This was the judicial review, supported by CPAG, of the failure of the bedroom tax regulations to address the position of tenants where a bedroom was needed for overnight carers for a child. The only statutory 'exemption' is for overnight carers for the tenant or their partner.

While the Claimant lost in the challenge, despite having a very clear and specific 'class' of disability at issue – the court again found that while there was discrimination, it was justified – the basis on which the Court found that justification should cause a considerable degree of worry to the DWP. The Court found:

> *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.*

And then, on the specific case presented by the Rutherfords, where DHP was in payment:

> *For obvious reasons, any expression of view on my part in this judgment is not binding on Pembrokeshire or generally. However, on the information that is available to me, including Warren's condition, the Claimants' need for overnight carers requiring a bedroom, the fact that the property has been specifically adapted (twice) for Warren's needs, the absence of any alternative suitable accommodation in the county, and the fact that Pembrokeshire has had and should continue to have available sufficient funds, a decision to withhold DHPs would appear to be unjustifiable. As it is, after the initial hiatus, no such decision has been made. Although Pembrokeshire's undertaking to consider whether further DHPs were warranted if the Claimants' HB entitlement were to be similarly limited in future does not amount to a written guarantee, the fact that Pembrokeshire has exercised its discretion in favour of an award for the last two financial years adds weight to the conclusion that it would appear perverse for Pembrokeshire to reach a contrary decision in the future if the scheme and the Claimants' circumstances remain unchanged. As I have said, there is no evidence that Pembrokeshire will refuse to make up the Claimants' shortfall by DHPs.*
>
> *54. I therefore conclude that there is at present adequate assurance that the Claimants will continue to benefit from awards of DHPs to plug the gap that would otherwise exist. If the scheme or other circumstances were to change materially, different considerations might apply; but they do not apply now.*

The Court's finding of justified discrimination is wholly predicated on not just the existence and funding of the DHP scheme, but on DHP actually being in payment in this specific case. And what is more, that payment being adequate and apparently secure for the reasonable future. While the Court doesn't go so far as to state this, the inevitable suggestion is that the bedroom tax regulations would be an unjustified breach of article 14 in such a case if DHP was not in payment and not reasonably secure.

This would seem to leave the lawfulness of the regulations at the whim of local authorities' discretion and whatever conditions they choose to set on DHP

availability. (On which see the ongoing Sandwell DHP judicial review mentioned at the end).

2. Article 14 in the Tribunals.

While *MA & Others v SSWP* in the High Court and Court of Appeal has resulted in findings that the regulations are discriminatory against the disabled, but that the discrimination was, in effect, justified, the FTTs have at times taken a different route. One of the issues in *MA* was that the DWP defended on the basis that it was too difficult to produce regulations exempting people with varied need for an 'additional' bedroom for reasons related to disability. The number of claimants in *MA* perhaps aided the High Court to share that view. However, the FTTs are faced with specific individual circumstances and have been deciding on those.

The only disability related exemptions in the Regulations (as amended after *Burnip/Gorry* and *MA* in the High Court) are and additional bedroom for an overnight carer where the claimant or their partner require overnight care, or where children are unable to share a room by reason arising from disability. No other disability related situations are exempted.

The first, and most clearly reasoned, of these FTT decisions was in Glasgow [2], in September 2013. The appellant had progressive multiple sclerosis, used an electric wheelchair and had multiple carer attendances during the day. At night her husband cared for her. The bedroom was fitted with a tracking hoist, a hospital bed and required space by the side for the wheelchair. There was not room in the bedroom for a second single bed for the husband, who slept in the second bedroom. There was no overnight carer, save for the husband.

The FTT found that there was discrimination under Art 14 of the ECHR, combined with A1 P1, but distinguished MA (in the High Court judgment) on the basis that this was a discrete case. The FTT followed *Burnip & Gorry*, finding that the discrimination against the Appellant was not justified.

On remedy, the FTT decided that *Ghaidan v Godin-Medoza* [2004] UKHL 30 enabled a 'broad approach' via s.3 Human Rights Act 1997 in interpreting legislation so as to be compatible with convention rights, which was not reliant on finding an ambiguity in the statutory wording. The FTT decided to read the relevant regulation (B13(5)(a)) so as to read

> "(a) a couple (within the meaning of part 7 of the Act) (or one member of a couple who cannot share a bedroom because of severe disability) in order to give the regulation effect in a Convention compatible way. Not to read the regulations in this way would be incompatible with the Convention and the Human Rights Act."

[2] http://nearlylegal.co.uk/blog/2013/10/yell-tak-the-high-road/ And the decision is at http://www.govanlc.com/CaseF.pdf

The decision does not address Discretionary Housing Payments, one of the key issues in *MA*, nor does the decision deal with the Court of Appeal's finding in *Burnip/Gorry*, on which more below.

The DWP is appealing the Glasgow decision to the Upper Tribunal.

The Glasgow decision is one of the better reasoned of the Article 14 FTT decisions. The Redcar decision [3] doesn't even mention Article 14, simply stating, in relation to the Appellant's disabilities:

> The Local Authority have not taken into consideration her disabilities and her reasonable requirements, as a result [of] these, to sleep in a bedroom of her own.
>
> [...] that the property has 3 bedrooms and although the appellant and her husband are a couple, her particular circumstances (ie the extent and effect of her disabling medical conditions and her resulting needs due to those disabilities) mean that they reasonably require one bedroom each and should therefore be assessed for housing benefit on that basis.

There is, of course, no basis in the Regulations for inventing a 'reasonable requirements' criteria for number of bedrooms. It is hard to see any way in which the Redcar decision could survive an appeal to the Upper Tribunal (although I have not heard of one).

An Edinburgh decision [4] follows similar lines to the Glasgow one. Husband and wife were unable to share a bedroom due to the husband's health conditions.

A variation on the Article 14 argument was found in a Liverpool decision [5]. In this, the appellant's adult daughter received overnight care from the other adult daughter, who stayed overnight in a room on a bed on the floor twice a week. The FTT found that this was a bedroom, despite not being used as such days a week, but that Article 14 discrimination arose in not treating the non-dependent daughter in the same manner as the appellant or appellant's partner would have been treated if they received overnight care. The difference in treatment was not justified. The FTT remedied this by 'reading in' the words 'or a non-dependent' after the word 'partner' in Reg B13(5).

These decisions predated the Court of Appeal decision in *MA & Ors*, though post-dated the High Court decision. However, since the Court of Appeal decision there have been a number of FTT decisions that have sought to distinguish, side step or otherwise not follow *MA & Ors*.

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[3] http://nearlylegal.co.uk/blog/2013/10/the-absence-of-reasons-in-redcar/
[4] http://nearlylegal.co.uk/blog/wp-content/uploads/2013/10/EdinburgFTT.pdf
[5] http://nearlylegal.co.uk/blog/wp-content/uploads/2013/10/SC068-13-10123-LIVERPOOL.pdf

The most important of these is the Carmichael FTT [6] from April 2014. While it is just a non-binding FTT decision, the significance lies in that this was the very case – the Carmichaels – dealt with specifically and individually by the Court of Appeal in *MA & Ors*. Yet the Tribunal found that there was unjustified discrimination in their situation. Mrs Carmichael needs a separate (specialist) bed with space for carers and manoeuvring of her wheelchair. She and her husband cannot share a bed and there is no space for an additional bed in the room.

Before the Tribunal, the Carmichael's argument was that because it was a statutory appeal the approach to justification was different from that in *MA* - that is, the tribunal was looking at the discriminatory effect on this family only and whether that can be justified by the Council, as opposed to the discriminatory effect in disabled people generally.

The exercise on justification was argued to be different in a statutory appeal to the tribunal than on a judicial review in the Administrative Court. *MA* was used as authority for this in the way in which the Court of Appeal distinguished that case from *Burnip/Gorry* (which was of course an appeal to the Court of Appeal from the FTT/Upper Tribunal route.

While the Court of Appeal dealt with the Carmichaels' case specifically, the argument was that the court failed to make any findings that conflicted with *Burnip/Gorry*, because the Court of Appeal only approached the issue from the point of view of a comparative exercise between disabled children and disabled adults, instead of considering whether the discrimination against people with Mrs Carmichael's disability was justified as against people who did not have her disability. *MA* was silent on that second comparison, the key one for a finding for or against justification in respect of Ms Carmichael, and *Burnip/Gorry* was left untouched. In short, the court had 2 conflicting Court of Appeal judgments and *Burnip/Gorry* was to be preferred as it was more relevant as a statutory appeal, not a judicial review.

The Tribunal accepted this argument. DHP was only in payment for a limited time. There was unjustified discrimination and the Regulations had to be read to be compatible with Convention rights, so, in this case, should be read to exclude a couple unable to share a bedroom because of disability.

An FTT decision from Wakefield in August 2014 [7] tackled the DHP situation head on. This was another case where a couple were unable to share a bedroom through disability, living in an adapted bungalow property.

The Council as benefit authority had applied a 14% reduction in HB for the property. Mr G had been granted DHP back dated to April 2013, but, as a condition of DHP, Mr & Mrs G had to search for a one bedroom property (despite, as they pointed out to the FTT, the fact that this would inevitably have to be of a larger floor space than the current property, and would need

[6] http://nearlylegal.co.uk/blog/2014/04/ignoring-the-court-of-appeal/
[7] http://nearlylegal.co.uk/blog/2014/08/dhp-enough-remedy/

adaptations). Further, the DHP was expressed to be time limited and of short duration.

The FTT found that the conditions on the DHP and the expressed short term nature of it meant that "I cannot see how the discretionary housing payment policy of Kirklees Council "plugs the gap" in relation to their claim for housing benefit and the effect of regulation B13".

While *R (Rutherford) v SSWP* had found that payment of DHP was enough to amount to justification in that specific case, the time limited and short duration of DHPs in Mr G's case "must cause unnecessary distress to Mr and Mrs G in a way that was not the case in *Rutherford*. In that case there was more confirmation that the payments would continue and there was no requirement to look for alternative 'cheaper' accommodation".

What this decision shows is that it is not just whether DHP is in payment that may be an issue for the Tribunal. Equally, conditionality of an award of DHP may well be taken as an unacceptable restriction such that DHP does not amount to justification in an individual article 14 discrimination case.

3. Other Tribunal arguments and the ontological status of bedrooms

Room size

This was an early target, in fact I and others were raising it back in February 2013[8]. The basis of the argument is that a room below a certain size cannot properly be considered as a bedroom. The measure for room size has so far mostly been found in Part X Housing Act 1985 – the statutory overcrowding provisions at s.326, where for the purposes of an assessment of overcrowding by space standards, the following is set out:

- more than 110 sq feet (10.2 sq metres approx) = 2 people
- 90 – 109 sq ft (8.4 – 10.2 sq m approx) = 1.5 people
- 70 – 89 sq ft (6.5 – 8.4 sq m approx) = 1 person
- 50 – 69 sq ft (4.6 – 6.5 sq m approx) = 0.5 people.
- Less that 50 sq ft = not suitable as sleeping accommodation

(In Scotland there is an identical provision in Housing Act (Scotland) 1987).

While the Housing Act 1985 provisions don't offer up a definition of a bedroom, and the room size standards are in the context of an overcrowding assessment of the whole property (such that a dining room or living room could be a 'bedroom' for the purposes of the assessment), these standards have had considerable success in the FTT.

[8] http://nearlylegal.co.uk/blog/2013/02/room-without-review-thoughts-on-tackling-the-bedroom-tax/

Some councils (as landlords) accepted that anything below 50 sq ft could not be a bedroom and reclassified properties on that basis.

However, the FTTs have been keener on the 70 sq ft boundary. One of the clearest statement of reasons for this is in a decision made by the FTT in Fife, 26 August 2013 [9]:

> "under-occupancy can be seen as the flip side of overcrowding, and that it is relevant to have regard to statutory space standards. These indicate that a room of this size is appropriate for use as sleeping accommodation by a young child – as has indeed been the case in relation to room 1 – but not an adult. It is in effect regarded by section 137 of the 1987 Act as only half a room. I also accept, having regard to Circular A4/2012, that paragraph 613(5) generally presupposes that to be classified as a bedroom a room should be large enough to be appropriate for use as a bedroom by an adult- or by two children."

The room in this case was 64 sq ft, and had, in fact, been used as a bedroom by the appellant's children when young, under 16, but was no longer used as a bedroom.

Regulation B13 (5) provides:

> (5) The claimant is entitled to one bedroom for each of the following categories of person whom the relevant authority is satisfied occupies the claimant's dwelling as their home (and each person shall come within the first category only which is applicable)—
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> (a) a couple (within the meaning of Part 7 of the Act);
> (b) a person who is not a child;
> (c) two children of the same sex;
> (d) two children who are less than 10 years old;
> (e) a child,
> and one additional bedroom in any case where the claimant or the claimant's partner is a person who requires overnight care (or in any case where each of them is).".

It is not entirely clear that B13(5) does presuppose a room large enough for use by an adult or two children. (5)(e) would include a child of any age and a child under 10 is 0.5 of a person for the purposes of the Housing Act 1985 provisions. It may be that the DWP guidance in Circular A4/2012 [10] that "With the agreement of the landlord a claimant may be able to take in a boarder or

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[9] The first decision here: http://nearlylegal.co.uk/blog/2013/09/changing-rooms/ And statement of reasons here: http://www.insidehousing.co.uk/journals/2013/09/20/d/x/z/First-Decision-Notice.pdf

[10] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226237/a4-2012.pdf

lodger to fill any unoccupied room" (para 63), is persuasive in the FTT accepting the room must be large enough for an adult.

While many other FTT decisions have gone along with the room size argument, some on practical grounds, others with explicit reference to the HA 1985 Part X criteria, it has not been universally adopted. In a decision in Inverness, for example, a room of 54 sq ft was fond to be a bedroom despite its size, as it was actually being used as a bedroom, which indicates that the room size argument has its limits in practice.

More significantly, some FTTs have found that the HA 1985 criteria are of no relevance to an assessment of whether a rom is a bedroom. The clearest statement of this so far is in a decision SC231/13/01993, from Bedlington [11] . The Tribunal found:

> *What is clear from this legislation is that involves an assessment of the number of rooms, the number of people in the dwelling, the rooms available as sleeping accommodation. The size of a room is used to decide how many people can be treated as sleeping in it for the purposes of calculating whether a dwelling is overcrowded.*
> *The Housing Act 1985 therefore regards overcrowding not only in relation to the number of bedrooms and the people in bedrooms but those who could sleep in a living room [sic]*
>
> *It is an assessment of the overall number of people in the property compared to the rooms and space available. It has a definition of sleeping accommodation which is fundamentally different to that contained within the MRSS [bedroom tax]. It is not limited to bedrooms. […]*
>
> *The relevance of a room having a floor area of less than 50 square feet is relevant for the calculation of the number of people in the dwelling for the purposes of overcrowding. It has no other relevance. It has no relevance as far as the MRSS is concerned.*

This is the argument that I would expect the DWP to make in the Upper Tribunal (Administrative).

As yet no appeals on this issue have been heard, but it appears that the Upper Tribunal has stayed all appeals bearing on this issue pending the hearing of a test case (or possibly two) on the room size issue. The known test case is apparently CH/153/2014, which is from the Wirral. The tenant is represented.

In addition, in response to room size decisions at the FTT, the DWP issued Circular HB/U6 2013 [12] which, despite the DWP's stated determination not to define a 'bedroom', stated:

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[11] http://nearlylegal.co.uk/blog/2014/08/bedroom-tax-human-rights-ftt-miscellany/

[12] http://www.disabilityrightsuk.org/sites/default/files/word/HB-U6-2013.doc

4. *This bulletin is to inform LAs that when applying the size criteria and determining whether or not a property is under-occupied, the only consideration should be the composition of the household and the number of bedrooms as designated by the landlord, but not by measuring rooms.*

5. In determining whether or not a room is a bedroom the landlord may consider a number of factors, but one of these must be whether or not a room is large enough to accommodate at least a single bed. Where this is not the case, the landlord should reassess whether or not that room should be classified as a bedroom and ensure that the rent correctly reflects the size of the property.

6. Where rooms are designated as bedrooms landlords should classify it as such notwithstanding that the tenant may argue that it has been habitually used for something else (such as storage).

This looks a lot like trying to define a bedroom – 'large enough to accommodate a single bed'. As it is just an HB circular, of no statutory effect, the FTTs have been ignoring it.

If the DWP lose the Upper Tribunal appeals, there will be a clear and binding decision on room size, which would, in practice, require the Council as benefit authority to inspect and measure any disputed rooms.

Room Use

Room use, whether historic or current, has played a part in a number of FTT decisions on whether a room is actually a bedroom for the purposes of the regulations. But there are only a few decisions made wholly on room use.

A Rochdale decision [13] concerned a flat let as a two bed. The appellant lived there alone. His evidence was that the second bedroom had always been used as a dining room, as there was no room for a dining table in the living room, which contained the kitchen area. Despite the appellant having signed a housing benefit application describing the property as a two bedroom flat, and the tenancy agreement also stating this, the FTT accepted the tenant's evidence (including video of the room with a table and sideboard) and that he regarded the property as a one bedroom flat. "Landlords cannot arbitrarily reclassify room use and the tenant is free to use rooms as they wish".

Other 'pure' room use decisions include one from Wiltshire [14] found that the room 'ceased to be used as a bedroom before 2011'. Used as an office and contained office furniture. That it had been used as bedroom in the past and could be used as bedroom in the future did not mean it was a bedroom now.

[13] http://nearlylegal.co.uk/blog/wp-content/uploads/2014/01/BT-appeal-result1.pdf
[14] http://nearlylegal.co.uk/blog/wp-content/uploads/2013/10/wiltshire.pdf

A couple of decisions in Glasgow assessed downstairs rooms as being dining rooms through established usage reasonably necessary for enjoyment of the property [15].

This approach to room use should be set against a Fife decision, William Thomson [16], in which the tenant's argument that a 'bedroom' was used for storing gardening equipment was rejected:

> *I was attracted to Mr Sutherland's [for the appellant] general approach to the question of considering whether a room which was in all physical aspects capable of being used as a bedroom should nonetheless not be classified as one. His approach meets the objection of self classification by requiring (a) that there be well established alternative use of the room, and (b) that that alternative use is in reality not a matter of choice for the occupant but reasonably required for their continued occupation of the property as their home.*
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> *[…] I did not accept that it was necessary to effectively reclassify the room as a garden tool store in order for the appellant to be able to have reasonable enjoyment of his property consistent with his tenancy obligation. I consider that few tools are likely to be reasonably required to maintain the garden to a standard consistent with the tenancy agreement. The garden is small, barely four times the size of the disputed room said to be necessary to store the tools to maintain it. […] it is not unreasonable to expect the tenant to obtain a small outdoor shed to store them in, as other tenants do.*

This approach – that the alternative use be reasonably required for occupation of the property – has been adopted in other FTT decisions, disposing of room use.

The Westminster decision in Lall [17] has been held up as a clear room use case. However, the housing association landlord (or rather its predecessor) had bought the property in a dilapidated state. It was arranged that Mr Lall would become the tenant but that various alterations, including structural alterations would be carried out to make the property suitable for Mr Lall's needs. (Mr Lall is blind). The landlord consented to and participated in these alterations. Part of the purpose of the alterations was to make one room suitable for Mr Lall's reading and other equipment required.

So, from the start of the tenancy, the obtaining of the property by the landlord, and the alterations made, it was clear that the purpose of one of the rooms was for use in relation to that equipment and it was not intended as a room for (potential) use as a bedroom by the landlord.

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[15] http://govanlc.blogspot.co.uk/2014/05/first-tier-tribunal-rules-that-dining.html

[16] http://www.insidehousing.co.uk/journals/2013/09/20/t/x/f/William-Thomson-Decision-Notice.pdf

[17] http://nearlylegal.co.uk/blog/2013/09/westminster-clear-up/

The designation as a two bed was an error by the landlord's agent, which had been corrected by the housing association – so not a 'redesignation'. In these circumstances, unsurprisingly, the FTT found that "the room was never intended to be a bedroom" and was not used as such.

Room use also featured in other decisions, such as from Islington [18] and Aberystwth [19] but as a factor, alongside room size, where it is not clear that room use was the deciding factor.

Room use featured in a decision from Monmouthshire [20]. Two 'bedrooms' as described by the landlord, were both under 70 sq ft. In addition, these rooms were argued to be 'box rooms', one used as office for a computer and storage, the other used as a room for painting and artwork. The smallest of the two had a seat which could be pulled down and slept on if necessary. It was occasionally used by the claimant's daughter if she stayed over and sometimes, rarely, by the claimant when his wife was restless due to her disability.

The FTT found they were not bedrooms due to room size, but also, referencing a decision of the Upper Tribunal that I'll come to below, that:

> *Bedroom' is not defined by the legislation. This has most recently been pointed out in the Upper Tribunal decision 2014 UKUT 48 AAC. A(t) paragraph 19 of that decision the Tribunal helpfully refer to various definitions of a bedroom.*
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> *The Tribunal finds that neither of the two smallest rooms are bedrooms. They do not contain beds, they are not used for sleeping, they can only be occupied by a child under 10, a half person according to the overcrowding regulations. That on rare occasions the seat is pulled out so that it can be slept on does not make the room a bedroom and more that [sic. 'Any more than'] putting a sleeping bag on the floor of the living room would make that room a bedroom. The Appellant would not be able, due to the size of the room, to let the room to a lodger to assist with the reduction in Housing Benefit because it is not big enough. The property would in any event become overcrowded.*

While the room size aspect of this decision is in line with the other FTT decisions discussed above, the room use element is more controversial.

The Upper Tribunal decision referred to is *Bolton Metropolitan Borough Council v BF (HB)* [2014] UKUT 48 (AAC) [21]. This was an LHA case. As

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[18] http://nearlylegal.co.uk/blog/wp-content/uploads/2013/10/Islington-Statement-of-reasons.pdf
[19] http://nearlylegal.co.uk/blog/2014/01/bedrooms-in-wales/
[20] http://nearlylegal.co.uk/blog/2014/02/on-folding-beds-and-sleeping-bags/
[21] http://www.bailii.org/uk/cases/UKUT/AAC/2014/48.html And discussion here: http://nearlylegal.co.uk/blog/2014/01/upper-tribunal-on-bedrooms/

background, the appeal concerned a 'two bedroom' property occupied by the claimant and his wife. It appears that both were receiving DLA, though this is not certain. The claimant had been discharged from hospital, suffering from pneumonia and chronic obstructive pulmonary disease. he had apparently been advised to sleep in a separate downstairs bedroom on a raised bed.

The couple's daughter stayed at the property 3 or 4 nights a week to look after their needs. After the claimant was discharged from hospital and was sleeping in the other downstairs bedroom, the daughter would sleep on a camp bed in the living room.

The issue was that the claimant had been assessed for LHA on a one bed rate – that he and his wife could share a room. The Council argued that while the claimant (and indeed his wife) might be entitled to an extra bedroom for an overnight carer, under the Burnip amendments to the regulations, in fact the carer was not occupying a bedroom, so the claimant was not entitled to the two bedroom rate of LHA.

The Upper Tribunal found that the living room was a bedroom for the purposes of the regulations, effectively because someone was sleeping in it. The key part of the decision is:

> *18. In my judgment, on the facts of this case the claimant's daughter was provided with the use of a bedroom additional to those used by the persons who occupy the dwelling as their home. The fact that the room which she used was also the lounge of the house does not preclude it from being a bedroom. It was the room in which she had a portable bed and the room in which she slept when she was caring for her father, staying over, as the appeal tribunal found, three or four nights a week and helping him at night to get to the bathroom and with his nebuliser when he needed it. The legislation does not require that the "bedroom" must be a room primarily intended for sleeping in, such that a lounge or other living room is necessarily precluded from being a bedroom because it can be used for another purpose when it is not being used to be slept in.*
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> *19. The word "bedroom" is not defined in the legislation. It is an ordinary English word and should be construed as such. According to the dictionary definition in the Shorter Oxford English Dictionary a bedroom is*
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> *"a room containing a bed", whilst in the Collins Dictionary it is*
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> *"a room furnished with beds or used for sleeping". In the Merriam Webster Dictionary it is*
>
> *"a room used for sleeping"*
>
> *and in Webster's Dictionary it is*
>
> *"a room furnished with beds and used for sleeping".*

> *(There is no essential or material difference between the room being furnished with one bed or more than one bed.) On any of those definitions it seems to me that the claimant's daughter had the use of a bedroom; the fact that the bed may have been folded up or put away in the course of the day when the room was being used as a lounge or living room does not mean that it was not a bedroom within the meaning of the regulations when she slept in it at night. It is sufficient if the room in question, of which the overnight carer has use, is furnished with a bed or is used for sleeping in. It would therefore make no difference if the claimant's daughter had, for example, slept on the sofa, or in a sleeping bag on cushions on the floor, as opposed to sleeping on a portable bed.*

This decision has been taken as providing a definition of 'bedroom', that it is a room furnished as a bedroom and/or a room used for sleeping. People have then argued that if this is applied to bedroom tax cases, tenant use is key. If the room is not furnished as a bedroom or not used for sleeping, it is not a bedroom.

My view is that this has to be approached with considerable caution.

It is clear that the UT is prepared to accept actual, current, use of a room as the deciding factor for the room to be classed as a bedroom.

Can this simply be taken to apply in reverse, so that actual current room use would be the deciding factor in classing a room as 'not a bedroom'?

The UT accepts that 'bedroom' is an 'ordinary english word and to be construed as such'. In this case, the UT refers to four dictionary definitions (although the Merriam-Webster definition is actually: "a room furnished with a bed and intended primarily for sleeping"). However, what the UT is not doing is setting these dictionary definitions as the only criteria for what is a bedroom.

This is clear because the UT's finding that the room would be a bedroom if someone was using it to sleep on the sofa or the floor contradicts two of the definitions, which require a bed. (In fact three of the definitions, if I'm right about the Merriam-Webster definition above). Only the Collins and the UT's version of Merriam-Webster would allow 'used for sleeping' in the absence of a bed.

Further, the UT holds that "The legislation does not require that the "bedroom" must be a room primarily intended for sleeping in", but at least one dictionary definition – the Merriam-Webster one I found above, not mentioned by the UT – requires just that, 'intended primarily for sleeping'.

So, what the UT is surely doing is using the dictionary definitions as examples of common meanings of 'bedroom'. This is the only approach that would allow

the UT to find that using a room to sleep in was sufficient to make it a bedroom, even in the absence of a bed.

But, if the definitions are not exhaustive, and are just examples of ordinary English usage of 'bedroom', then it remains open for other ways of construing the word to also be found to be valid.

It decision also raises the question of at what point does a bedroom cease to be a bedroom after it has been used as one? Is it sufficient for a room to continue to be available for use as a bedroom to make it a bedroom? And if so, would an alternative use have to be such as to make the room unavailable for use as a bedroom? What kind of use might that be?

It is worth recalling that one of the Fife FTT decisions suggested (but did not confirm) criteria for alternative use, as above:

> (a) that there be well established alternative use of the room, and (b) that that alternative use is in reality not a matter of choice for the occupant but reasonably required for their continued occupation of the property as their home.

And, as this UT decision makes clear, the absence of a bed does not stop a room from potentially being a bedroom.

Overall, the UT decision makes clear that the UT adopts an approach based upon construing 'an ordinary English word' and therefore that FTTs should similarly take that approach. It further makes clear that the UT is open to considering room use as a relevant factor. This is an important development. (Although it may be easier to identify when use makes a room a bedroom than when use makes a room not a bedroom).

However, what this decision does not do is provide a closed definition of bedroom. The use of the dictionary definitions can only be as examples of usage of an 'ordinary English word', for the reasons I've explored above. This decision does not say that a bedroom must have a bed in it. It does not say that a bedroom must be used for sleeping in.

The decision also makes clear that a room may be used for other purposes, here as a living room, yet also be a bedroom.

I think that the strongest that can be said is that this decision would offer support to a clear, evidenced case that a room can't be used as a bedroom. Whether it would assist a case that a room simply isn't used as a bedroom I am less certain.

The Monmouthshire FTT above, that refers to the Bolton UT decision, is not a particularly reliable example of the FTT using the UT decision. The FTT simply gets the UT decision wrong when it says

> *"That on rare occasions the seat is pulled out so that it can be slept on does not make the room a bedroom and more that [sic. 'Any more*

than'?] putting a sleeping bag on the floor of the living room would make that room a bedroom."

But the UT did indeed find that putting a sleeping bag on the floor of the living room would make it a bedroom, if it was slept in.

Other FTT decisions subsequently have held that the Bolton decision did not give a closed definition of a bedroom and was therefore not a restriction on the FTT. Eg. Liverpool SC068/14/1262[22].

There has been another argument on room use raised, based on a misunderstanding of *Uratemp Ventures Ltd v Collins* [2001] UKHL 43. The argument is that use of a room defines what it is. A couple of FTTs have upheld this argument. The trouble is that it is simply wrong. In *Uratemp*, the issue was purely and simply whether a room could be a dwelling. A dwelling is a term of legal significance, not least in Housing Act 1988. A dwelling could be one room, or could contain lots of rooms, from bedrooms, studies, morning rooms through to an indoor swimming pool, and still be a dwelling. *Uratemp* has nothing to say about room use, per se. What is more, the supposed finding of the House of Lords as referred to in these decisions, 'usage of a room defines what it is', appears nowhere in *Uratemp*. Clearly, the FTTs had not read *Uratemp*, if it was put before them.

A purely 'subjective' approach, accepting the tenant's definition and use of the room as conclusive, surely cannot be successful, at least in the longer term. As the FTT in the Bedlington decision SC231/13/01993 stated:

> *[…] the situation where someone uses what would be regarded as a bedroom for other purposes such as an office or a study. A person has chosen, for personal reasons, to use that particular space in that way. Mr has chosen to have weights and to put them in that room. That use could change very rapidly e.g. he stops using weights.*
>
> *The Tribunal therefore find that, unless there is something very peculiar and persuasive to the particular needs of that person at that time in the house the use to which a person puts the room out of choice and preference does not prevent a room which is capable of being a bedroom, one which is normally regarded as being a bedroom, from being classified as such for the purposes of MRSS.*

However, subjective views of room use can be persuasive when combined with other, objective factors. For example, a Sunderland decision from June 2014 [23]. (with the same Judge as the Bedlington decision just mentioned). The appellants were joint tenants of what had been a three bedroom property. One of the joint tenants suffers from severe and degenerating muscular dystrophy, and had been reliant on a wheelchair for the last 14 years. In about 2006, the property had been adapted in view of the tenant's disability. Two bedrooms

[22] http://nearlylegal.co.uk/blog/2014/08/bedroom-tax-human-rights-ftt-miscellany/
[23] http://nearlylegal.co.uk/blog/2014/06/privacy-lifts-bedrooms/

were knocked into one large one and the existing stair lift was replaced by a vertical lift from the living room into what had been the third bedroom.

The Tribunal found that, although a bed could be fitted into the room, constant access to the room was required for using the lift, including sometimes at night. A bedroom connotes a "degree of personal space and privacy". It is not "just a place where you sleep". Therefore the room was not a bedroom as "it lacks that degree of personal space and privacy integral to the definition of a bedroom".

This, I think, is also perfectly congruent with that initial Fife suggestion that room use would only be a viable issue where the use of the room for other purposes was 'reasonably required' for the tenants occupation of the property.

A Runcorn decision, from June 2014 also found on room use. The appellant's daughter suffered from severe physical and learning disabilities. She also had Smith Lemi Opitz Suyndrome, visual impairment and skin prone to burns and blistering through photosensitivity. She is unable to walk and is incontinent.

The property was a disability adapted bungalow. Since the 1990s, only the appellant and her daughter had lived there, though the third too had previously been a bedroom for another person.

The third room had been adapted to be a 'sensory room' for the appellant's daughter. There was a TV, and a ball pit filled most of the floor. The room was painted black with fairy lights on the ceiling. LHA had, on the recommendation of the Occupational Therapist some 7 or 8 years before, carried out adaptions to the room, moving electric sockets to half way up the wall, covering radiators and putting dark film over the windows (because of the daughter's photosensitivity).

The Occupational Therapist described the room as a "sensory room, a safe environment that [the daughter] can relax and play in" and that "we consider that the sensory room makes an essential contribution to supporting [the daughter's] safety, comfort and well being in the home".

The tribunal found:

> *There is no definition of what constitutes a bedroom with the regulations. I this case there was undoubtedly a third bedroom at the outset of the tenancy and for some years thereafter. However, that does not mean that it will always be a bedroom. Rooms can change use. The Tribunal accepted [the appellant's] evidence, which was straightforward and clear, about the current use of the room. This was supported by the Occupational Therapist's letter. The room has not been used as a bedroom, in the sense of a place where someone sleeps, for many years, probably for over 10 years. This was not a tenptoary change in use. The room has not lain empty but has been transformed into a sensory room which evidently has a vital role to play in [the daughter's] life. This has been known to the landlord which has carried out several adaptations at the property, including*

some in the sensory room itself, over the years since the sensory room was created. The tribunal concluded that what had been the third bedroom was no longer such and could not be regarded as having been such for many years.

Like Lall in Westminster, the landlord's participation in changing the use of a room is taken to be a key factor in changing its use and status as a 'bedroom'.

As shown by its belated attempt to set out what is a bedroom, the DWP has created a very messy problem for itself by refusing to define the term, and the bedroom tax can't be easily administered on a case by case 'we'll know one when we see one' basis. But no DWP guidance or attempts to make the landlord's decision final have had success in the FTTs.

The meaning of 'regular' for overnight care.

Aside from the main areas of challenge, there has been an Upper Tribunal decision on the meaning of 'regular' for receiving an exemption for a room used for an overnight carer, in *SD v Eastleigh Borough Council* (HB) (Housing and council tax benefits : other) [2014] UKUT 325 (AAC) [24] . The Upper Tribunal held that firstly, whether the claimant was receiving DLA/PIP night care component was neither here nor there. The question was simply whether they required overnight care. And then, on 'regular':

The word can also be used as a synonym for "habitually" or "customarily" or "commonly" and this seems a more sensible understanding of the word in the context of this legislative provision than that adopted by the First-tier Tribunal. Whether the intervals between a person's need for overnight care are uniform or not is, as the First-tier Tribunal pointed out, immaterial to his or her need for a bedroom in which to accommodate a carer.

What the legislation is concerned with is whether the need for care arises often and steadily enough to require a bedroom to be kept for the purpose. A bedroom cannot be switched on and off and, if the object of the legislation is to encourage claimants to move to smaller accommodation or take lodgers into their spare rooms, it is to be presumed that whether overnight care is regular or not has to be considered over a fairly long period. Moreover, there is nothing in the word "regularly" that requires that the carer must be required to stay overnight on the majority of nights for the claimant to meet the criterion. That may be why that word was chosen. It does not mean the same as "normally" or "ordinarily". A bedroom may be required even if the help is required only on a minority of nights. Whether a carer must "regularly" stay overnight must be considered in that context.

[24] http://www.bailii.org/uk/cases/UKUT/AAC/2014/325.html

Separated families and Article 8

There have been four FTT and one Upper Tribunal decisions on a requirement for extra bedrooms to accommodate children staying over with a separated parent.

In the Inverness decision [25], the appeal was dismissed, no entitlement to an 'extra' bedroom was found.

In a Liverpool FTT [26], however, an additional bedroom was found.

The appellant was separated from his partner in 2006, when their daughter was seven. He then lived in a one bed flat for two years before securing his current two bed property. Relations were amicable and a usual pattern of shared parenting was established with the daughter staying with the appellant and sleep at the property at weekends and over school holidays. This was the applicant's primary purpose in seeking a two bed flat originally, to enable his daughter to stay.

The FTT found:

> *The Tribunal accepted, too, that it was possible for a person to be resident in more that one place at a time, as found in AM v Secretary of State for Work and Pensions [2011] UKUT 387 (AAC). The Tribunal found, as a fact, that both the Appellant's property and the property of his ex-partner, both constituted a home for the Appellant's daughter and that the Appellant's home could not be regarded merely as a place where the Appelllant's daughter transiently or temporarily resided. That this should be held to be so was crucial to the well-being of the Appellant's daughter, a child.*
>
> *Significantly, the Respondent [Council] endorsed the findings of 'The father's Engagement Project. To find that the Appellant is not entitled to an additional bedroom to accommodate the Appellant's ongoing engagement with his daughter directly undermines the findings of that project.*
>
> *Accordingly, the Tribunal found that the regulations had to be read subject to the imperatives dictated by Article 1 Protocol 1, Article 8 and Article 14 of the ECHR, to the effect that, in the circumstances of this appeal, the Appellant was entitled to an additional bedroom to accommodate his daughter staying overnight with him.*

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25 http://www.cih.org/resources/PDF/Scotland%20Policy%20Pdfs/Bedroom%20Tax/Bedroom%20tax%20tribunal%20rulings%20-%20revised%2029%20Nov%202013.pdf

26 http://nearlylegal.co.uk/blog/wp-content/uploads/2014/02/liverpoolfamily.pdf

A Newcastle tribunal also found an article 8 breach in a separated family case.

The appellant's son stayed some 4 nights a week with him, but the mother was the one in receipt of child benefit. The Tribunal decided, despite the Council pointing out that the guidance they had received was that only the parent with child benefit should be the one not to face the bedroom tax, that the bedroom was clearly the son's bedroom and that the appellant's article 8 rights were engaged, as were the mother's and the child's.

In SC231/13/01993, from Bedlington [27], the Tribunal found that a child staying for a weekend per month, and weeks during school holidays should be treated as being one of the household for bedroom tax purposes, to give effect to Article 8 rights to private and family life.

> *It is crucial to family life and society's well being that parents, even though separated, maintain good and regular contact with their children. [...] Fathers and mothers are entitled to see their children. [...]*
>
> *Maintaining good and regular contact usually means the child says over on a frequent basis. Personal circumstances may determine how that operates in practice. For example [...] parents who live many hundreds of miles apart may have to arrange blocks of contact because weekly contact would be impractical. [...]*
>
> *It is clear that [staying son] regards [the property] as his home when he is there. It has all his belongings there. His brother is there. [...]*
>
> *The Tribunal is satisfied that this test has nothing to do with who receives child benefit. The mothers receive the child benefit. [...] It is not possible for more than one parent to receive child benefit even where there is a 50/50 split as to where the children live.*

The difficulty with these three decisions is that they appear to have been made *per incuriam,* without considering the Upper Tribunal decision in *TD v SSWP and London Borough of Richmond-Upon-Thames (HB)* 2013 UKUT 642 AAC [28] or indeed *R (Marchant) v Swale Borough Council* HBRB [2000] 1 FLR 246.

TD, which is an LHA decision, rejects an Article 14 discrimination argument in a 50/50 shared care situation. While no article 8 argument was made in that case, the finding that there was Article 14 discrimination but that the discrimination was justified would clearly present a mountain for an Article 8 argument to climb.

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[27] http://nearlylegal.co.uk/blog/2014/08/bedroom-tax-human-rights-ftt-miscellany/

[28] http://www.osscsc.gov.uk/Aspx/view.aspx?id=4072

Marchant v Swale found that a child can only 'occupy' one home and that home must be the one where the child belongs to a "family" – normally with the child's mother who gets Child Benefit. The FTT does not deal with the issue of 'occupation', instead discussing whether a 'home' could be in two places.

Housing lawyers will also be familiar with the very high hurdle set by *Holmes-Moorhouse v LB Richmond upon Thames* [2009] UKHL 7 [29] in terms of any requirement for housing provision based upon shared care of children in a separated family.

Sadly, it has to be concluded that these decisions would be highly likely to be overturned on appeal, at least pending the outcome of the Liberty backed Judicial Review on the issue of separated families. That judicial review has been given permission and should be heard before long.

The Upper Tribunal in Scotland has now dealt with a separated family Article 8 case in CSH 777 2013 [30]. The appeal was unsuccessful, but not in such a way as to deliver a knock out blow to all such appeals.

The appellant is the sole tenant of a two bedroom property. The only other person who sometimes stays at the house is the appellant's 14 year old son, who stayed each week for 3 nights, using the second bedroom as his own. In the course of the appeal, the tenant was awarded DHP from 1 April 2013 and confirmed to 31 March 2015. In addition, there were no one bedroom properties variable through his landlord and he was unable to take in a lodger. His hearing loss made it difficult to find employment.

The appellant's argument on Art 8 was rejected by the First Tier Tribunal, but it was agreed by both appellant and respondent that the FTT had not properly directed itself on how Convention rights might be applied, having ceased to consider them after noting it could not make a declaration of incompatibility. The appellant sought a declaration that his case was 'seriously arguable' and should receive a further hearing on the particular facts and circumstances of his case.

The Upper Tribunal found that Article 8 was engaged, but then considered whether the consequences of any breach were of 'sufficient gravity' – serious enough to make the Respondent show justification.

> *However, I am also of the clear opinion that any relevant interference which may be established in this case could not, having regard to the jurisprudence on Article 8, be regarded as having consequences of such gravity as to satisfy the second part of the test and thus require the respondents to show justification.[…].*

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[29] http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090203/holmes-1.htm

[30] http://nearlylegal.co.uk/blog/2014/09/bedroom-tax-human-rights-ut-go/

> *At this stage I see no reason to leave the scheme of discretionary housing payments out of account and in that situation, looking at what this appellant may be able to establish, I cannot see that this case could be of sufficient gravity. […] As Mr Bryce fairly acknowledged, all that the appellant can point to is a degree of uncertainty in the past and a degree of uncertainty as to the future. As to the past, I cannot see that the by no means unduly long period during which the application for discretionary housing payment was being processed, or the brief accidental failure to make the payments, can have any weight at all. As to the future, while I do not regard this as irrelevant, I do not on the material before me think that it can have a serious effect on consideration of the present position. I note the reference in para 100 of SG to "a premature and pessimistic assumption" and consider the position about the discretionary payments in the short period of around six months during 2015 is similar. It will be clear from the foregoing that I regard the approach taken in MA and Rutherford to discretionary housing payments as part of the scheme under consideration, as relevant here even although the issue in those cases related to justification of discrimination. […] Put shortly, taking the discretionary housing payments into account, there is no interference of any gravity at all with the appellant's Article 8 right or that of his son.*

This did not rule out other prospective cases, but they would have a hurdle to get over:

> *an appellant who is not able to show actual, as opposed to threatened, serious breaches of his home and family life, may well find it difficult to overcome this particular hurdle in an Article 8 argument. It might also be – I only say might be – that the appellant's son's family life might not be sufficiently seriously interfered with even if the appellant were required to move to a smaller house. While one could envisage particularly serious consequences in some cases for children, might there also be, individual cases in which the interference does not have a sufficiently serious effect.*

It was worth noting that the DWP had argued that *Humphreys v HMRC* [2012] 1 WLR 1545 (on Article 8 and financial support being channeled through one parent) was fatal to the appeal. The Upper Tribunal did not take that line, apparently accepting that there was more to Art 8 than the financial support.

4. Noises off.

There is plenty more court action to come over the bedroom tax.

In the High Court, there is the Liberty backed judicial review on Article 8 and separated families. There is another judicial review with permission on article 14 discrimination against women who are the victims of domestic violence in

adapted Sanctuary Homes, where the claimant is a woman who's property has a specially adapted 'panic space' with reinforced doors and alarms.

The there is the judicial review of Sandwell MBC for taking Disability Living Allowance into account when assessing applicants for DHPs. It appears that some 75% of councils do something similar. Given the very clearly expressed views of the Court of Appeal in *Burnip* that DLA should not be considered to include housing costs, the prospects for Sandwell are interesting and the results of that could have a major impact on Council's DHP schemes. Simply because DHPs are discretionary does not mean that the administering and policy of a DHP scheme are not subject to public law.

Rutherford may be going to the Court of Appeal.

And of course, we wait to find out whether MA & Ors have permission to go to the Supreme Court. I would be surprised if permission was not given. The Supreme Court might just change everything yet.

The Upper Tribunal test case on room size is awaited, and there will no doubt be other Upper Tribunal decisions before too long on all of the issues raised above.

And of course, the bedroom tax itself may not last long after the next election.

Giles Peaker
7 Sept 2014.