

## Housing Benefit and Council Tax Benefit Circular

Department for Work and Pensions

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# HB/CTB A6/2012

### ADJUDICATION AND OPERATIONS CIRCULAR

<b>WHO SHOULD READ</b>	All Housing Benefit (HB) and Council Tax Benefit (CTB) staff
<b>ACTION</b>	For information
<b>SUBJECT</b>	Court of Appeal judgment: Burnip, Trengove and Gorry

### Guidance Manual

The information in this circular does affect the content of the HB/CTB Guidance Manual. Please annotate this circular number against paragraph 4.1620.

The information in this circular does affect the content of the Local Housing Allowance Guidance Manual. Please annotate this circular number against paragraph 2.010.

### Queries

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## **Court of Appeal judgment: Burnip, Trengove and Gorry**

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## **Court of Appeal judgment: Burnip, Trengove and Gorry**

### **Introduction**

1. An urgent email was issued on 16 May 2012 to all local authorities (LAs) the day after the judgment in these appeals was handed down. It has since become apparent that many LA decision makers have not received a copy of our advice; we are therefore re-issuing our previous advice through this circular.
2. Since the advice was issued the Department for Work and Pensions (DWP) has applied for permission to appeal the decision to the Supreme Court on the grounds that the use of the size criteria in the Local Housing Allowance (LHA) is not discriminatory or in any case can be justified. We understand that these applications are taking around three months to consider and that, as the Supreme Court does not sit over the summer period, we are unlikely to know if permission has been granted until at least October/November 2012.

### **Background**

3. The Court of Appeal considered two separate scenarios where the Housing Benefit (HB) claimant needs an additional room for:
  - a non-resident overnight carer. The HB Regulations (both the working age and State Pension Credit (SPC) versions) have already been amended to allow an additional room in such cases from April 2011, but the appellant continued his court case in relation to periods before that date
  - children with serious disabilities that are said to make it inappropriate for them to share a bedroom
4. The Court of Appeal (overruling earlier decisions of the Upper Tribunal) unanimously held that the size criteria discriminated unlawfully against the three appellants, on grounds of disability, by not including provision to meet their need for an additional room. This was in breach of Article 14 of the European Convention on Human Rights (non-discrimination).
5. Independently of the court case, changes have already been made to HB Regulations to recognise that some people need an additional room for an overnight carer who lives elsewhere. Those changes came into effect in April 2011 and allow an extra room where either the claimant or their partner, or both, require and receive overnight care and have a bedroom for the carer's use.

### **Outcome**

6. While there has been no change to the HB legislation, the Court of Appeal judgment is relevant case law and as such LAs are legally bound to apply the judgment when determining applications for HB under the LHA size criteria:
  - those who need an extra room for a non-resident carer are already able to get HB for that due to amendments made in April 2011. The judgment does not change that

- those whose children are said to be unable to share a bedroom because of severe disabilities will be able to claim HB for an extra room from the date of the judgment
7. When a claimant says that their children can not share a bedroom, LAs should expect to be provided with sufficient medical evidence to satisfy themselves that these factors are sufficiently weighty in the individual case to make it inappropriate for the children to share a bedroom on a continual basis. Only in such circumstances will they be justified in making an exception to the normal application of the size criteria and granting HB on the basis of an additional bedroom.
  8. LAs will then have to assess the individual circumstances of the claimant and their family and decide whether their disabilities are genuinely such that it is inappropriate for the children to be expected to share a room. This will involve considering not only the nature and severity of the disability but also the nature and frequency of care required during the night, and the extent and regularity of the disturbance to the sleep of the child who would normally be required to share the bedroom. In all cases this will come down to a matter of judgment on the facts.
  9. It should be noted that this judgment does not affect those in other situations who claim to need an extra bedroom for another reason, such as they are one of a couple who are allegedly unable to share a bedroom as the size criteria assumes or they need an extra room for equipment connected with their disability.
  10. The judgement affects the treatment of all those private sector tenants who have their eligible rent determined by either the maximum rent or the maximum rent (LHA). The judgment does not mean that the four bedroom maximum in the latter can be exceeded where a LA decides that an extra room is needed.
  11. LAs should also bear in mind that, should an appeal by the DWP be successful, the decision will need to be reversed. They should therefore consider suspending the part of the HB award that relates to the extra room allowed as a result of the Court of Appeal judgment, pending any appeal by the DWP, under Regulation 11(2)(b) of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001/1002). Any extra help can only be made available from the date of the Court of Appeal judgement, 15 May 2012.
  12. Where the LA systems do not have the facility to suspend in part they should consider making a decision outside of their automated systems and then suspend the decision. Any decision notice should include the necessary information required by the HB regulations.
  13. These cases are all statutory appeals from the Upper Tribunal, so the anti-test case rule means the judgment has no impact on past periods in other cases. In HB, this rule is found in paragraph 18 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. LAs are however likely to have to pay arrears in other cases where the claimant had already put in an appeal and this had been held pending the outcome of these cases.