

Housing Benefit

Urgent Bulletin

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<https://www.gov.uk/government/organisations/department-for-work-pensions>

HB U2/2014

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Who should read	All Housing Benefit (HB) staff
Action	For information

Court of Appeal Judgement: MA and Others

1. HB Bulletin U5/2013 informed you as to the judgement that was handed down on 30 July 2013 in the cases of MA & Others. This related to ten judicial review claims brought against the Secretary of State for the Department for Work and Pensions (DWP) which challenged the government's policy to reduce Housing Benefit (HB) for working age social sector tenants who are deemed to be under-occupying their property by reference to the size criteria set out in the HB Regulations 2006.
2. Five of the ten claimants appealed the judgement to the Court of Appeal and the hearing took place in January 2014. The claims that were not pursued to the Court of Appeal concerned children who were unable to share a room who, following SI 2013/2828, were allowed an additional room under the size criteria.
3. The remaining claimants challenged the validity of the HB (Amendment) Regulations 2012 (SI 2012/3040) in the Court of Appeal on two principle grounds:

- that the reduction in eligible rent calculated by reference to regulation B13 discriminated against disabled persons contrary to article 14 and article 1 protocol 1 of the European Convention on Human Rights (ECHR); and
 - that the Secretary of State for DWP failed to have due regard to disability when formulating the policy in breach of his public sector equality duty under section 149 of the Equality Act 2010 (“EA”)
4. This bulletin is to inform you that the Court of Appeal judgement was handed down in relation to these five cases on 21 February 2014. The Court found in favour of DWP and held that the policy does not unlawfully discriminate against any of the claimants and that the Secretary of State complied with his public sector equality duty in respect of all of the claimants when formulating the policy.
 5. The key points of the judgement, given by the Master of the Rolls, are:
 - Although the Regulations do discriminate against the claimants, there is no ECHR breach because the discrimination is justified and, therefore, not unlawful.
 - The Secretary of State was entitled to take the view that it was not practicable to provide a further exemption for an imprecise class of persons as it would result in an administratively intensive and costly process. The Secretary of State is, therefore, entitled to rely on the flexibility of Discretionary Housing Payments (DHP).
 - The claimants had been relying on an earlier Court of Appeal decision in the case of *Burnip, Trengrove and Gorry* ([2012] EWCA Civ 629) (“Burnip”), in which the Court of Appeal held that not awarding an extra room in respect of overnight carers or children who were unable to share a room because of disability breached ECHR and argued that, for the same reasons, the Removal of the Spare Room Subsidy policy unlawfully discriminated against them. The Court of Appeal did not accept this argument and distinguished Burnip on the grounds that, unlike Burnip, it could not be said that the category the exemption was sought for in these cases were relatively few in number and not likely to require ongoing monitoring. The Court of Appeal also noted that the DHP scheme was different from the one considered by the Court in Burnip as the fund had been increased, the guidance had been altered and the Secretary of State had pledged to keep it under review.
 - In relation to the Carmichaels (the couple who are unable to share because of disability) it had been argued that they were in exactly the same position as the children who were unable to share in the Burnip case. The Court of Appeal accepted the Secretary of State’s arguments that children are in a different position to adults and held

that the differential treatment of adults and children was not irrational or without reasonable justification, and therefore, not unlawful.

- In relation to section 149 of the Equality Act 2010 (public sector equality duty) the Court found that the Secretary of State did have due regard to his statutory duties and noted that *"it was obvious that he was aware of the serious impact the bedroom criteria would have on disabled persons who, by reason of their disability, had an actual need for more accommodation."*
6. The claimants have applied for permission to take the appeal to the Supreme Court.
 7. Local authorities (LA) should ensure that this decision is quoted when appealing against adverse First-tier Tribunal decisions that raise similar issues. **Annex A** provides details of the individual cases in this appeal where an under-occupancy reduction has been applied in line with the legislation. The Court of Appeal has confirmed that these decisions are lawful.
 8. LAs retain the responsibility for deciding whether, in cases where a claimant faces a shortfall in their rent, a DHP is appropriate and for what period. The judgement does not imply that all disabled people should be awarded a DHP, but LAs can consider the particular needs of disabled claimants in assessing applications.

Case 1 – Jacqueline Carmichael

Jacqueline Carmichael lives with her husband in a two bedroom flat. He is her full-time carer. She has spina bifida, hydrocephalus, is doubly incontinent, is unable to weight bear, and has recurring pressure sores. She needs a special hospital-type bed in her bedroom with an electronic pressure mattress, specially designed to fit a single hospital bed. She has to sleep in a fixed position. She requires specialist in-bed toileting equipment, medical sheets and incontinence pads. She and her husband cannot share a bed. There is no space for an additional bed in the room.

Case 2 – Richard Rourke

Mr Richard Rourke is a widower living with his step-daughter in a three bedroom bungalow. She stays in university accommodation during the week in term-time, and over some weekends. Mr Rourke sleeps in one bedroom, his step daughter in another, and the third is used to store equipment. Mr Rourke is a wheelchair user. He has spinal arthritis, sciatica, sleep apnoea, diabetes and hereditary progressive deafness. He needs assistance with basic care tasks, which is provided by a combination of professionals (during the daytime) and local family support (overnight when needed and at weekends). His mobility is decreasing. Although he can sometimes use crutches for short periods indoors he usually uses a manual wheelchair which has to be pushed. Outdoors he uses a powered wheelchair and a specially adapted Motability vehicle. His step-daughter is also a wheelchair user, although she can sometimes walk for short periods. She has emery dreifuss muscular dystrophy and supra ventricular tachychardia.

Case 3 – Mervyn Drage

Mr Mervyn Drage is a single man who lives alone in a high-rise tower block, on the site of a former colliery. He has been there for nineteen years. His flat has three bedrooms; but he does not sleep in any of them. They all contain papers which he has accumulated (as does his bath). He has a number of significant mental health problems (depression, anxiety and obsessive compulsive disorder), and various physical difficulties. He is prescribed medication for his depression and receives hospital psychological treatment. These conditions are exacerbated by stress, anxiety and changes to routine. He states that he is very anxious about the prospect of having to move, and disruption to his routines.

Case 4 – JD

JD lives with her disabled 26 year old daughter, AD. They occupy a specially adapted three bedroom property where they have lived since 1993. AD has a twin brother who previously lived in the house but has now moved out. The landlord is a housing association. AD has severe physical disabilities, learning disabilities and visual impairment. She has cerebral palsy with quadriplegia and she is registered blind. She has been assessed as having the approximate mental age of a 3 year old and is reliant on others to make decisions for her. She is doubly incontinent, and needs 24 hour care and support with every aspect of her life. Two carers are required to assist with all transfers, as she uses a hoist but is herself physically unable to assist. She is a permanent wheelchair user and is unable to move without assistance. JD cares for AD full-time, and respite care has been provided for JD in respect of AD.

The property was specially constructed to meet AD's needs, with input from the family, an occupational therapist and a property development team. Specific aids include an internal lift, a gradual slope at the front and rear to allow wheelchair access, ceiling hoists in the bathroom and bedroom, an accessible bathroom and a changing bed.

Case 5 – James Daly

James Daly is the father of a son, aged 9. He lives in a two bedroom flat on the ground floor which has level access throughout and also has access to a garden front and back. When his son was born Mr Daly was living with the mother of his son as his partner. They lived in an owner-occupied property. When his son was approximately eighteen months old the couple separated and since that time Mr Daly and his ex-partner have shared his son's care. Mr Daly looks after him every weekend and at least one day during the week. He also lives with Mr Daly for part of the school holidays and whenever his mother is away. His mother receives the Child Benefit in respect of him.

Mr Daly's son suffers from spastic quadriplegia, cerebral palsy, epilepsy, learning difficulties, intraventricular haemorrhage and hydrocephalus. He has significant mobility problems (including an inability to use stairs) and other health problems including incontinence. He is assessed as being a full-time wheelchair user, and uses a wheelchair outside the home. Inside he moves by shuffling around on his bottom. He requires assistance with all aspects of daily living.

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