THE UPPER TRIBUNAL **Case No: CSH/793/2014**
ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE JUDGE OF THE UPPER TRIBUNAL

The appeal is allowed. The decision of the First-tier Tribunal given at Dundee on 29 July 2014 is set aside. The decision of the First-tier Tribunal is re-made as follows:

"The appeal is refused. The decision of Perth and Kinross Council dated 9 April 2013 is confirmed. Perth and Kinross Council were obliged to determine a maximum rent (social sector) in accordance with Regulations A13 and B13 of the Housing Benefit Regulations 2006 when determining the claimant's housing benefit claim. On application of Regulations A13 and B13, the claimant was under-occupying her property, and from 1 April 2013 her eligible rent for the purposes of HB fell to be reduced. The claimant's status as a gypsy traveller and her particular factual circumstances were taken into account by the Council appropriately, by the payment by it of discretionary housing payments between 1 April 2013 to 10 September 2015, which mitigated in full the adverse effect of the application of Regulations A13 and B13 on the claimant's housing benefit claim".

REASONS FOR DECISION

1. This case concerns the application to gypsy travellers of what "is described as either the "bedroom tax" or "removal of spare room subsidy" according to political viewpoint" (*R(MA) v SSWP* [2016] 1 WLR 4550 ("***Carmichael***"), per Lord Toulson at paragraph 2).
2. The appellant (the "**claimant**") was born in 1972 and is a member of the travelling community. For more than 30 years she has lived in Double Dykes Caravan Site, a long established site for gypsy travellers. At the time with which this appeal is concerned, the claimant rented a chalet and pitch on this site from Perth and Kinross Council (the "**Council**"). The Council was also responsible for housing benefit ("**HB**") and discretionary housing payment ("**DHP**"). On 9 April 2013 the claimant was notified of the decision of the Council to reduce her HB on the basis that she was under-occupying her property by two bedrooms. She was advised that she could apply for DHP to make up the shortfall, although did not initially apply. She appealed the Council's decision to reduce her HB because the chalet she lived in on Double Dykes Caravan Site was a mobile home, which she considered should be exempt, and relied on her rights under the European Convention of Human Rights ("**ECHR"**). The Council accepted that the claimant lived in a mobile home, but submitted that it had correctly applied the Housing Benefit Regulations 2006 (the "**2006 Regulations**").
3. On 29 July 2014 the First-tier Tribunal (the "**tribunal**") allowed the appeal in part, because it found that one of the two bedrooms taken into account by the

Council when it decided there was under-occupation was too small to be classed as a bedroom. However, it found that the claimant was not exempt from application of Regulation B13 of the 2006 Regulations. The Council had been entitled to reduce housing benefit, although it ought to have used a lower percentage of 14% of eligible rent rather than 25%, because the under-occupation was by one bedroom not two. The tribunal also found that if there was any discrimination it was justified, and the claimant could apply for DHPs (although she had not done so at that point).

4. After the decision of the tribunal, the claimant applied for DHP. Unchallenged information produced by the Council discloses that the claimant was awarded backdated DHP, which mitigated in full the reduction in HB caused by the application of Regulation B13. The claimant applied for DHP on 9 September 2014. Her award of DHP was backdated to 1 April 2013, and continued until 10 September 2015, after which she moved out of the mobile home with which this appeal is concerned to a different mobile home on Double Dykes Caravan Park.

5. An application for permission to appeal was made to the Upper Tribunal on three grounds:

   5.1 The **"statutory construction argument"**: The portion of the claimant's rent which covered the pitch on which the mobile home stood was exempt from assessment for maximum rent under the Housing Benefit Regulations (Regulation A13(2)(c)).

   5.2 The "**Convention rights argument**": There was an error in the tribunal judge failing to find that there was a violation of the claimant's rights under Articles 8 and 14 ECHR.

   5.3 The "**PSED argument**": There was an absence of reasoning about the public sector equality duty ("**PSED**") under the Equality Act 2010, because being a gypsy traveller was a protected characteristic.

6. Permission to appeal was granted by a Judge of the Upper Tribunal on 19 December 2014. It was directed that the respondents were to be the Council and the Secretary of State for Work and Pensions ("**SSWP**"). The case was then sisted pending the outcome of the decision in *Carmichael*. After that decision was available, the sist was recalled on 26 January 2017. A submission from the Council was received on 15 March 2017, partially supporting the appeal on the basis that the tribunal had erred in law in its finding it would not have been able to grant any remedy even if it had found a violation of Convention rights, but not supporting the appeal on the other grounds brought. A submission from the SSWP was also received, on 10 April 2017, which does not support the appeal. It also raises the issue of whether the First-tier Tribunal erred in law in its approach to classification of one of the rooms as too small to be classified as a bedroom (the "**number of bedrooms argument**"). There were then further delays due to the claimant being in poor health and having difficulties with representation. On 12 January 2018, following a request from the claimant supported by a medical certificate, the appeal was further sisted until the claimant's representative returned from maternity leave. The claimant has now changed representative

and confirmed that she wishes to proceed with her appeal. Parties were requested to make representations about whether there should be further delay to await the outcome of two housing benefit cases, CH/2658/2015 and CH/4674/2014 (expected to challenge the reasoning in *SSWP v Carmichael* [2018] EWCA Civ 548), which are currently awaiting determination of applications for permission to appeal from the Supreme Court. In response, all parties indicated that they would like the case to be determined on the papers now, without a further sist. I am satisfied I can fairly determine the appeal on that basis in the particular circumstances of this case.

7. Below I set out the governing provisions in the 2006 Regulations. I then address each of the four arguments raised before me in turn: the statutory construction argument, the Convention rights argument, the PSED argument, and the number of bedrooms argument. I have rejected the first three of these arguments, which were advanced by the claimant. Properly interpreted, the 2006 Regulations did not exempt the claimant's chalet and pitch (or a portion of the rent paid by the claimant) from application of the maximum rent provisions in Regulation B13. This means that Regulation B13 applied to the claimant's housing benefit claim. In relation to the Convention rights argument, I have found that there is no violation of the claimant's Convention rights in the particular circumstances of this case, where the Council has indicated that DHP can be applied for to mitigate any shortfall in HB which application of Regulation B13 caused, and made available DHPs to mitigate the shortfall in full until the claimant moved out of her property. I have also found in relation to the PSED argument that the tribunal's approach to the Equality Act 2010 was not in error of law. Finally, I have sustained the number of bedrooms argument raised by the SSWP; cases decided after the tribunal decision under appeal in this case establish that the tribunal's approach to deciding whether one of the rooms in question was a bedroom under the 2006 Regulations was in error of law.

The 2006 Regulations

8. The 2006 Regulations are part of the legislative framework regulating HB, more fully described at paragraph 9 of *SSWP v Carmichael* [2017] UKUT 174. The material provisions for the purposes of this case are as follows. Regulation A13 of the 2006 Regulations obliges local authorities to determine a maximum rent in the social sector (with the effect that HB is capped) in accordance with Regulation B13. There are some exceptions when Regulation A13 does not apply, including:

   "(2)(c) in respect of mooring charges for houseboats and payments in respect of the site on which a caravan or mobile home stands".

   There is no express exclusion for mobile homes themselves.

9. Regulation B13 provides a formula for determining the maximum rent. After an initial 'eligible' rent figure is ascertained, the formula includes the following provisions:

   > "(2) (b) where the number of bedrooms in the dwelling exceeds the number of bedrooms to which the claimant is entitled in accordance

> with paragraphs (5) to (7), reducing that amount by the appropriate percentage set out in paragraph (3)…
>
> (3) The appropriate percentage is –
>
> (a) 14% where the number of bedrooms in the dwelling exceeds by one the number of bedrooms to which the claimant is entitled; and
>
> (b) 25% where the number of bedrooms in the dwelling exceeds by two or more the number of bedrooms to which the claimant is entitled….
>
> (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):
>
> (a) a couple
>
> (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".

This is the version of Regulation B13 of the 2006 Regulations in force at the time the Council made its decision. Subsequently, three additional categories have been added into Regulation B13(5), following successful court challenges based on Convention rights, but none of these additional categories are relevant to the circumstances of this particular case. I also note in passing that there are further provisions in the 2006 Regulations creating allowances for additional bedrooms, for example if a person needs overnight care or family members are members of the armed forces on operational duties; but it is not argued any of these provisions apply in this case.

The statutory construction argument

10. In the first ground of appeal, the claimant argues that there was an error of fact by the tribunal amounting to an error in law. It is argued that this error resulted in the tribunal going wrong because it did not find that part of the claimant's rent (the part of rent for the pitch on which her chalet stood) was exempt from assessment for maximum rent under the 2006 Regulations, on application of Regulation A13(2)(c). It is argued that, before 2008, there were caravans and mobile homes on the Double Dykes caravan site, with the sites they were on being exempt under Regulation A13(2)(c). Although in 2008 the site was developed by the Council, in that it placed chalets on all sites and then rented chalets and sites as one let, it is argued that the global rent charged for chalet and pitch should be apportioned so that the part of the rent referable to the pitch only should be exempt. The error of fact amounting to an error in law is said to be that the tribunal wrongly found that the word chalet and pitch in the lease was a historical reference to the original (pre-2008) sites.

11. The tribunal made the following finding in fact in paragraph 5:

> "There was no separate payment for the ground on which [the claimant's] chalet/mobile home stands".

It made further factual findings at paragraph 19, having accepted the Council's submission:

> "there is a single rent for the chalet which includes the ground on which it stands and the amenity unit, which is a small brick built unit separate and independent from the chalet. These were originally designed to provide toilet and washing facilities for the residents and a power supply. [The claimant] uses the amenity unit to house her washing machine and drier. The rent also includes a charge for the maintenance of areas of the site which are communal to all the chalets. There is no separate charge for the ground the chalet stands on. This has been the case since the refurbishment [of the site] in 2008. The use of the wording 'chalet and pitch' in the lease is an historical reference to the original sites".

Earlier in its decision, the tribunal made factual findings about the previous use of the site. Prior to 2007/2008, residents lived in their own caravans and rented a 'hard standing' or site from the Council on which to place the caravan. During 2007/2008 the site was refurbished and chalets were built on each site. There was space beside the chalet to accommodate a touring caravan, but living in the touring caravans was no longer permitted. The claimant had no choice but to rent a three bedroom chalet if she wished to remain on Double Dykes site (paragraphs 8 to 10). At paragraph 5 the tribunal decided that the claimant's 'chalet and pitch' constituted a dwelling in terms of the 2006 Regulations, and Regulation B13 applied to determine her eligible rent for HB. At paragraph 18 the tribunal noted the claimant's argument that in the lease the property is described as a 'chalet and pitch', and that the part of the rent referable to the pitch should be exempt from assessment for maximum rent under Regulation A13(2)(c). At paragraph 21 the tribunal found Regulation A13(2)(c) would apply in cases such as those previously found at Double Dykes, where the site was owned by the Council and the caravan or mobile home on the site was owned by the tenant. But that was no longer the situation on the site, because both the chalet and the pitch were rented as one let. Accordingly the exemption in Regulation A13(2)(c) did not apply, and the claimant's whole rent was subject to the maximum rent provisions and application of Regulation B13.

12. The claimant's contention in the grounds of appeal that Regulation A13(2)(c) applied so that sites were exempted prior to refurbishment in 2007/2008 (and therefore this position should continue) cannot be correct, since Regulation A13(2)(c) was not enacted until 2012 or in force until 1 April 2013. Since 1 April 2013, the law in force has provided a limited exemption which may benefit gypsy travellers, in Regulation A13(2)(c). But that exemption is carefully drafted, and whether it applies depends on whether the situation of a particular claimant falls within its terms. On the wording of Regulation A13(2)(c), it applies to a "payment in respect of a site on which a caravan or

mobile home stands". Within Regulation A13(2)(c), a distinction is made between site and mobile home. The exemption on its terms can only apply to a payment for a site, not a mobile home, and it will only apply where, as a matter of fact, there is a "payment in respect of a site". On the facts of any particular case, there may or may not be such a payment. Where there is a global rent and no separate payment for a site, the 2006 Regulations impose no express obligation or requirement on landlords or others to try to apportion a global rent between a home and the site it is on. In my view such a requirement cannot be read in to Regulation A13(2)(c) by implication. The position for most dwellings is that there is no separate payment for a home and the land it is on. It would be onerous to require landlords or others to start trying to apportion a rent between building and site underneath it. If it was the intention that apportionment had to be carried out where, as a matter of fact, there were no separate payments for site and mobile home, in my view clear express wording would be expected, defining the categories of case in which it would be obligatory to carry out an apportionment; and it might also be expected that the principles upon which any such apportionment ought to be made would be set out. There is no such wording.

13. In the absence of any express obligation of apportionment, I do not consider the tribunal erred in law when it found that Regulation A13(2)(c) did not apply to the claimant's situation. The tribunal made a clear finding in fact that there was no separate payment for the site, and there was a single rent for the chalet and pitch (paragraphs 5 and 19). These were findings that the tribunal was entitled to make on the evidence before it; the tenancy agreement with the papers expressly provides for a global rent for chalet and pitch, not separate payments (p136), and there is a letter from the Council (p51) supported by a document with a breakdown of the charges (p49-50) confirming there was no pitch charge included in the rent. It was for the tribunal to weigh up the evidence and arguments before it and make its own findings in fact, as it did. In the circumstances, I do not find the tribunal's finding that the wording 'chalet and pitch' in the lease refers back to the historical position to be material. For Regulation A13(2)(c) to apply, on the facts at the time the decision was made there had to be an identifiable payment in respect of the site on which the mobile home stood, and the historical position did not matter, given the clear finding in fact there was no such payment at the material times. On the facts found, the tribunal's conclusion that Regulation A13(2)(c) did not apply does not disclose a material error of law.

The Convention rights arguments

14. The claimant's arguments about violation of her Convention rights have been put in various ways during the course of this case.

    14.1 Argument 1. Before the tribunal, the claimant argued that the Council's decision put her heritage as a traditional gypsy traveller under threat. This was because there were no one or two bedroom mobile homes at Double Dykes (all are a standard three bedroom design), no other

caravan sites she could move to in the area, and living in a house would be tantamount to giving up her cultural beliefs and heritage. As a result she argued that her rights were being infringed under Article 8 of the Human Rights Act 1998.

14.2 Argument 2. Before the Upper Tribunal, the ground of appeal was initially that the tribunal had erred in its findings about remedy for violation of Convention rights. The tribunal had found there was no such violation, but even if wrong about that, it could do nothing (paragraphs 33-34). It is argued this was incorrect as the tribunal had some powers, for example to make a finding that Convention rights have been breached.

14.3 Argument 3. On further submissions before the Upper Tribunal, the Convention rights argument is stated to be that the local authority's interpretation of Regulation A13(2)(c) as not applying to the claimant's property is a violation of the claimant's Convention rights under Article 8 read with Article 14.

15. Articles 8 and 14 ECHR have been incorporated into UK law by the Human Rights Act 1998.

Article 8 ECHR provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14 ECHR provides:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Following a number of legal challenges based on Convention rights, it is now clearer how these provisions apply in the context of Regulation B13 of the 2006 Regulations. The key point is that both Articles 8 and 14 are subject to justification tests. Convention rights will not be violated if interferences with homes or unequal treatment are justified (Article 8(2) and *Carmichael* paragraphs 29 to 38). It is not in dispute in this case that, in general terms, gypsy travellers have rights to respect for their homes under Article 8 ECHR, and are protected from unjustified discrimination in the enjoyment of these rights by Article 14 (*Chapman v UK* [2001] 33 EHRR 18). Nor is it in dispute in this case that gypsy traveller status is a status recognised by Article 14 ECHR, and is a protected characteristic under the Equality Act 2010 (*R (Knowles) v SSWP* [2013] EWHC 19 (Admin) at paragraph 5). But, if any

interference or unequal treatment is justified, there will be no violation of Convention rights.

Argument 1

16. The tribunal found as fact at paragraph 10 that the claimant had no choice other than to rent a three bedroom chalet if she wanted to continue to live on the site for gypsy travellers which had been her home for more than 30 years. The Council did not allow living in touring caravans on the site (although there was a space to accommodate a touring caravan on each pitch as well as a chalet). The Council had decided that only one type and size of chalet would be installed, so there were no one or two bedroom ones available.

17. However, despite these findings, the tribunal mentioned the first instance decision in *R(MA) v SSWP* [2013] EWHC 2213, and found that any discrimination against gypsy travellers was justified, resulting in there being no violation of Convention rights. This was because the claimant could apply for DHP to make up the HB payment (paragraph 6). After the tribunal made its decision in this case, this legal position was confirmed by the Supreme Court in *Carmichael*. In *Carmichael*, the Supreme Court found that in certain cases, where there was an objective need for an additional bedroom, it was discriminatory not to have explicit exemptions under Regulation B13 (this was the reason for additional categories being amended into Regulation B13(5), and others may arise (*SSWP v PE and Bolton MBC* [2017] UKUT 393 (AAC)). But in other cases, where there is no objective need for an additional bedroom (such as sanctuary schemes for victims of domestic violence), the majority of the Supreme Court found that there was no violation of Convention rights, because of the availability of DHP under Section 69 of the Child Support, Pensions and Social Security Act 2000 and the Discretionary Financial Assistance Regulations 2001 (SI 2001/1167). The DHP scheme had the benefit of flexibility, and could recognise a number of situations not easily dealt with in bright line rules, as well as changes in circumstances.

18. In the case of gypsy travellers, there is an express exemption in Regulation A13(2)(c) in respect of payments for sites on which caravans and mobile homes stand. This covers some of the difficulties that Regulations A13 and B13 of the 2006 Regulations would otherwise have caused gypsy travellers. Other issues may arise, which will have to be considered on their facts. In this particular case, I have decided there was no violation of the claimant's Convention rights. This is because of the Council's position that DHP was available to cover any shortfall, and the actual payment by the Council of DHP to mitigate in full the adverse effect of the application of Regulation B13 to the claimant. In coming to that conclusion, I have noted that *Carmichael* considered Article 14 in conjunction with Article 8, rather than Article 8 on its own. Nevertheless, Article 8(2) subjects Article 8(1) rights to a justification process, in which DHP is highly relevant. I have also taken into account the reservations expressed in paragraph 13 of the 3-judge panel decision in *SSWP v Carmichael and Sefton BC* [2017] UKUT 174 about DHP not necessarily providing a justification in all cases. I would also accept that local

authorities have some positive obligations to facilitate the gypsy way of life under the ECHR (*R (Knowles) v SSWP* [2013] EWHC 19 (Admin) paragraph 5). But the situations of gypsy travellers are not all identical. The situation on Double Dykes of there only being three bedroom homes is not universal. The flexibility of DHP rather than bright line rules is in my view the appropriate way of addressing the different factual situations which may arise for gypsy travellers. In this case, the claimant had no objective need for additional bedrooms. The Council paid DHP to the claimant to mitigate in full the shortfall in HB resulting from application of Regulation B13 to the claimant. She was able to remain in her home until moving to a different chalet on Double Dykes Caravan Site. If Article 8 were to be engaged, this in my view would be a complete justification under Article 8(2). I find that if there is any interference with the right of respect for the claimant's home (which I do not need to decide so do not), it is in accordance with the law (the 2006 Regulations and the DHP legislation set out in the previous paragraph) and is necessary in a democratic society for the economic well-being of the country (protection of public funds), and the protection of the rights and freedoms of others (the taxpayer). In these circumstances, there was no violation of Convention rights, and the tribunal did not err in law in its findings at paragraph 6 of its decision.

Argument 3

19. I deal with Argument 3 out of sequence. Argument 2 is about remedies if a violation of Convention rights is found, so logically I should first decide the arguments about whether there is any such violation. Argument 3 is that the local authority's interpretation of Regulation A13(2)(c) as not applying to the claimant's property is a violation of the claimant's Convention rights under Article 8 read with Article 14. This argument has not been developed in any detail, perhaps due to the claimant's issues with representation.

20. Neither of the respondents accept that there has been a violation of the claimant's Convention rights, or that the 2006 Regulations have to be read as exempting the claimant's property from the application of Regulation B13. The Council refers to paragraphs 40, 41, 56, 58, 62 and 64 of *Carmichael*, which in effect find that it is permissible to have a flexible DHP scheme to address some potential discrimination issues which may arise, rather than a bright line scheme in Regulation B13 to cover every contingency, and given that the claimant had no objective need for additional bedrooms, the DHP scheme was sufficient to address her reasons for remaining there. The SSWP submits that Argument 3 is comparable to the argument in *Carmichael* at paragraph 28 which was rejected. Just as in *Carmichael*, no objection is taken by the claimant to the general policy of Regulation B13, but rather to the application of the policy in a way which unjustifiably discriminated against a particular group of people. But the SSWP submits that challenging only the implementation of the Regulations does not alter the test which has to be applied, which is whether the policy choice is manifestly without foundation. The SSWP, like the Council, argues that the availability and payment of DHP is sufficient for there to be no violation of Convention rights.

21. Section 3 of the Human Rights Act 1998 provides that:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

It follows that if there would be incompatibility with Convention rights, which can be avoided by interpreting legislation in a particular way, that interpretation should be adopted if it is possible to do so. The starting point is to consider the ordinary construction of the provision in question (*R (Wardle) v Crown Court at Leeds* [2002] 1 AC 754 at paragraph 79). The second step is to consider whether this ordinary construction results in a violation of the claimant's Convention rights. Only if there is such a violation is it necessary to go on and consider a third question: whether, using the far-reaching interpretative tools then available, it is possible to read and give effect to the relevant statutory provisions so that they are compatible with Convention rights.

22. The ordinary construction of Regulation A13(2)(c) has already been looked at above. Regulation A13(2)(c) exempts payments in respect of the site on which a caravan or mobile home stands from the application of the maximum rent provisions in Regulation B13. On its ordinary construction, Regulation A13(2)(c) covers only the site on which a mobile home stands, not the mobile home itself. On its ordinary construction, it covers only the situation where there is, as a matter of fact, a payment for the site on which a mobile home stands, and does not mandate apportionment of a global rent between site and mobile home where those are not in fact the payment terms.

23. The next question is whether this ordinary construction involves a violation of Convention rights. I find that it does not, in the circumstances of this case. The tribunal found as fact that the claimant had no choice other than to rent a three bedroom chalet if she wanted to continue to live on the site for gypsy travellers which had been her home for 30 years. In this situation, if the Council were not making available DHP to cover any shortfall created by applying Regulation B13 to the claimant, it might have been in some difficulty arguing there was no violation of the claimant's Convention rights. But that is not the position in fact. The claimant did not show any objective need for an additional bedroom. It therefore was not the type of case found in *Carmichael* (paragraphs 42-54, 62) to demand bright line rules rather than a DHP scheme for Convention compatibility see also *SSWP v GCC* 2017 SC 707 paragraph 26). As it happens, gypsy travellers do benefit from one bright line rule in Regulation A13, exempting payments for sites on which caravans or mobile homes are situated. The claimant's real complaint is that this did not go far enough to cover her rent (either a notional apportioned part for the site, or perhaps her whole rent). But the claimant's Convention rights are secured by the shortfall in her HB caused by the application of Regulation B13 being

mitigated in full by DHP. Section 3 of the Human Rights Act 1998 does not apply so as to result in Regulation A13(2)(c) having to be interpreted in an extended way, to exempt part or all of the claimant's rent from the application of Regulation B13.

Argument 2

24. The remedies which the tribunal and Upper Tribunal may give, where it is found that there has been a violation of Convention rights, is a controversial matter. It is the subject of an application for permission to appeal to the Supreme Court in cases CH/2658/2015 and CH/4674/2014, which seek to challenge the decision of the majority of the Court of Appeal in *SSWP v Carmichael and Sefton Council* [2018] 1 WLR 3429; compare *JT v First-tier Tribunal, Criminal Injuries Compensation Authority and Equality and Human Rights Commission* [2018] EWCA Civ 1735. However, as I have not sustained the argument that there has, on the facts, been a violation of the claimant's Convention rights, it is not necessary for me to make any decision about remedy for violation of Convention rights. I acknowledge that the tribunal found that there was no remedy it could afford the claimant (paragraph 31), because given the clear wording of Regulations A13 and B13 they could not be interpreted in some other way, and the tribunal could not therefore ignore them (paragraph 33). But it is sufficient to say I accept the argument of the respondents that the comments of the tribunal about remedy were obiter (paragraph 31), and had no bearing on the overall conclusion that there was no violation of Convention rights. The decision of the tribunal did not turn on these comments, so whether correct or not, they disclose no material error of law.

The PSED argument

25. The final argument for the claimant is that there was an absence of reasoning as to why the tribunal considered the Council had complied with PSED under the Equality Act 2010 (the "**2010 Act**"). In later submissions, it is argued that there was a material error of law, because the local authority had not considered whether it had discharged PSED in its interpretation of Regulation A13(2)(c).

26. It is true that the tribunal dealt with this matter summarily at paragraph 23 of its decision, saying only: "I was not persuaded that there was any sustainable argument advanced under any provision of the Equalities Act". The tribunal judge explains why she took this approach in her decision refusing permission to appeal; because no specific argument based on any particular provisions of the 2010 Act was advanced by the claimant before the tribunal. It is apparent from the papers that, in a letter dated 15 July 2014 (p121), the claimant stated she believed as a gypsy/traveller that her rights were being infringed under the 2010 Act, but not which particular rights. A document from the Equality and Human Rights Commission ("**EHRC**") entitled "Gypsy Travellers in Scotland: A resource for the Media" was produced for the tribunal. This is a 24 page document, which includes two pages headed

'Law', discussing the Race Relations Act 1976 and not the 2010 Act (suggesting the version of the EHRC document produced predates that development in the law). There was also a letter from the Traveller Movement at p127 of the papers on behalf of the claimant, which advanced arguments under Article 8 ECHR discussed above, but not the 2010 Act.

27. A tribunal's inquisitorial function (*AP v SSWP* [2018] UKUT 307 (AAC) paragraph 9) can only go so far. Tribunals are not permitted to take over the role of representative for one party, because they must act fairly to all parties. The 2010 Act extends to 218 sections and 28 Schedules. Many different equality arguments can potentially be made using its provisions, often involving different statutory tests. I have not noticed anything in the papers before the tribunal that expressly raised an argument based on PSED at that stage. A tribunal cannot be expected to go through a lengthy Act such as the 2010 Act trying to work out which provisions a claimant might wish to rely on. In any event, PSED, in Section 149 of the 2010 Act, is "an obligation to have due regard to the need to eliminate discrimination, and advance equality of opportunity, between those with and without a relevant protected characteristic" (*Carmichael* paragraph 67). It would not be apparent from what was before the tribunal that PSED was in issue, in a situation in which there is no automatic correlation between being a gypsy traveller and having a need for an extra bedroom, and where DHPs were available. (I note the rejection of PSED as assisting a claimant in *Carmichael* at paragraph 67-70). In these circumstances I do not consider that the tribunal erred in law in dealing with matters as they were raised before it in the short way in which it did, and not expressly addressing PSED. The tribunal's reasons might have been insufficient, had there been a more detailed argument put before it, but there was not.

The number of bedrooms argument

28. The SSWP, as a respondent to the appeal further to Rule 9 of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the "**Upper Tribunal Rules**"), raises a further point, not relied on by the Council. The SSWP argues that the tribunal erred in law in its assessment of the third bedroom. The tribunal did not follow the approach set out by the Upper tribunal in *SSWP v Nelson and Fife Council* [2014] UKUT 525 (AAC) and [2015] AACR 21. The SSWP argues the Council was correct to find that the claimant was under-occupying the property by two bedrooms rather than one; and accordingly the tribunal decision should be set aside and the appeal against the Council's decision dismissed.

29. There is provision under Rule 24(3)(f) of the Upper Tribunal Rules for a respondent to raise the grounds on which it relies in its response to an appeal, as the SSWP has done. This includes any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely on in the appeal. The SSWP was not a party at first instance, but the issue of whether there was under-occupation by two or one bedrooms was a live matter before the tribunal and addressed in its

decision, and the SSWP is now a party to the proceedings. In these circumstances, it is appropriate that I should determine this issue.

30. The tribunal's reasoning as to why it found there was over-occupation by only one bedroom and not two is found between paragraphs 36 and 40 of its statement of reasons. The tribunal found as fact that, of the two rooms in question, one had a floor area of 110 square feet and the other 56.10 square feet. The tribunal had regard to the overcrowding provisions of the Housing Scotland Act 1987 (the "**1987 Act**"), and in particular Section 137. The tribunal stated that under those provisions a room between 50 and 70 square feet was only to be regarded as sufficient for a child under the age of ten and any room under 50 square feet was to be disregarded. It also had regard to Circular A4/2012 and the advice in it to consider taking in a lodger. Because the tribunal did not consider that the room was big enough to take an adult lodger, and overcrowding was potentially an offence under the 1987 Act as well as being prohibited under the claimant's lease, it found that the smaller room was not a bedroom.

31. Cases decided since the tribunal's decision in this appeal establish that the tribunal's approach was in error of law. The leading case in Scotland is *SSWP v City of Glasgow Council and IB* [2017] CSIH 35. At paragraph 20, after noting that 'bedroom' was not defined in the 2006 Regulations, the court found:

> "In our opinion the classification and description of a property used as a dwelling is a matter of fact to be determined objectively according to relevant factors such as size, layout and specification of the particular property in its vacant state".

Accordingly, while size is a factor, it is not the only relevant factor, and fact finding should be carried out on other relevant matters such as layout and specification, for a tribunal to be able properly to apply the 2006 Regulations. The Inner House also endorsed the approach in the three judge panel Upper Tribunal decision of *SSWP v Nelson and Fife Council* [2014] UKUT 525 (AAC) and [2015] AACR 21 ("***Nelson***") at paragraphs 28 and 30 to 33 (although disapproving of some dicta suggesting that tenant classification of rooms might be relevant). The correct approach is to start from the description of a room by landlords when a property was being let (and indeed in borderline cases the landlord's designation may be determinative: *SSWP v RR* [2018] UKUT 180 (AAC)). Then case sensitive factors such as size, configuration, overall dimensions, access, natural and electric lighting, ventilation and privacy, and how similar rooms and spaces are used in other properties in the area would fall to be considered. It is not sufficient that the floor space can accommodate a single bed; height, ventilation, lighting, windows, space to get into the room or put clothes, or any features that prevent a room being used as a bedroom, are also relevant. Space for dressing and undressing and a bedside table are two potential further factors (*Stevenage Borough Council v ML* [2016] UKUT 164). Considering only floor size is not sufficient.

32. *Nelson* also directly addressed the argument which persuaded the tribunal in this case, based on the 1987 Act and Circular A4/2012, and decided it was not the correct approach (paragraph 55-56). *Nelson* found that the legislative intent, operation and approach of the 1987 Act regime and 2006 Regulations were sufficiently different that it was wrong to transport only some elements of the 1987 Act into the 2006 Regulations; and in any event the 1987 Act did not have the consequence that rooms under 50 square feet were left out of account, or that use of a room below 70 square feet by an adult was an offence. The only relevance of the figures in the 1987 Act were to provide warning bells that a room might be too small, so in that event reasons had to be provided about the basis on which the room qualified as a bedroom or not. The area of the room was not determinative of whether the room was a bedroom. The irrelevance of other housing legislation to the application of Regulation B13, albeit in an English context, was confirmed in *Stevenage Borough Council v ML* [2016] UKUT 164. (There is a further three judge panel decision concerning the meaning of the word bedroom (*Nuneaton and Bedworth BC v RH and SSWP* [2017] UKUT 471 (AAC)), an appeal from which is to be heard in the Court of Appeal later this year. However, the issue that arises in that case is not directly in point in the present case, because it concerned whether a decision was properly made that two boys could share a bedroom so that there was over-occupancy).

33. In the present case, the tribunal erred in law because it did not apply the correct legal approach to deciding whether the third bedroom was a bedroom within the meaning of the 2006 Regulations. Its findings about the effect of the 1987 Act on the tests in the 2006 Regulations were also wrong in law. In the papers, it can be seen that the landlord designated the third room as a bedroom (p119-120), so that should have been the tribunal's starting point (the papers also suggest the room had a window). As the bedroom was small at 56.10 square feet, having regard to the dimensions in the second table in Section 137 of the 1987 Act, it was necessary for the tribunal to find further facts about it, before being able to decide if it was a bedroom or not. It was not sufficient to find that the bedroom was small and consider that factor only.

34. The next question is what should be done about the tribunal's error in law in finding the smaller room was not a bedroom. One option would be to remit the case to a new First-tier Tribunal to find additional facts about the bedroom, but I do not consider that it is in the interests of justice to do so. This case is about HB for a property which the claimant vacated in September 2015. The historic position between 1 April 2013 and 10 September 2015 is that any shortfall in the claimant's HB by virtue of application of Regulation B13 to her situation was met in full by DHP. The Council's defence at all times has been that the availability of DHP to rebalance the application of Regulation B13 results in there being no unlawfulness. The logic of this position is that whether there was under-occupation by one or two bedrooms, DHP was in principle available to make up any shortfall in HB as a result of the application of Regulation B13. (This may be why the Council did not challenge the finding that there was only one additional bedroom not two, because in the circumstances of this particular case it would make no practical difference to

it). The Council is a public authority and it is unlawful for it to act in a way incompatible with Convention rights (Section 6 of the Human Rights Act 1998). This restricts the Council's ability to recover any formal HB overpayment, were it to be found that there was under occupation by two bedrooms rather than one, unless a commensurate DHP was given to the claimant. Accordingly, in this particular case, the financial consequences for both the claimant and the Council should be neutral, whether there is under-occupation by one bedroom or two. In these circumstances, further litigation serves no useful purpose. It is more appropriate simply to set aside the tribunal's decision on the basis that there has been an error of law, and re-make the decision in the terms set out at the beginning of this decision.

35. I therefore allow the appeal on the ground advanced by the SSWP, set aside the decision of the tribunal, and remake the decision in the terms set out at the beginning of this decision.

(Signed)
A I Poole QC
Judge of the Upper Tribunal
Date: 30 January 2019