**[2023] UKUT 193 (AAC)**

**IN THE UPPER TRIBUNAL** **Appeal No. UA-2019-001395-HB**
**(formerly CH/561/2019)**

**ADMINISTRATIVE APPEALS CHAMBER**

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

**Between:**

**IB**

Appellant

**-v-**

**Gravesham Borough Council**

First Respondent

**-and-**

**Secretary of State for Work and Pensions**

Second Respondent

**Before: Upper Tribunal Judge Poynter**

Hearing date: 21 July 2021
Decision date: 7 August 2023

**Representation**

| | |
|---|---|
| Appellant: | In person |
| First Respondent | Courtney Harvey, Appeals Officer, Gravesham Borough Council |
| Second Respondent | John Paul Waite of counsel instructed by the Government Legal Department |

## DECISION

This decision is given pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2007 and section 27 of the Judicial Pensions and Retirement Act 1993.

The appeal to the Upper Tribunal succeeds.

The First-tier Tribunal made a legal mistake in relation to the claimant's appeal (ref. SC168/18/02011) which was decided at Bexleyheath on 10 October 2018.

I set that decision aside and re-make it as follows.

1. **The appeal is allowed**

2. **The decision issued by Gravesham Borough Council ("Gravesham") on 23 January 2018 (and revised on 22 February 2018) is set aside.**

3. **Regulation 64(3) of the Housing Benefit Regulations 2006 does not treat the claimant as possessing the student loan of £12,114 to which he would have been entitled for the 2017/2018 academic year if he had applied for it.**

4. **Therefore that amount does not form part of his income by virtue of regulation 64(1) of those Regulations.**

5. **Gravesham must recalculate the claimant's entitlement to housing benefit on that basis for the period from and including Monday 4 September 2017 (or, if earlier, from the date on which a student loan was first taken into account under regulation 64(3)) and notify the claimant of his recalculated entitlement (if any).**

6. **If the claimant considers that Gravesham has recalculated his entitlement incorrectly, he may ask the Upper Tribunal to check the calculations.**

7. **To do that, the claimant should write to the office of the Administrative Appeals Chamber either:**

   **(a) by email to adminappeals@justice.gov.uk; or**

   **(b) by post or by hand to The Upper Tribunal (Administrative Appeals Chamber), Fifth Floor, Rolls Building 7 Rolls Buildings, Fetter Lane, London EC4A 1NL,**

   **so that his email or letter is *received* no later than two calendar months from the date on which the letter from Gravesham notifying him of the recalculated amount was *sent* to him. That email or letter must:**

   - **enclose or attach a copy of the letter from Gravesham notifying him of the recalculated amount; and**

   - **explain why he does not agree with Gravesham's calculations.**

## REASONS

### Introduction and summary

1. This is an appeal by the claimant against the above decision of the First-tier Tribunal ("the Tribunal"), which confirmed a decision by Gravesham Borough Council (Gravesham") that the claimant, a full-time student, was not entitled to housing benefit.

2. As a general rule, full-time students are not entitled to housing benefit. But there are exceptions to that rule and the claimant falls within one of them.

3. The claimant would have been eligible for a student loan for his tuition fees and maintenance while studying. However, the claimant, who is a devout Muslim, did not take out the loan that would have been available to him. To have done so would have made him liable to pay interest and he conscientiously believes that charging and paying interest are both forbidden by his religion.

4. Gravesham nevertheless treated the claimant as having an income based on the student loan he could have taken out if he had applied for one. As a result, it is said, he did not satisfy the housing benefit means test.

5. For reasons that will become apparent, the appeal to the Upper Tribunal turns on whether the claimant could have acquired the loan by taking "reasonable steps" to do so. He says that, given his beliefs, it would not have been reasonable to take steps to acquire the loan.

6. In *CH/4429/2006*, however, Mr Commissioner Powell (as he then was) decided that the word "reasonable" in the phrase "reasonable steps" qualified the mechanical steps that had to be taken to acquire the loan, and was not concerned with other matters, such as the motives and religious beliefs of the claimant.

7. That decision was, of course, binding on the Tribunal.

8. It is not, however, binding on the Upper Tribunal and, for the reasons set out below, I have declined to follow it and have decided instead that a judgment as to what is reasonable falls to be made having regard to all the personal circumstances of a claimant and, of course, all the other relevant circumstances.

9. Therefore one has to ask what steps it would have been reasonable for this particular claimant to have taken in this particular case. I have decided that the answer to that question is that—even though he undoubtedly had capacity to take the steps needed

to acquire the loan—it would not have been reasonable for him to have violated his strongly-held and conscientious religious beliefs by doing so.

10. I would like to stress the fact-sensitive and personal nature of that judgment. The decision does not discriminate in favour of Muslims or against anyone else.

11. I have not decided that all Muslim students who do not take out a student loan are entitled to housing benefit without having the notional loan included as their income. Neither have I decided that students of other religions, or none, must always have the notional loan taken into account when their housing benefit is calculated.

12. Rather, the effect of my decision is that *all* full-time students—irrespective of their religious belief, or lack of it—who fall within the limited exceptions set out in para 47 below but who have not who have not taken out student loans for which they would have been eligible, may argue that their omission to do so was reasonable.

13. Against that, the government's policy is that the costs of education are usually to be funded from the education budget, rather than from the social security budget. Further the provision of such funds is, in most cases, to take the form of repayable loans, rather than non-repayable grants. That is a circumstance that falls to be taken into account in the assessment of whether a claimant's actions or omissions are "reasonable". It is therefore unlikely that an omission to acquire a loan for purely financial reasons, such as a disinclination to incur debt, will be accepted as reasonable.

14. Finally, I do not accept that my decision makes the system unworkable, and I discount the prospect of a flood of opportunistic housing benefit claims from students.

**The facts**

15. The claimant is a devout and observant Muslim. He sincerely and conscientiously believes that to charge or pay interest on a loan is forbidden by his faith. Those facts are not in dispute and, in any event, are amply supported by the evidence.

16. Until 24 June 2016, the claimant lived with his mother and his younger brother and sister in a rented property in the area administered by Gravesham.

17. Sadly, his mother died on that date leaving the claimant—who was then 19—to take on the tenancy and to assume legal responsibility for his brother and sister. To maintain the family, the claimant worked two jobs and claimed child benefit, child tax credit, and working tax credit.

18. He also claimed housing benefit from Gravesham and was awarded it from—at the latest—Monday 8 August 2016. Benefit was paid at the weekly rate of £109.05 from that date until Sunday 2 April 2017, and then at the weekly rate of £108.02 from Monday April 2017 to Sunday 3 December 2017. Those weekly rates represented his full weekly eligible rent.

19. I surmise—although the relevant documents were not before the Tribunal—that Gravesham suspended payment of benefit for from Monday 4 December 2017 under Part III of the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001. That decision was probably taken on Wednesday 29 November 2017 (see paragraph 26 below) so that the issues that led to the decision under appeal could be investigated.

20. Those issues arose because, in September 2016, the claimant had enrolled on a degree course at Queen Mary University of London ("QMUL").

21. These proceedings are concerned with Gravesham's decisions in respect of the 2017/18 academic year.

22. On 4 September 2017, the student finance service awarded the claimant a non-repayable parents' learning allowance of £1,617 for that academic year.

23. On 5 October 2017, QMUL awarded him a bursary (again non-repayable) of £1,571 for the same period.

24. Had he applied for them, the claimant would also have been entitled to student loans of £9,000 for his tuition fees and £12,114 for his maintenance. However, he did not apply for either loan because they are both repayable with interest and he conscientiously believed that his religion forbade him to pay interest.

25. That decision meant he had to pay his tuition fees himself and to maintain himself and his siblings from his savings and through part-time work, whilst also studying and looking after his family.

26. On 29 November 2017, Gravesham wrote to the claimant in response to a statement about his employment status that they had received the previous day. The Tribunal papers do not contain a copy of that statement. The letter asked for his P45 from a previous job, for his wage slips from a current job; for his bank statements for the preceding two months; and for:

> "• Proof of your student income, for example notification of any bursary or loan entitlements (even if you have not taken a loan)."

The letter then ended:

> "**If you do not supply the information and documentation requested above within 14 days of the date of this letter, your claim will no longer be valid and will not be processed.**"

The emphasis is original.

27. The claimant provided the required information, and on 23 January 2018, Gravesham made (at least) four decisions to the effect that:

(a) the claimant was not entitled to housing benefit from 8 August 2016 to 3 December 2017;

(b) the claimant was not entitled to housing benefit from and including Monday 4 December 2017;

(c) the claimant had been overpaid £3,707.70 for the period from 8 August 2016 to Sunday 2 April 2017; and

(d) the claimant had also been overpaid £3,780.70 for the period from Monday 3 April 2017 to 3 December 2017.

The total claimed overpayment was therefore £7,488.40.

28. On 22 February 2018, those decisions were revised with the effect that the claimant was no longer disentitled to housing benefit from Monday 22 August 2016 to 3 September, but the weekly rate at which he was entitled was less than the rate that he had actually been paid. As a result, the total claimed overpayment was reduced by £2,883.44 (representing the claimant's reduced entitlement between those dates) to £4,604.96.

29. On 12 March 2018, the claimant appealed to the First-tier Tribunal ("the Tribunal") against the decision dated 23 January 2018 as revised.

## Gravesham's decisions

30. Gravesham made the decisions set out above for two reasons. The first was that the original award of housing benefit to the claimant had not taken into account his entitlement to tax credits. The second was that the items of student finance listed at paragraphs 22-24 above were taken into account.

31. The papers that were before the Tribunal are unclear about the date from which Gravesham took the bursary and the notional student loan into account:

(a) The narrative response to the Tribunal does not state the date from which the student finance decision took effect.

(b) The manuscript worksheet dated 23 January 2018 in the supporting papers states that the student finance figures were:

> "INPUT: WEF 3/9/17 (Student Year 17/18)".

(c) However, the calculations in the original computer-generated decision disentitling the claimant from 8 August 2016 to 3 December 2017 (see paragraph 24(a) above) suggest that the student finance was not taken into account between Monday 4 September 2017 and Sunday 3 December 2017.

Faced with that conflict, I prefer the evidence of the human being who made the decision. The idiosyncrasies of housing benefit management software are well known. Moreover, when the decisions were revised on 22 February 2018, the claimant's entitlement was restored in part to Sunday 3 September 2017, but not thereafter. As at that date, it appears that claimant was entitled to housing benefit at the weekly rate of £55.80. There is nothing in the papers that explains why the claimant was not so entitled on the following day unless it be that the student finance had been into account.

32. Gravesham calculated the effect of the claimant's student finance by:

(a) taking into account the QMUL bursary of £1571 (see paragraph 19 above) as income for the academic year at the weekly rate of £37.40.

(b) disregarding the Parents' Learning Allowance (see paragraph 23 above) under regulation 59(4) of the Regulations;

(c) taking into account the maintenance loan of £12,114 to which the claimant would have been entitled (see paragraph 24 above) and then:

  (i) disregarding £693 as money intended to meet the cost of books and equipment under regulation 64(5);

  (ii) dividing the reduced amount of £11,421 by 42 weeks in accordance with regulation 64(2) to give £271.93 per week; and then

(iii) making the further disregard of £10 required by the full-out words of regulation 64(2) to give £261.93 per week;

(d) on the view of the law that Gravesham took, the £9,000 loan for tuition fees (see paragraph 21 above), which the claimant also declined, was technically required to be taken into account as income. However, it then fell to be disregarded in full under regulation 64A.

33. When added to the claimant's earnings and his benefit income, his student income had the effect of extinguishing his entitlement to housing benefit.

**Digression: Gravesham's letter of 29 November 2017**

34. Before I move to the substance of this appeal, I feel obliged to comment on the final sentence in the letter that Gravesham sent the claimant on 29 November 2017: see paragraph 26 above.

35. Housing benefit became subject to the general social security rules on decision-making and appeals on 1 July 2001: more than 16 years before Gravesham's letter was sent. Since that date, a claim for housing benefit ceases to exist when it is decided: see paragraph 2 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. Therefore the claimant's claim ceased to exist when the decision was made to award him housing benefit with effect from Monday 8 August 2016. Gravesham should have known that.

36. For that reason, Gravesham had no power to treat the claim as no longer valid or not to process it. It was quite wrong for them to have threatened to do so.

37. Far worse, however, is that the letter only gave the claimant 14 days to provide the information requested. That time limit does not appear in any relevant regulation. For the reasons I gave in *DTM v Kettering Borough Council (CTB)* [2013] UKUT 625 (AAC),[1] the Regulations allow claimants who are required to provide information or evidence a minimum period of one month within which to do so: see paragraphs 24-39 of *DTM*. The 14-day limit in Gravesham's letter has been plucked from the air, either by Gravesham themselves or by the company that provides their computer software.

38. Gravesham's threat to visit adverse consequences on the claimant if he did not respond within 14 days—less than half the minimum period allowed by the law—was therefore without legal foundation and improper. Although the point is one for the Local Government Ombudsman, not me, I tend towards the view that it amounted to

[1] In relation to the similarly worded former Council Tax Benefit Regulations 2006.

maladministration. It is particularly unfortunate that Gravesham was continuing to issue such threats—apparently in standard letters—nearly four years after the promulgation of the decision in *DTM*. I hope that it has now ceased to do so.

**The relevant law**

*Which housing benefit scheme?*

39. As the claimant is not of pensionable age, his entitlement to housing benefit and his liability to repay any overpayment are governed by the scheme for people of working age established by the Housing Benefit Regulations 2006 ("the Regulations"). Those Regulations are made under the Social Security Contributions and Benefits Act 1992 ("the Act"). Where I refer without more to numbered regulations or sections, those references are to the Regulations and the Act respectively.

*Housing benefit legislation*

40. By section 131(1)(a) of the Act, the principal condition of entitlement to housing benefit is that the claimant should be "liable to make payments in respect of a dwelling in Great Britain which he occupies as his home".

41. It is not in dispute that, as between himself and his landlord, the claimant is liable to pay rent for his home or that his home is a "dwelling in Great Britain".

42. However section 131(1)(a) is qualified by section 137(2)(i) of the Act, which gives the Secretary of State for Work and Pensions power to make regulations that "[treat] any person who is liable to make payments in respect of a dwelling as if he were not so liable".

43. In other words, the rules of a housing benefit scheme may treat someone as not being legally liable to pay rent—and therefore not entitled to housing benefit—even though he is so liable under the law of landlord and tenant.

44. The Secretary of State has used that power to make regulation 56 of the Housing Benefit Regulations 2006 ("the Regulations"). Paragraph (1) of the regulation provides that "a full-time student shall be treated as if he were not liable to make payments in respect of a dwelling".

45. The phrase "full-time student" is defined by regulation 53(1) as meaning "a person attending or undertaking a full-time course of study and includes a student on a sandwich course". "Full-time course of study" is also defined by that regulation but, as it is not in dispute that the claimant was attending such a course, I need say nothing further about that definition.

46. As the claimant was attending a "full-time course of study", he was a "full-time student" and, on the face of things, the rule in regulation 56(1) therefore excluded from entitlement to housing benefit.

47. However, that rule is subject to exceptions that are set out in regulation 56(2) under which regulation 56(1) does not apply to full-time students:[2]

- who are receiving income support, income-based jobseeker's allowance or income-related employment and support allowance;
- who are receiving universal credit, except where the award of universal credit includes the housing costs element;
- who are lone parents;
- whose award of HB would—but for regulation 56(1)—include the disability premium or severe disability premium;
- who have been assessed, or treated, as incapable of work for 196 days;
- who have been assessed as, or treated as, having, limited capability for work for 196 days;
- who have a partner who is also a full-time student, if he or that partner is treated as responsible for a child or young person;
- who are single claimants with whom a child has been placed (or, in Scotland, boarded out) by a local authority of voluntary organisation;
- who, in certain circumstances are aged under 21 (or became 21 during their course) or are a child or young person for whom child benefit is payable;
- who are deaf and in respect of certain specified payments have been awarded from public funds.

48. It is not in dispute that the claimant falls within the exception in regulation 56(2)(b) as the "lone parent" of his brother and sister.[3] In principle, therefore, he was entitled to housing benefit as long as he satisfied the other conditions of entitlement including, in particular, the means test.

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[2] The following list is a paraphrase and does not include the exception in regulation 56(2)(j), which is based on circumstances that existed or occurred between 31 August 1990 and 28 February 1992. That exception does not apply in this case and, given the lapse of time, it is vanishingly improbable that it applies in any other cases.

[3] See the definition of "lone parent" in regulation 2(1) taken together with regulation 20.

49. I will not lengthen this decision with a description of the detailed rules for the housing benefit means test, or of how the figures derived from that test affect the calculation of entitlement to housing benefit. It is enough to say that, if a claimant has income above a certain level, his entitlement to housing benefit begins to reduce and that, if the income is high enough, entitlement will reduce to nil.[4]

50. It is, however, necessary to say that section 136(5)(a) of the Act gives the Secretary of State power to make regulations with the effect that, in specified circumstances:

> "a person is treated as possessing … income which he does not possess",

and that the Secretary of State has used that power to make (among others) regulation 64 of the Regulations.

51. So far as is relevant to the main issue in this appeal—and during the period with which I am concerned—regulation 64 was in the following terms:

> "**Treatment of student loans …**
>
> **64.**—(1) A student loan … shall be treated as income.
>
> (2) **…**
>
> (3) A student shall be treated as possessing a student loan … in respect of an academic year where—
>
> (a) a student loan … has been made to him in respect of that year; or
>
> (b) he could acquire a student loan … in respect of that year by taking reasonable steps to do so.
>
> (4) Where a student is treated as possessing a student loan under paragraph (3), the amount of the student loan to be taken into account as income shall be, subject to paragraph (5)—
>
> (a)…
>
> (b) in the case of a student to whom a student loan is not made in respect of an academic year, the maximum student loan that would be made to the student if—

[4] There is also a capital test, but it does not apply in this case.

(i) he took all reasonable steps to obtain the maximum student loan he is able to acquire in respect of that year; and

(ii) no deduction in that loan was made by virtue of the application of a means test"

52. The Regulations consolidated the Housing Benefit (General) Regulations 1987 ("the Former Regulations") with effect from 6 March 2006. Until 31 July 1999, the relevant parts of regulation 57A of the Former Regulations read as follows:

"**Treatment of student loans**

**57A.**(1) A loan which is made to a student pursuant to arrangements made under section 1 of the Education (Student Loans) Act 1990[ or Article 3 of the Education (Student Loans) (Northern Ireland) Order 1990]2 shall be treated as income.

(2) …

(3) Any loan for which a student is eligible in respect of an academic year under the arrangements mentioned in paragraph (1) but which has not been acquired by him shall be treated as possessed by him and paragraphs (1) … shall apply accordingly; and for the purposes of this paragraph the loan for which a student is eligible is the maximum amount payable to him under those arrangements."

With effect from 1 August 1999, that regulation was amended by regulation 5(6) of the Social Security Amendment (Students) Regulations 1999 so that its provisions were the same as the current regulation 64.

*The European Convention on Human Rights and the Human Rights Act*

53. The relevant provisions of the European Convention on Human Rights and the Human Rights Act 1998 are set out in the quotation from the decision of Mr Commissioner Powell's decision in *CH/4429/2006* (see para 64 below) and it is therefore unnecessary to set them out here.

*The Equality Act*

54. The Secretary of State relies on the Equality Act 2010 ("the Equality Act") in support of her submission that the construction of regulation 64(3) for which the claimant contends would involve impermissible direct discrimination against those students who do not share his religious objections to interest.

55. I consider the following provisions of that Act to be potentially relevant.

56. In material part, section 4 provides:

> "**The protected characteristics**
>
> **4.** The following characteristics are protected characteristics—
>
> …
>
> religion or belief;
>
> …"

and section 10 provides:

> **"Religion or belief**
>
> **10.**(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
>
> (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
>
> (3) In relation to the protected characteristic of religion or belief—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."

57. Direct discrimination is defined by section 13(1):

> **"Direct discrimination**
>
> **13.**(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

58. Section 13(1) of the Equality Act defines direct discrimination but does not, without more, make it unlawful. The various prohibitions against discriminations are contained in Parts 3 to 7.

59. However, those prohibitions are subject to Schedule 22 to the Equality Act (to which effect is given by section 191). The relevant parts of paragraph 1 of that Schedule read as follows:

> **Statutory authority**
>
> **1.**(1) A person (P) does not contravene a provision specified in the first column of the table, so far as relating to the protected characteristic specified in the second column in respect of that provision, if P does anything P must do pursuant to a requirement specified in the third column.
>
> | **Specified provision** | **Protected characteristic** | **Requirement** |
> |---|---|---|
> | … | | |
> | Parts 3 to 7 | Religion or belief | A requirement of an enactment |
> | … | | |

*CH/4429/2006*

60. The decision of Mr Commissioner Powell (as he then was) in *CH/4429/2006* was given on 20 February 2008 in relation to earlier, differently numbered, but otherwise identical, legislation.

61. The decision was not published on the website of the Office of Social Security Commissioners at the time and is not now published on the website of the Administrative Appeals Chamber. I will therefore need to quote from it more extensively than would otherwise have been the case.

62. However, it is unnecessary for me to include those parts of *CH/4429/2006* that deal with the facts of that case. I agree with the Tribunal that they are indistinguishable from the facts of this case. In other words, although there are differences between the facts of the two cases, those differences are not legally relevant.

63. Neither do I need to reproduce those parts of the Commissioner's decision that consider the particular error made by the appeal tribunal in that case.

64. On that basis—and so far as is relevant and does not repeat legislation that I have already set out—what the Commissioner said was as follows:

> "4. This appeal relates to the treatment of student loans under regulation [64] which requires a student loan to be treated as income. The regulation contains formulae for converting the amount of the loan into a weekly amount which is

then treated as part of the applicant's weekly income. Put very simply, certain deductions have to be made and the balance is then to be spread over a period laid down in the regulations. The practical effect is that a person who is *entitled to a student loan* will suffer a diminution in the amount of housing benefit to which he or she would otherwise be entitled. Indeed, there may be no entitlement at all. The use of the words "*entitled to a student loan*" is deliberate. Many students do not wish to take out a student loan because they do not wish to leave university with a substantial amount of debt or because they may have been able to make other arrangements or else receive assistance from their families. It does not matter that no loan is taken out. The amount of the student loan to which they are entitled must still be taken into account. …

5. The problem which arises in this case is does it matter that the student has strongly held beliefs which prevent him or her applying for a loan? To be more specific, what if he or she is a devout Muslim who considers that he or she is prohibited from applying for a loan because of the Islamic, or Sharia, laws against paying or receiving interest? As I understand it, the matter comes before me as an issue of principle. I am not concerned with the calculations which have been made.

…

11. In the appeal to me, a number of arguments have been advanced on behalf of the claimant. Perhaps, I should say that I have sympathy for her and for her partner. The fact that they take their religion seriously to the point of suffering a degree of hardship is highly commendable. It is not something for which they should be criticised. The first point taken relates to the construction of regulation [64](3)(b) which, it will be recalled, requires a student loan to be taken into account, even where it has not been applied for, where "he could acquire such a loan in respect of that year *by taking reasonable steps to do so*". It is submitted on behalf of the claimant that because of the strongly held religious beliefs of her partner and herself, it is unreasonable to expect her partner to apply for a student loan or to expect her to request him to do so. However, that is not how the regulation is worded. The regulation could have said something along the lines as "where it is reasonable for him to do so" or "reasonable in all the circumstances". That would focus attention on the claimant's partner and involve an examination of his reasons for not applying for a loan. However, what the regulation refers to is the taking of "reasonable steps". Reasonable qualifies the steps which must be taken to acquire a loan. It is not concerned with other matters, such as the motives and religious beliefs of the claimant and her partner. It is the steps needed to obtain a loan – or, putting it another way, the mechanics of doing so – which are required to be considered. If that is right, then the claimant's argument cannot succeed. No one has sought to suggest that there is anything unreasonable about the steps which would need to be taken to obtain a loan in this case. Indeed, on the limited information available to me it is extremely difficult to see how the necessary steps could ever become unreasonable save in the most exceptional case. The claimant's argument is based on the motives and reasons of the claimant and her partner in not applying for the loan. However,

as I have said, that is something which does not fall within the wording of the regulation.

12. The claimant has referred to decisions of Commissioners where it has been held permissible to look at a person's motives or reasons for not doing something. Namely, R(S)2/63 and CH/393/2003. They are both decisions where a person seeking benefit failed to make a claim at the appropriate time and then, when a claim was made, asked for that claim to be backdated. The issue in both cases was whether good cause for the delay had been shown. The concept of good cause for delay in presenting a claim is far removed from the present facts. I derive no assistance from such authorities when construing the words of regulation [64](3). Nor do I derive assistance from the authorities referred to in an earlier set of submissions that were sent to the appeal tribunal with a covering letter dated 19 July 2006.

13. I reach the conclusion that the appeal cannot succeed as a matter of the simple construction of the words "by taking reasonable steps to do so" in the regulation. At any rate, without the aid of the Human Rights Act 1998 and the European Convention on Human Rights (the "Convention"). I therefore turn to this aspect of the matter. Section 3 of the Human Rights Act 1998 is as follows:

> 3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights.

14. In order to bring this provision into play it is necessary to demonstrate a breach of the Convention. In the present case the claimant relies on Article 14 of the Convention taken in conjunction with Article 1 of the first protocol to the Convention ("1/P1"). Article 14 is as follows.

> 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.

1/P1 then provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.
>
> The proceeding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

15. The claimant's representative has lodged extensive submissions to the effect that this matter – by which is meant the award of housing benefit – falls within the ambit of 1/P1. I have been referred to passages from the case of *Stec and other -v- United Kingdom*, European Court of Human Rights - applications 65731/01 and 65900/01 (admissibility decision given on 6 July 2005, final decision given on 12 April 2006) which it is submitted show that it does. It is only if the action complained of falls within the ambit of some other provision of the Convention that one can consider whether or not there has been a breach of Article 14. For present purposes I am going to assume, without deciding, that 1/P1 is engaged. That is a matter which is not entirely easy to decide on the present state of the authorities. However, on the assumption 1/P1 is engaged, it becomes necessary to consider Article 14.

16. I must mention one point before doing so. Article 9 of the Convention provides as follows.

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others.

Article 9 was raised at a very early stage in the appeal to the tribunal. However, it was not mentioned thereafter and there have been no submissions addressed to me about its relevance. That being so, it is not appropriate for me to consider it. Further, from my limited understanding of the area, Article 9 is concerned to outlaw acts or omissions which interfere with the practice of a person's religion rather than the ability of the adherence of a particular faith to access financial benefits or subsidies which are open to them under the general law but which they cannot access because of some part of their belief.

17. I begin by pointing out that what is complained of is not the law relating to student loans. It is the fact that they have to be taken into account under regulation [64](3). The claimant does not seek to attack student loans themselves and her representative's submissions do not go into detail about them and how they operate. She does not seek to say that nobody should have a loan nor does she attempt to say how they might be amended to accord with Islamic law – something which, I suspect, could be very complicated. The evidence obtained from the internet alludes to the fact that banks and other lenders have devoted much energy to designing loans which are compliant with Islamic law. However, this is a general comment and no mention is made of any such attempts extending to student loans. Further, although the matter

> has largely been argued on the basis of their religious scruples, it should not be forgotten that at the beginning at any rate an alternative reason was put forward namely that the claimant's partner did not wish to complete his mechanical engineering course owing a substantial amount of money. If that reason still holds good, the claimant and her partner would not wish to take out a student loan even if it could be made compliant with Islamic law.
>
> 18. Her complaint is with the Housing Benefit regulation and the fact that the amount of the loan is treated as income. However, on the basis that all, or virtually all, students are eligible for a loan, then the amount of the loan is taken into account in all cases – whether or not any particular student has applied for it and, if not applied for, whatever the motives for not applying. The claimant and her partner wish to escape from this universal situation by putting forward a particular reason. They are thereby seeking to place themselves in a favourable situation not enjoyed by others. Many students will have sound and perfectly reasonable objections against incurring debt at all or may wish to defer doing so in order to limit their ultimate liability. For example, if they will be involved in further education or training following a first degree course. Again, if they are contemplating a career which, whilst entirely worthwhile, will not pay well – such as a career in the caring professions. Many people simply have an aversion to incurring debt and in some cases this will involve deeply held principles akin to those of a religious nature.
>
> 19. The regulation requires that everyone should be treated in the same way whether they apply for a loan or not. For the reasons I have attempted to explain, I do not consider that the claimant has made out a case that she and her partner should be treated differently from others or that their situation is significantly different from that of others. See paragraph 44 of *Thilimmenos -v- Greece*, European Court of Human Rights, application number 34369/97. The claimant may say that that is all very well but other persons, who object to taking out a student loan, could take one out if they wanted to. She and her partner, on the other hand, are prevented from doing so by their religious principles. However, those principles are simply one amongst many perfectly understandable motives for not taking out a loan. I see no reason why, because they hold them, they should be placed in a favourable position.
>
> 20. They are being treated in exactly the same way whether they take out a loan or do not. They are treated in the same way as everyone else. There is no discrimination and therefore no breach of Article 14. It follows that I must dismiss the appeal."

The emphases in that quotation are the Commissioner's.

**The Tribunal's decision**

65. The claimant's appeal came before the Tribunal sitting at Bexleyheath on 10 October 2018. The claimant attended that hearing and Gravesham was represented by two presenting officers.

66. The Tribunal refused the appeal, confirmed Gravesham's decisions, and stated that the student loan available to the claimant, and the student bursary he received, fell to be taken into account when calculating his housing benefit entitlement.

67. The decision referred to the student bursary because the claimant had argued that it should be disregarded. The Tribunal rejected those submissions. In my judgment it was correct to do so, and the claimant's submissions have not been renewed before the Upper Tribunal.

68. The Tribunal decided that the notional student loan had to be taken into account because it was bound by the decision in *CH/4492/2006*. That was also correct, even though, for the reasons I give below, I consider that *CH/4492/2006* was wrongly decided.

69. I may be mistaken but from the papers that were before the Tribunal, I believe it may have failed to deal with an issue that was before it. Paragraph 9 of the written statement of reasons states:

> "Calculations in respect of an earlier period also resulted in him not qualifying for HB …, and resulted in an overpayment, although this was not directly relevant to this appeal, but instead arose because [the claimant] had not notified the council that he had started to receive tax credits."

I am puzzled why, on the view of the law it took, Gravesham did not also bring the claimant's notional student loan, and any bursary, into account for the 2016/17 academic year as well. However, no such decision appears to have been made.[5] At least in respect of the period before 4 September 2017, therefore, the Tribunal was correct to say that any overpayment arose from the claimant's tax credits and was thus not relevant to what it had to decide.

70. However, the 2017/18 bursary and notional student loan were brought into account with effect from 4 September 2017 (see paragraph 31 above), at a time when benefit had already been paid to 3 December 2017. It therefore seems to me that, although part of the overpayment for the period between those two dates was caused by the tax credits, it was also partially caused by the student finance issues and that the Tribunal needed to deal with the overpayment issues for that period.

[5] Moreover, in the light of this decision, any such decision would have been incorrect in any event.

71. The previous two paragraphs are couched in the cautious language of possibility and belief, because Gravesham's response was inadequate almost to the point of being useless and—in breach of rule 24(4) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008—did not include relevant documents that would have enabled the either the Tribunal or me to establish the effective dates of its decisions with certainty.

72. This decision turns on matters of principle and I will therefore not digress again to elaborate in detail. Suffice it to say that the narrative part of the response should have said in terms that under the decision as revised, the effective date of the claimant's exclusion from housing benefit was 4 September (or whenever it actually was), and that such exclusion had in part caused an overpayment from that date until 3 December.

73. In those circumstances, even if I had agreed with Gravesham and the Secretary of State on the main issue before the Upper Tribunal, I would have set aside its decision and remitted any issues arising from the overpayment to the same judge. I mention this because, should my decision be reversed on appeal, those overpayment issues may once again require consideration.

**Permission to appeal and the Secretary of State**

74. The claimant applied to the Tribunal for permission to appeal, but his application was correctly refused by a District Tribunal Judge. He, too, was bound by *CH/4429/2006* and to have given permission to appeal would have been to force the Upper Tribunal to reconsider whether that decision was correct. That was a decision for the Upper Tribunal, not the First-tier Tribunal.

75. However, on 20 February 2019, the claimant renewed his application to the Upper Tribunal. I held a hearing of the application on 9 May 2019, at which the claimant was present but Gravesham—as was their choice to make—was not represented. Following that hearing, on 21 May 2019, I gave the claimant permission to appeal.

76. At the same time, I invited the Secretary of State to say whether she wished to be joined as second respondent to the appeal and directed that, if she did so wish, she would automatically be added as second respondent on receipt by the Upper Tribunal of the letter expressing that wish. Such a letter was received on 3 July 2019.

**Grounds of Appeal**

77. The best-presented version of the claimant's grounds of appeal appears in his skeleton argument. To summarise, the claimant submits:

(a) that "the phrase 'reasonable steps' should be interpreted in such a way as to take account of the personal circumstances and rationale of the individual; including any religious considerations undertaken in the course of such steps". Further it should not "be read such that it is limited to the 'mechanics,' 'nature and quality of the steps' without any regard for how the circumstances of the applicant (including religious belief and observance thereof) impacted their decision;

(b) that, if necessary, the phrase "reasonable steps" should be given a strained construction to avoid the discriminatory impact of the construction for which the Secretary of State contends; and

(c) that the construction of the phrase "reasonable steps" for which he contends would not involve direct discrimination against those students who do not share his religious views about interest and, in particular, that it would not make him materially better off than such students.

**The responses**

78. Gravesham's response to the appeal was brief. It maintained that, given *CH/4429/2006*, the Tribunal had reached the correct decision.

79. The Secretary of State's response contains a helpful summary of her case as follows:

> "2. The regulations impose what is (in effect) a statutory duty (or obligation) upon an Applicant for housing benefit to take reasonable steps to apply for a student loan before the potential income from that loan is discounted for the purposes of calculating entitlement to such benefit. Whilst the circumstances of [the claimant's] case attract sympathy, an individual cannot avoid that duty on the basis that its existence is contrary to their beliefs (whether religious or otherwise). In that regard the SSWP contends that
>
> (a) The word "reasonable" is concerned with the nature and quality of the steps which are taken in discharge of the duty/requirement to take reasonable steps (as opposed to the applicability of that requirement/duty).
>
> (b) When deciding whether reasonable steps have been taken, the decision maker is not permitted to take account of a belief (whether based on religious grounds or otherwise) that loans are wrong. To do otherwise would (a) be contrary to the proper construction of the Regulation (b) would fatally undermine its purpose (making the use of the Regulation contingent upon the personal beliefs of those who are subject to it) and (c) would be impossible to implement in practical terms.

(c) The construction of the regulation which the Tribunal has provisionally adopted is liable to give rise to direct discrimination against those who do not hold a relevant belief that student loans are wrong (absence of a belief being a protected characteristic under [section 10(2)] of the Equality Act and also protected under Articles 9 and 14 of the European Convention on Human Rights). The SSWP' s construction avoids such an outcome.

3. Accordingly, the only lawful interpretation of the regulation is one which treats a conscientious objection to the existence of the duty/requirement (whether based on religious grounds or otherwise) as an irrelevant consideration for the purpose of deciding whether reasonable steps to apply for a loan have been taken.

4. The SSWP provisionally accepts that the above interpretation indirectly discriminates against those with [the claimant's] religious beliefs (because it places them at a particular disadvantage compared to those without such beliefs). Any such discrimination is, however, a proportionate means of achieving a legitimate aim for the reasons set out in paragraph 10 below.

…

10. The Respondent respectfully contends that the construction advanced above is the only reasonable construction open to the Tribunal. It provisionally accepts that such a construction is indirectly discriminatory against those in [the claimant's] position who regard the obtaining of a loan as being contrary to their religious beliefs (the relevant comparator group being those who do not hold such beliefs). The Respondent nevertheless contends that such discrimination is objectively justified. In so contending the Respondent relies upon the following factors:

(a) The legitimate aim behind the provision, namely that those for whom there is a potential alternative source of income (namely student loans), do not draw upon finite public funds which are made available in the form of housing benefit.

(b) The fact that the SSWP's construction of the regulation is proportionate (and goes no further than is necessary to achieve the legitimate aim) because

- It ensures that the regulation is applied in a manner which is not directly discriminatory (and indeed is necessary to avoid a construction of the regulation which directly discriminates against a person due to the absence of a belief).

- It avoids the invidious and impractical consequences which would flow from decision makers forming judgments as to the validity and strength of different objections to the taking out of student loans.

- It ensures that the legitimate aim behind the regulation is not fatally undermined by what is otherwise liable to be significant numbers of individuals asserting that they had a conscientious objection to the taking out of a loan, whether on religious grounds or otherwise."

**Hearing**

80. I held an online hearing of the appeal on 21 July 2021. I would like to take the opportunity to apologise once again to the parties that my long-term ill-health has led to such an unacceptable delay between the hearing and the promulgation of this decision. I should stress, however, that the hearing was recorded and therefore my memory of the submissions that were made has not dimmed.

81. At the hearing, the claimant appeared in person, Gravesham were represented by their appeals officer, Courtney Harvey, and the Secretary of State was represented by John Paul Waite of counsel instructed by the Government Legal Department.

82. I am grateful to all the parties for their helpful submissions, both written and oral. However, I must single out the claimant for special mention. Despite the importance of the matter to him, and the fact that he has no legal training, he presented his case persuasively and thoroughly, but without taking obviously bad points, and with a moderation and discretion that many junior barristers of his age fail to bring to the affairs of their clients. I am confident that he will succeed in his chosen field of life, but he is a loss to the legal profession.

**Discussion**

83. Except on points of minor detail, however, none of the submissions summarised above has persuaded me that the provisional views I expressed when giving permission to appeal were incorrect. As far as the construction of regulation 64 is concerned, I have the misfortune to find myself in disagreement with Mr Powell. I am satisfied that *CH/4429/2006* was wrongly decided and I respectfully decline to follow it.

84. I will therefore begin this discussion by explaining why I have formed that view. I will then explain why I am unable to accept the submissions to the contrary from Gravesham and the Secretary of State.

85. In adopting that approach, I have not overlooked that Mr Waite did not base his submissions on the authority of *CH/4429/2006*. However, as that decision would normally be binding on me in comity, it is necessary to explain in detail why I disagree with it.

86. As I have reached my decision as a matter of the domestic law of Great Britain, it is unnecessary for me to consider whether the regulation would be unlawfully discriminatory if its meaning were as the respondents submit. However, as I also disagree with *CH/4429/2006* on this point, and as it is clearly possible that this decision will not be the last word on the matter, I will comment briefly on what I would have decided if I had determined the main issue against the claimant.

87. I should also say that, although I have considered the 678 pages of authorities that have been cited to me, this discussion will mention very few of them. None are directly in point and—particularly as I regard the appeal as turning on the interpretation of regulation 64, as opposed to the discrimination issues—I have derived little help from them.

*The interpretation of regulation 64:* CH/4429/2006

88. Were it not for the decision in *CH/4429/2006*, I would have said that the construction of regulation 64(3) was straightforward and that its meaning was plain.

89. I begin by reminding myself that under regulation 64(3), the claimant "is to be treated as possessing a student loan in respect of [the 2017/2018 academic year] where … he could acquire a student loan … in respect of that year by taking reasonable steps to do so".

90. At paragraph 4 of *CH/4429/2006*, the Commissioner stated that the practical effect of that provision is that a person who is *entitled to a student loan* will suffer a diminution in the amount of housing benefit to which he or she would otherwise be entitled, and that the use of the words "*entitled to a student loan*" was deliberate. But unless the Commissioner was saying that his own use of the words "entitled to a student loan" earlier in the same paragraph was deliberate—which would be a strange thing to say given that he had emphasised them on both occasions—I judge that to be an impermissible gloss on the statutory wording. Not only does the phrase "entitled to a student loan" not appear in regulation 64; an electronic search suggests that it does not appear anywhere in the Regulations. For the purposes of regulation 64(3), students are "treated as possessing student loans", rather than being "entitled" to them.

91. I therefore return to what that regulation actually says: the claimant is to be treated as possessing a student loan that he could have taken reasonable steps to acquire.

92. Leaving aside the issue of reasonableness for the moment, and assuming for the moment that the word "steps" has the significance that Mr Powell ascribed to it, it is thus necessary to consider what "steps" the claimant would have had to take to acquire a student loan.

93. In my judgment, such steps would have included:

(a) obtaining an application form and supporting documents;

(b) scrutinising the terms on which the loan was offered;

(c) deciding whether to accept those terms; and if so

(d) completing the form and returning it to the Student Finance Authority.

94. It is step (c) that lies at the heart of my disagreement with *CH/4429/2006*. In contrast with, for example, regulations 42(2) and 49(2) (see paragraph 102 below)—and indeed in contrast with the pre-August 1999 version of regulation 57A of the Former Regulations (see paragraph 52 above)—regulation 64(3) does not assume the making of the application. Rather, deciding to apply is one of the "steps" that is needed to be taken to acquire the student loan. It follows that the decision maker must be satisfied that it would have been a "reasonable" step for the student to have taken before he may be treated as possessing a loan that has not been made to him.

95. It also follows that the phrase "reasonable steps" cannot be confined to "the mechanics" of obtaining a loan (see paragraph 11 of *CH/4429/2006*). There is nothing mechanical about the decision to apply for the loan. Even those students whose only concerns are that they do not wish to leave university with a substantial amount of debt or that they might be able to make other arrangements or else receive assistance from their families (see paragraph 4 of *CH/4429/2006*) will need to undertake some moderately complex calculations in order to ascertain whether they will have sufficient cash flow to see them through the academic year if they do not apply.

96. Moreover, if "reasonable steps" is interpreted as only applying to the mechanics of making the application, then the phrase becomes otiose. At paragraph 11 of *CH/4429/2006*, the Commissioner stated:

> "… It is the steps needed to obtain the loan – or, putting it another way, the mechanics of doing so – which are required to be considered. If that is right, then the claimant's argument cannot succeed. No one has sought to suggest that there is anything unreasonable about the steps which would need to be taken to obtain alone in this case. Indeed on the limited information available to me it is extremely difficult to see how the necessary steps could ever become unreasonable save in the most exceptional case."

97. I would go further. If one ignores personal circumstances and focusses solely on the mechanics of the application, then is *inconceivable* that in any case—exceptional or not—

the mechanics of applying for a student loan would ever require students to take steps that were unreasonable.

98. To take an extreme example, no Scheme will involve the taking of evidence under torture or deciding the application through trial by combat. The mechanics of any conceivable Scheme will involve a written application supported by evidence that the student meets the prescribed criteria. They will therefore be self-evidently reasonable.

99. In my judgment, therefore, the final three sentences of that passage quoted under paragraph 96 above—which are clearly correct if one grants the premise expressed in the first sentence—demonstrate that the premise is incorrect. It is to be inferred that the draftsman intended the words "reasonable steps" to have some practical effect. But if one adopts the interpretation in *CH/4429/2006*, they have none.

100. *CH/4429/2006*, relies in part on an argument from possible alternative legislative wording:

> "11. … It is submitted on behalf of the claimant that because of the strongly held religious beliefs of her partner and herself, it is unreasonable to expect her partner to apply for a student loan or to expect her to request him to do so. *However, that is not how the regulation is worded. The regulation could have said something along the lines as "where it is reasonable for him to do so" or "reasonable in all the circumstances".* That would focus attention on the claimant's partner and involve an examination of his reasons for not applying for a loan. However, what the regulation refers to is the taking of "reasonable steps". Reasonable qualifies the steps which must be taken to acquire a loan. It is not concerned with other matters, such as the motives and religious beliefs of the claimant and her partner …" (my emphasis).

101. But it is always easy to suggest that, had a different outcome been intended, different legislative wording would have been used. It may be argued with equal justice that—if it had been intended that a student should be treated as possessing a student loan in any circumstances in which such a loan would have been awarded to him if he had applied for it (which is what is what regulation 64(3) means in practice if *CH/4429/2006* is correct)—the regulation would or should have been worded:

> "(b) in the case of a student to whom a student loan is not made in respect of an academic year, the maximum student loan that would have been awarded upon application being made".

102. Such an argument would, moreover, be fortified by the fact that—without any consideration of reasonableness—other parts of the housing benefit scheme do treat claimants as possessing income or capital that would become available on application.

When that is the case, the relevant regulations say so in terms. For example, 42(2) (Notional income) is worded as follows:

> "(2) Except in the case of—
>
> (a)-(h) …
>
> any income which would become available to the claimant upon application being made, but which has not been acquired by him shall be treated as possessed by the claimant but only from the date on which it could be expected to be acquired were an application made."

Regulation 49(2) (Notional capital) is similarly worded, the only significant difference being that the word "capital" appears instead of the word "income".

103. To follow the argument through, the draftsman could have used regulations 42(2) and 49(2) as a basis for the drafting of regulation 69(3)(b). Instead he provided that a student who is eligible for a student loan, but has not in fact acquired one, should have that loan treated as income for the purpose of housing benefit if he did not take "reasonable steps" to acquire it, but not otherwise. The use of a different form of words suggests that the Secretary of State intended the phrase "reasonable steps" to mean something in practice and that the outcome required by regulation 64(3) is not the same as that required by regulation 42(2) or 49(2).

104. Although it is not the sole basis for my decision, I find that argument from alternative legislative wording more persuasive than the considerations that found favour in *CH/4429/2006*. I accept that the draftsman did not use the phrases, "where it is reasonable for him to do so" or "reasonable in all the circumstances". Neither did he use the alternative form of words that I suggest in regulation 102 above. But he did use the wording in regulations 42(2) and 49(2), I have difficulty seeing why, if he wished to achieve the same result in relation to notional student loans, he did not use equivalent language in regulation 64(3)(b).

105. Moreover, the law as stated in *CH/4429/2006* is in all practical respects the same as that which existed before the amendment of regulation 57A of the Former Regulations with effect from 1 August 1999. If that was what the legislator intended, it is difficult to understand why amendment was felt to be necessary. Both regulation 64 and the post-amendment version of regulation 57A contemplate that there will be circumstances in which a student will not acquire a student will not acquire a student loan despite taking reasonable steps to do so. If those reasonable steps are restricted to the mechanical steps necessary to complete the application form, then there are no such circumstances.

106. In that context, I note the Secretary of State's acceptance that matters relating to at least some circumstances of an individual claimant may be relevant when assessing whether a step is reasonable (see paragraph 112 below).

107. Finally, even if I am wrong about all that—even if Mr Powell was correct to interpret "reasonable steps" as referring to the mechanics of making the application—then I cannot see that his conclusion follows.

108. Rather, I accept the claimant's submission that the final "mechanical" step he would need to take to acquire the student loan would be to sign an agreement to the terms on which the loan was offered. That would involve agreeing to pay interest. And that is something his religion forbids him to do.

109. For all those reasons, I am sure that, as it relates to the construction of regulation 64, *CH/4429/2006* was wrongly decided. I decline to follow it.

*The interpretation of regulation 64: Gravesham's submissions*

110. At the hearing, Ms Harvey relied upon the written submissions that Gravesham had made (see paragraph 78 above) and on the submissions of Mr Waite, without wishing to add anything to them.

111. As Gravesham's own submissions relied upon the decision in *CH/4429/2006*, I have already given my reasons for rejecting them. I therefore turn to the Secretary of State's submissions, with which Gravesham agreed.

*The interpretation of regulation 64: the Secretary of State's submissions*

112. The Secretary of State's skeleton argument submits that the reasonable steps that fall to be considered:

> "are those relevant to the individual's capacity to obtain a loan, such as ill health, eligibility or other practical impediments to the acquisition of such finance",

and her original response suggests "an extraneous event for which the applicant was not responsible, for example error on the part of the person administering the application" as an example of another practical impediment.

113. I agree that, since the amendment of regulation 57A of the Former Regulations with effect from 1 August 1999, a claimant who is ineligible for a student loan has to rely on being unable to acquire it by taking reasonable steps if he is to avoid having a notional loan taken into account.

114. I cannot, however, agree that regulation 64(3) applies to questions of a claimant's "capacity". It is concerned with people who have sufficient capacity to qualify for a place on a course of full-time education. Such people will inevitably also have sufficient capacity to complete a student loan application.

115. The other examples suggested by the Secretary of State relate to matters that are likely to be temporary.

116. It would normally be reasonable for a student who could not in practice make a loan application because of physical or mental ill-health to take the reasonable step of obtaining help to do so.

117. A student who is denied a loan because of an error by a person administering the application is effectively in the same position as someone who is ineligible except to the extent that he is able to take reasonable steps to correct the error.

118. Similar considerations are likely to apply whenever a person who is eligible for a student loan faces a practical impediment to obtaining it. The very fact of his eligibility makes it likely that, by taking reasonable steps, the impediment can be overcome.

119. If that is so, the loan will still be given for the whole of the academic year. And when that happens the local authority will be required by regulation 64(2) to take it into account as income from the beginning of the academic year and adjust the claimant's entitlement to housing benefit accordingly, potentially generating an overpayment.

120. The effect of the Secretary of State's construction is therefore that—except in cases of ineligibility—regulation 64(3) provides a period of grace for students who are likely to acquire a student loan eventually.

121. The claimant would accept that, in the examples given by the Secretary of State, the student could not acquire a loan by taking reasonable steps. The real question between the parties is whether other matters personal to a claimant can also be taken account.

122. The claimant submits that all the claimant's personal circumstances are potentially relevant.

123. By contrast the Secretary of State submits that, as a matter of principle, regulation 64(3) does not permit a decision-maker or tribunal to take account of an individual's personal objection to, or disagreement with, a substantive requirement when deciding whether reasonable steps have been taken to comply with that requirement. In this case, it is said, the requirement reflects a wider national education policy, approved by

parliament, that support for students should take the form of a repayable loan. The effect, it is said, of the claimant's preferred construction is to establish a form of maintenance grant for those Muslims who share his beliefs in place of the national student loan scheme.

124. The focus on the alleged "requirement" to apply for a student loan echoes the Secretary of State's response, which began with the submission that the regulations impose what is (in effect) a statutory duty (or obligation) upon a housing benefit claimant to take reasonable steps to apply for a student loan before the potential income from that loan is discounted for the purposes of calculating entitlement to such benefit.

125. If that were the case, the Secretary of State's submission would be correct. A claimant under the jobseeker's allowance scheme that was in force at the time I am considering could not argue that his personal disinclination to work should be taken into account when considering whether he had taken reasonable steps to find a job. But that is because jobseeker's allowance claimants were under a positive duty actively to seek employment as condition of entitlement to the that benefit.

126. However, this case is not like that. I reject the Secretary of State's submission, and all her subsequent submissions that depend upon the existence of a supposed duty or requirement to apply for a loan.

127. Regulation 64(3) does not impose any duty or requirement on the claimant, and he is therefore not in breach of any duty or requirement: he has *omitted* to apply for a student loan, not *failed* to do so. Regulation 64(3) merely specifies the consequences of that omission.

128. To elaborate, an example of a requirement can be found in the case of Mr Thlimmenos (see paragraph 171 below) who was obliged to serve in the Greek armed forces on pain of criminal liability. Regulation 46 does not take that, or any similar, form. It does not state that students "must", or are "required", or are under a "duty", to do anything (even though other provisions of the Regulations do impose requirements on claimants). It sets out the circumstances in which a student loan is to be taken into account as income in the calculation of housing benefit and the manner in which it is to be taken into account.

129. For similar reasons, I do not find the submissions about reasonable steps at paragraph 6 of Mr Waite's skeleton argument persuasive. The senior managers in paragraph 6(b) and the local authorities in paragraph 6(c) are under positive duties to take reasonable steps whereas the claimant is not under a duty to apply for a student loan. Paragraph 6(a) provides employers with a statutory reasonable steps defence to vicarious liability. The circumstances in which that defence is potentially applicable are

wide and I can envisage cases in which the beliefs of the employers might be relevant to what is reasonable.

130. The Secretary of State also submits that a "step" is a positive action taken to achieve a particular result and that in the context of regulation 64(3) a decision not to acquire a loan cannot be a "step" towards acquiring it.

131. As I explain at paragraphs 93-94 above, I do not read the regulation in that way. In order to acquire the loan, a student must decide to apply for it and make the application. If it would not be reasonable for him to take those steps, then the loan is not one that "he could acquire … by taking reasonable steps to do so".

132. What, then, does reasonableness require in the absence of a duty to bring about a particular result?

133. It has been said during these proceedings (not necessarily by the Secretary of State) that the test of reasonableness is an objective one. With respect, I do not find that helpful. What I think it means is that decisions about reasonableness concern themselves with what a person ought to have done or not done, rather than what he actually did or didn't do, and that that judgment is not based on the subjective views and beliefs of that person.

134. However, there is a risk that the language of objectivity can obscure the facts that decisions about what ought to have happened embody value judgments and that the values are inevitably those of the decision maker. That is why, for example, circumstances can arise in which there are a range of conclusions at which decision-makers or tribunals can reasonably arrive.

135. Social security law is often concerned with marginalised members of the community. It is important to keep the normative nature of decisions about reasonableness in mind to minimise the potential for such decisions to become culturally influenced. The views of (for example) a white, professional, middle-aged, middle class, male member of the Church of England as to what is reasonable may not coincide with (for example) those of a young Muslim refugee.

136. Whether deliberately or not, social security law has historically minimised that risk by focussing on the circumstances of individual claimants. One does not ask in the abstract what would be reasonable or what "the reasonable man" would do. The question is always what it would have been reasonable for this particular claimant to have done in this particular case.

137. The best-known, but far from only, example of that is in the reported decision of a Tribunal of Commissioners in *R(S) 2/63*, That case involved whether a claimant had

"good cause" for claiming sickness benefit late. The Commissioners held that "good cause" had the same meaning as "reasonable cause" and approved an earlier dictum from another Commissioner to the effect that the phrase meant:

> "… some fact which, having regard to all the circumstances (including the claimant's state of health and the information which he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) as the claimant did."

The claimant's state of health and the information were factors of particular relevance in that case, but the decision is authority for the propositions that all the circumstances must be taken into account and that the enquiry as to reasonableness must be focussed on the claimant.

138. I can see no reason why I should interpret regulation 64(3) any differently. In this case, the relevant circumstance is the claimant's religion rather than his state of health or state of knowledge. Nothing in regulation 64(3) says that religious or other strong conscientious beliefs must be disregarded when deciding what is reasonable. When social security law wishes to exclude religion as a factor to be taken into account in the assessment of reasonableness, it tends to say so: see, for example, regulation 9(7) of the Social Fund Maternity and Funeral Expenses (General) Regs 2005 as it relates to regulation 9(3)(d) and (e).

139. I therefore conclude that "reasonable steps" means steps that are reasonable in all the circumstances including all the personal characteristics of the individual who was eligible to have applied for the student loan. That includes strong conscientious religious or other objections to the payment of interest.

140. I would, however, add that all the circumstances includes the interests of the wider public as represented by the Secretary of State and that assessing reasonableness will need to give those interests weight (see paragraphs 190-191 below). Without being prescriptive, I suggest that an omission to acquire a loan that is based on purely financial considerations is unlikely to outweigh those interests.

141. That leaves the Secretary of State's submission that such an interpretation gives rise to direct discrimination against those who do not share the claimant's views.

142. I can explain my reasons for rejecting that submission briefly. The line drawn by my interpretation is not between Muslims and non-Muslims nor even between people who have conscientious objections to taking out a student loan and those who don't. Rather it is between, on the one hand, any student whose personal circumstances as a whole are such that—for whatever reason—he cannot take reasonable steps to acquire a student loan and, on the other, all students who are not so circumstanced. Those two groups are

not in analogous situations. The latter could reasonably acquire the loan that regulation 64(3) takes into account as their income. The former cannot.

143. Moreover, if I am wrong about that, any discrimination, whether direct or indirect, is saved by paragraph 1 of Schedule 22 to the Equality Act because it is required by an enactment, namely regulation 64(3) itself on what I have held to be its true construction.

*Administrative inconvenience and the floodgates*

144. The Secretary of State submits that to interpret regulation 64(3) as I have done would make the housing benefit scheme administratively unworkable and invite numerous, potentially opportunistic, claims.

145. I disagree.

146. It must be remembered that the majority of students are wholly excluded from housing benefit by regulation 56(1). It is only those who fall within the regulation 56(2) exceptions who will be able to make claims to which local authorities will have to give detailed consideration.

147. I doubt that there will be many such students who have sincere and principled non-financial objections to either receiving a loan or the payment of interest. It will not even be all the Muslims among them. The work of the First-tier Tribunal often involves the detailed consideration of a claimant's finances and I know from my years as a District Tribunal Judge that many who profess the Islamic faith nevertheless hold interest-paying savings accounts or have taken out interest-paying loans or mortgages.

148. I appreciate that the objection is not merely to the number of valid claims, but to the opportunity that interpreting regulation 64(3) as I have done would allegedly provide to students for false claims that they held sincere and principled reasons for declining a student loan.

149. What that objection ignores is that in order to make an opportunistic claim based on regulation 64(3), *students would actually have to decline the student loans for which they were eligible*.

150. In the context of a system where it is anticipated that two-thirds of such loans will never be fully repaid, such students would have to give up the advantages of a loan that would pay their tuition fees and give them hundreds of pounds a week towards their maintenance in return for a much smaller amount of non-repayable housing benefit.

151. Moreover, the housing benefit scheme would then present such students with further problems.

152. First, housing benefit is not calculated on the full amount of a claimant's contractual rent but on a notional rent that is intended to ensure that housing benefit only meets rents in the bottom third of the local rental market. Moreover, most students under 30 will find that benefit is calculated on the basis of a notional "single room rent", irrespective of the extent of the accommodation they actually occupy.

153. Second, for most students the only way of maintaining themselves without a loan would be to work.

154. Regulation 64(3) only applies to students who fall within the exceptions in regulation 56(2). Many such students will in practice not be able to work—or will only be able to work to a limited extent—by reason of their illness or disability.

155. For those who are able, time spent working reduces the time available to study. Moreover, their earnings would be taken into account in the housing benefit calculation thereby reducing or extinguishing their entitlement to benefit.

156. Third, students without a loan will also have to find £9,000 to pay their tuition fees at the beginning of each academic year.

157. Students who forego a loan in order to claim housing benefit will have to save that money from their earnings. They are likely to have difficulty borrowing such a large amount without paying interest. Even those whose claims are opportunistic will need to avoid borrowing at interest, because to do so would expose their opportunism.

158. That means they will have to work more hours than would be necessary if their only aim were to maintain themselves. The extra money they earn by doing so will increase their income for housing benefit purposes and reduce their entitlement correspondingly.

159. Finally, if a student does manage to save enough to pay tuition fees, those savings will reduce benefit entitlement still further as soon as they exceed £6,000 because of the tariff income rule: see regulation 52.

160. In short, students who decline to take out a student loan (which in future they may not have to repay in full) are choosing to make their lives considerably more difficult in return for an amount of non-repayable housing benefit—which is likely to be small and may be nil—and the certainty of paying for their education now. Those students who do so for opportunistic reasons need to take a course in mathematics.

161. For those reasons, I do not consider that interpreting regulation 64(3) as I have done is likely to lead to a flood of claims, far less a flood of opportunistic claims. I do, however, accept that—as part of deciding what steps would be reasonable—local authorities will have to decide whether a claimed objection to taking out a loan or paying interest is principled and held sincerely and conscientiously.

162. What I do not accept is that the system thereby becomes unworkable.

163. Whether someone holds a particular belief is a question of fact. Like many facts—for example the level of pain a person experiences—it cannot be directly known. But it can be inferred on a balance of probabilities from other evidence. Sitting in the First-tier Tribunal, I have myself refused appeals relating to other aspects of the housing benefit scheme on the basis that a claimed religious belief was not conscientiously held. That issue was no more difficult to decide than many other factual issues with which the First-tier Tribunal is faced, and less difficult than some. By definition, local authority decision-makers also have to face those equally- and more-difficult issues.

164. Local authorities routinely require housing benefit claimants to produce their bank and building society statements as part of their claim. If those statements show that a claimant has an interest-bearing savings account, a mortgage (other than an Islamic mortgage) or a credit card, that is likely to be the end of the matter. And if there is any doubt, the local authority may require the production of credit card and mortgage statements.

165. Otherwise, for the reasons summarised at paragraph 160 above, where students deliberately accept the disadvantages of living without a loan, that very fact will often be evidence that any claimed objections to paying interest are conscientiously held.

166. Finally, if the position is still insufficiently clear, then under the principles established by the House of Lords in *Kerr v Department of Social Development*, [2004] UKHL 23 (also reported as *R 1/04 (SF)*), it is for claimants to establish that their objections to taking out student loans are principled and conscientiously held and are not merely an attempt to obtain a perceived financial advantage.

167. All the information that is relevant to whether a claimant could have acquired a loan by taking reasonable steps will be in the knowledge and power of that claimant. As Mr Commissioner Henty said in *CIS/5321/1998*,[6] “a claimant must to the best of his or her ability give such information … as he reasonably can, in default of which a contrary inference can always be drawn”.

[6] In a passage approved by the House of Lords in *Kerr* at paragraph 64 of the opinion.

168. Put another way, local authorities that cannot tell from the evidence presented whether the reason a claimant did not acquire a student loan was because the steps required to do so were unreasonable in his case, will simply decide that issue against him and take the notional loan into account as income.

*Discrimination*

169. Given my decision on the construction of regulation 64, it is unnecessary for me to decide whether, if the regulation had the effect for which the Secretary of State contends, that would amount to unlawful indirect discrimination. However, as I am again differing from *CH/4429/2006* on this point, I should briefly explain why.

170. I have referred above to the decision of the European Court of Human Rights in *Thlimmenos v Greece* (2001) 31 E.H.R.R. 15. This was the first case in which it was recognised that unlawful discrimination was not confined to treating people who are in an analogous situation differently but could in some cases extend to treating people who were not in analogous positions the same.

171. Mr Thlimmenos was a Jehovah's Witness whose religious beliefs prohibited him from serving in the armed forces of Greece. He was convicted by a military tribunal of insubordination for having refused to wear military uniform at a time of general mobilisation, and sentenced to four years imprisonment of which he served two years and a day. Subsequently, he applied to become a chartered accountant but was refused appointment to the Greek Institute of Chartered Accountants on the ground that he had been convicted of a felony.

172. At paragraph 44 of its judgment, the Court stated:

> "The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification …. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. *The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different*." (my emphasis)

Applying that principle, the Court stated (at paragraph 47 of its judgment) that:

> "… as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, … unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any

> dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified."

and that therefore the exclusion of Mr Thlimmenos from the profession of chartered accountancy did not pursue a legitimate aim and was a violation of his rights under Article 14 of the Convention, taken together with Article 9.

173. By contrast, it was concluded in *CH/4429/2006* that the Convention Rights of the claimant in that case had not been infringed. The Commissioner gave the following reasons for that conclusion:

> "19. The regulation requires that everyone should be treated in the same way whether they apply for a loan or not. For the reasons I have attempted to explain, I do not consider that the claimant has made out a case that she and her partner should be treated differently from others or that their situation is significantly different from that of others. See paragraph 44 of [*Thilimmenos*]. The claimant may say that that is all very well but other persons, who object to taking out a student loan, could take one out of they wanted to. She and her partner, on the other hand, are prevented from doing so by their religious principles. However, those principles are simply one amongst many perfectly understandable motives for not taking out a loan. I see no reason why, because they hold them, they should be placed in a favourable position.
>
> 20. They are being treated in exactly the same way whether they take out a loan do not. They are treated in the same way as everyone else. There is no discrimination and therefore no breach of Article 14. It follows that I must dismiss the appeal."

174. I find that unpersuasive. It is no defence to an allegation of *Thilimmenos* discrimination that the alleged discriminator treats everyone the same. On the contrary, treating people the same when they should be treated differently is the very essence of *Thilimmenos* discrimination: to treat people equally, it is sometimes necessary to treat them differently.

175. Further, I cannot agree the matter should be approached on the basis that a sincere religious objection is "simply one amongst many perfectly understandable motives for not taking out a loan" and that therefore the position of the claimants in *CH/4429/2006* and this case "is not significantly different from that of others". Such an approach fails to attach weight to the facts that freedom of religion is guaranteed by Article 9 of the European Convention on Human Rights and that religion is a protected characteristic under Article 14. The same is not true of a desire not to be saddled with a lot of debt on leaving university.

176. In this case, the Secretary of State has conceded that her interpretation of regulation 64 would involve indirect discrimination against the claimant. I accept that concession and—subject to the issue of justification—would have held that the claimant was a victim of *Thlimmenos* discrimination.

177. I would not, however, have held that such discrimination was unlawful. Rather, I would have accepted the Secretary of State's submission that it was justified on the basis that it pursued a legitimate aim and was not manifestly without reasonable foundation.

178. I stress again that this part of my decision is dealing with what I would have decided if (contrary to what I have actually decided) I had accepted the Secretary of State's construction. For the reasons I have given, and except in the case of eligibility, that construction limits "reasonable steps" to matters that are essentially temporary and allows a claimant a period of grace during which those matters can be resolved. Apart from that period of grace, the meaning of the regulation would be the same as that of the former regulation 57A, namely that students are to be treated as possessing as income any student loan for which they would have been eligible had they applied.

179. Such a regulation would pursue the policy that education funding should come out of the education budget, not the social security budget. That is clearly a legitimate aim. To hold the contrary would amount to saying that the government is not entitled to set budgets. It is therefore irrelevant that it has been decided that funding via the education budget should in most cases be made by way of loans, rather than of grants. That is a decision about the allocation of funds between competing priorities and is quintessentially a matter that falls to be decided by those who have been democratically elected.

180. It may be arguable that the rules of the student loan scheme are themselves indirectly discriminatory on the grounds of religion. However, as Mr Waite rightly submits, that question is not before me, and I have no jurisdiction to adjudicate on it.

181. In the context of the housing benefit scheme as it applies to full-time students, most claimants are excluded from entitlement by regulation 56(1). The exceptions in regulation 56(2) (see paragraph 47 above) relate to categories of claimant who are potentially more vulnerable than other students and who may have needs that are not taken into account when their eligibility for a student loan is calculated. If the Secretary of State's construction were correct, regulation 64 would have the effect that housing benefit would take into account such needs (*e.g.*, through the disability premium) to the extent that they were not already covered by the loan, but that maintenance requirements that are common to all students would be met either from the education budget through a student loan or from the student's own resources.

182. Such a rule would not be directly discriminatory, and it is impossible to say that it would be manifestly without reasonable foundation. Any indirect discrimination to which it gave rise would therefore be justified.

183. In other words, the Secretary of State has power to make a regulation that has the effect for which she contends, and such a regulation would not be unlawfully discriminatory irrespective of any disparate impact it might have on those whose religious beliefs do not permit them to pay interest.

184. However, the claimant's appeal succeeds because, correctly interpreted, the regulation that the Secretary of State has actually made does not have that effect.

**The Upper Tribunal's decision**

185. I therefore conclude that the Tribunal erred in law by following the decision in *CH/4429/2006*, even though that decision was binding on it. I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 to set its decision aside. Rather than remit the case to the First-tier Tribunal, I have decided to re-make it under section 12(2)(b)(ii).

186. In ordinary language a statement that someone cannot, or could not, do something, is not necessarily restricted to circumstances in which he is physically incapable of doing that thing, but may also cover circumstances in which, for whatever reason, he cannot bring himself to do it. For example, if a person is a sincere vegetarian, it would not be a misuse of language to say that he "cannot" or "could not" eat meat.

187. In that broader sense, the claimant cannot acquire a student loan while the terms of any such loan include a liability to pay interest. There are no steps, reasonable or otherwise, that he could take to acquire such a loan. His religion prevents him from doing so as much as, and possibly more than, a physical impediment would do.

188. The question therefore becomes whether the religious impediment to acquiring a loan is a reasonable one. There may be some who would say that all religion is inherently unreasonable, relying as it does on faith. Nevertheless many, if not most, people in the world hold religious convictions and I am not prepared to hold that the prohibition on interest, which is a tenet of one of the world's major religions, is unreasonable. It makes no difference to that conclusion that some who profess the Islamic faith do not follow its teachings on the point.

189. Taking into account all the claimant's circumstances and, in particular, his sincere and strongly held religious conviction that it would be a major sin for him to pay interest,

I judge that it would not have been reasonable for the claimant to take the steps that he would have needed to take in order to acquire a student loan.

190. That is so even though I must also give weight to the government's policy on the allocation of public funds. The claimant's refusal to apply for a student loan was not opportunistic. He was not trying to evade the rules on student finance any more than Mr Thlimmenos was seeking to be insubordinate when he refused military service. He was not seeking to obtain a financial benefit for himself even if, which he vigorously denies, that would be the effect were he to be awarded housing benefit without taking a notional student loan into account. Further, on what I have held to be the correct interpretation, regulation 64(3) impliedly contemplates that there will be circumstances in which a student could not acquire a student loan by taking reasonable steps which relate to his personal circumstances rather than to the mere mechanics of making the application.

191. In those circumstances I consider that the claimant's personal circumstances outweigh any loss to public funds, which is likely to be minor (see paragraphs 153-159 above), when it comes to assessing the reasonableness of his omission.

**Disposal**

192. It follows that regulation 64(3) of the Regulations does not treat the claimant as possessing the student loan to which he would have been entitled if he had applied for it.

193. My decision is therefore as set out on pages 1 and 2 above.

Authorised for issue
on 7 August 2023

Richard Poynter
Judge of the Upper Tribunal

Corrected under rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 on 21 August 2023