DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is (nominally) to allow the appeal by the Appellant (the Secretary of State).

The decision of the Liverpool First-tier Tribunal dated 9 April 2014 under file reference SC168/13/12054 involved an error of law. The decision of the First-tier Tribunal is set aside. The Upper Tribunal is able to re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> "1. Mr Carmichael's appeal against Sefton Council's decision dated March 5, 2013 is allowed.
> 2. Mr Carmichael's housing benefit entitlement is to be recalculated without making the under-occupancy deduction of 14%.
> 3. The reason for so directing is that if the Tribunal or the Council were to apply this deduction there would be a clear breach of Mr (or Mrs) Carmichael's Convention rights, contrary to section 6(1) of the Human Rights Act 1998 (*R (on the application of Carmichael and Rourke) (formerly known as MA and others) v Secretary of State for Work and Pensions* [2016] UKSC 58)."

This decision is given under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Attendances:

The **Appellant** was represented by Mr James Eadie QC and Mr Edward Brown of Counsel, instructed by the Government Legal Department.

The **First Respondent** was represented by Mr Richard Drabble QC, instructed by Leigh Day, Solicitors.

The **Second Respondent** neither appeared nor was represented.

REASONS FOR DECISION

The fundamental issue in this case

1. The fundamental issue in this case concerns the powers of the First-tier Tribunal in circumstances where the ordinary application of the words of secondary legislation results in (what is now recognised to be) an undisputed breach of the claimant's Convention rights. This problem arises in the context of the housing benefit (HB) regulations making provision for what is known colloquially as "the bedroom tax" or officially as either "the removal of the spare room subsidy scheme" or the "under-occupancy charge". Throughout this decision we refer to these rules more neutrally as the "social housing size criteria".

2. In summary, our conclusion is that the First-tier Tribunal ("the Tribunal") arrived at the correct outcome in this appeal but by the wrong route. The Tribunal sought to avoid a breach of the claimant's Convention rights by reading words into regulation B13(5)(a) of the Housing Benefit Regulations 2006 (SI 2006/213; "the 2006 Regulations") under section 3(1) of the Human Rights Act 1998. It was correctly common ground before us that that interpretative process was not open to the Tribunal, since it went beyond any interpretative reading permitted by section 3(1). Its effect was to give the claimant an entitlement to two bedrooms under regulation B13(5), such that no 14% reduction in his housing benefit entitlement applied. What the Tribunal should have done was to direct the local authority to calculate the claimant's housing benefit entitlement without making a deduction of 14% for under occupancy to avoid an unlawful breach of Mr (or Mrs) Carmichael's Article 14 rights (see paragraph 70 below). The result is the same, namely that no deduction operated.

The parties to this appeal

3. The Appellant in this case is the Secretary of State for Work and Pensions. The Secretary of State, of course, was not the original decision-maker in relation to the claimant's housing benefit entitlement. However, the Secretary of State has the right of appeal to the Upper Tribunal (subject to the grant of permission) in the same way as the original parties (see Child Support, Pensions and Social Security Act 2000, Schedule 7, paragraph 8(2)(a)).

4. The First Respondent is Mr Jayson Carmichael, whose wife Mrs Jacqueline Carmichael is seriously disabled. Mr Carmichael was the appellant in the appeal before the First-tier Tribunal. Mrs Carmichael was one of the applicants in the judicial review proceedings in *R (on the application of Carmichael and Rourke) (formerly known as MA and others) v Secretary of State for Work and Pensions* [2016] UKSC 58 (referred to throughout this decision as *MA and Others*). The housing benefit decision that Mr Carmichael challenged in the present proceedings was taken over four years ago in March 2013.

5. The Second Respondent is Sefton Council, the original decision-maker. The Council has elected (to date at least) to take no active part in this appeal to the Upper Tribunal. We simply record that the Council appears to have acted in a compassionate manner throughout in its dealings with Mr and Mrs Carmichael. Unlike many other local authorities, it also helpfully produced a clear and well-organised written response to Mr Carmichael's original appeal for the purposes of the hearing before the First-tier Tribunal.

6. Strictly the present appeal only concerns Mr Carmichael's appeal against Sefton Council's decision on his housing benefit entitlement. It is, however, effectively the current lead case in a block of some 170 further cases before the Upper Tribunal in England and Wales (some, but not all of which, share similar characteristics and so are known as "*Carmichael* look-alikes"). There are also approximately 40 further such Upper Tribunal cases pending in Scotland. In some, but not all of these Upper Tribunal appeals, the claimants have received discretionary housing payments to help bridge the gap between their rent and their housing benefit entitlement following the application of the social housing size criteria. It is not known how many other cases are pending before the First-tier Tribunal. It follows that the eventual outcome of this particular appeal is likely to have a significant impact on a considerable number of cases.

The living arrangements and the circumstances of Mr and Mrs Carmichael

7. The underlying facts of this case are not in dispute. They are summarised in the Supreme Court's decision in *MA and Others* in the following terms (see paragraph 1 of Appendix 1 to Lord Toulson's judgment):

> "Mrs Carmichael lives with her husband in a two-bedroom flat. She has spina bifida, hydrocephalus, double incontinence, inability to weight bear and recurring pressure sores. Her husband is her full time carer. She needs a special bed with an electronic mattress. She also needs a wheelchair beside the bed. Her husband cannot share the same bed, and there needs to be adequate space for her husband and nurses to attend to her needs. There is not enough space for him to have a separate bed in the same room. Their rent was previously met in full by HB, but this was reduced by 14% under Reg B13. The shortfall is presently covered by an award of DHP."

The social housing size criteria in the housing benefit scheme

8. Part 3 of the 2006 Regulations, namely regulations 11-18A, deals with "payments in respect of a dwelling" as covered by the housing benefit scheme. Over the years these provisions have been amended and repeatedly amended again in furtherance of certain policy objectives, resulting in a somewhat confusing numbering sequence for the regulations. In this section of our decision we set out the statutory framework. In doing so, we refer to the relevant provisions in the 2006 Regulations as they stood at the material time in the circumstances of this case (i.e. at the start of the 2013/14 financial year, the period to which the Council's decision of March 5, 2013 referred).

9. So far as the primary legislation is concerned, section 130(1) of the Social Security Contributions and Benefits Act 1992 provides that a person "is entitled to housing benefit" if certain conditions are satisfied. One of those requirements is that there is an "appropriate maximum housing benefit" in his or her case (section 130(1)(b)). The appropriate maximum housing benefit is to be determined in accordance with regulations (section 130A(2), inserted by section 30(2) of the Welfare Reform Act 2007). In any given case an individual's maximum housing benefit is calculated in accordance with Part 8 of the 2006 Regulations. However, for present purposes the starting point in the secondary legislation is regulation 11(1), which provides that "housing benefit shall be payable" in respect of rent and related payments and that "a claimant's maximum housing benefit shall be calculated … by reference to the amount of his eligible rent determined in accordance with" whichever further regulation is applicable in his or her case. The concept of "eligible rent" is then defined by regulation 12B, unless one of a number of other provisions applies. One such exceptional case is regulation 12BA, which applies in turn "where a maximum rent (social sector) has been, or is to be, determined in accordance with regulation

A13 (when a maximum rent (social sector) is to be determined)" (regulation 12BA(1)). In such a case, subject to various immaterial exceptions, "the amount of a person's eligible rent is the maximum rent (social sector)" (regulation 12BA(2)).

10. Regulation A13, which was first enacted with effect from April 1, 2013, provides, subject again to certain exceptions which do not apply in the present case, that "the relevant authority must determine a maximum rent (social sector) in accordance with regulation B13". In turn, regulation B13 provided at the material date as follows (omitting paragraph (8), a special provision for service families which is not in point for present purposes):

> "(1) The maximum rent (social sector) is determined in accordance with paragraphs (2) to (4).
> (2) The relevant authority must determine a limited rent by –
> (a) determining the amount that the claimant's eligible rent would be in accordance with regulation 12B(2) without applying regulation 12B(4) and (6);
> (b) where the number of bedrooms in the dwelling exceeds the number of bedrooms to which the claimant is entitled in accordance with paragraphs (5) to (7), reducing that amount by the appropriate percentage set out in paragraph (3); and
> (c) where more than one person is liable to make payments in respect of the dwelling, apportioning the amount determined in accordance with sub-paragraphs (a) and (b) between each such person having regard to all the circumstances, in particular, the number of such persons and the proportion of rent paid by each person.
> (3) The appropriate percentage is –
> (a) 14% where the number of bedrooms in the dwelling exceeds by one the number of bedrooms to which the claimant is entitled; and
> (b) 25% where the number of bedrooms in the dwelling exceeds by two or more the number of bedrooms to which the claimant is entitled.
> (4) Where it appears to the relevant authority that in the particular circumstances of any case the limited rent is greater than it is reasonable to meet by way of housing benefit, the maximum rent (social sector) shall be such lesser sum as appears to that authority to be an appropriate rent in that particular case.
> (5) The claimant is entitled to one bedroom for each of the following categories of person whom the relevant authority is satisfied occupies the claimant's dwelling as their home (and each person shall come within the first category only which is applicable) -
> (a) a couple (within the meaning of Part 7 of the Act);
> (b) a person who is not a child;
> (c) two children of the same sex;
> (d) two children who are less than ten years old;
> (e) a child.
> (6) The claimant is entitled to one additional bedroom in any case where -
> (a) the claimant or the claimant's partner is (or each of them is) a person who requires overnight care; or
> (b) the claimant or the claimant's partner is (or each of them is) a qualifying parent or carer.
> (7) The claimant is entitled to two additional bedrooms where paragraph (6)(a) and (b) both apply.
> …."

11. Decision-makers must accordingly determine a claimant's maximum rent (social sector) in line with regulation B13(2)-(4) (see regulation B13(1)). The first step in that process is to determine the individual's "limited rent" by going through the three

stages set out in regulation B13(2). Step 1 (sub-paragraph (2)(a)) is to work out that person's eligible rent, i.e. (in terms approaching plain English) the contractual rent minus any ineligible service charges (see further regulation 12B(2)). Step 2 (sub-paragraph (2)(b)) is, if appropriate, to apply the relevant percentage deduction of 14% or 25% (see sub-paragraph (3)) "where the number of bedrooms in the dwelling exceeds the number of bedrooms *to which the claimant is entitled in accordance with paragraph (5) to (7)"* (emphasis added). Step 3 is to apply apportionment where the claimant shares liability for the rent with another occupier or occupiers (sub-paragraph (2)(c)).

12. The original policy thinking behind regulation B13 and in particular Step 2 in sub-paragraph (2)(b) was summarised by Lord Toulson in the Supreme Court's decision in *MA and Others* (at paragraph 16):

> "In summary, as part of its policy for curbing public expenditure the government aimed to ensure that social sector tenants of working age who were occupying premises with more bedrooms than they required should, wherever possible, move into smaller accommodation. It was recognised at an early stage that a policy based purely on numbers of rooms and occupants would cause problems for some with disabilities, and there was a debate within government and Parliament about how such problems should be addressed. The government initially decided that, rather than creating general exceptions for persons with disabilities (or certain categories of persons with disabilities), their needs should be met as necessary through a scheme of discretionary housing payments based on individual assessments."

13. We interpose here that discretionary housing payments (DHPs) are made under section 69 of the Child Support, Pensions and Social Security Act 2000 and the Discretionary Financial Assistance Regulations 2001 (SI 2001/1167). This is an appropriate place to note that Mr Carmichael has (we are told) received DHPs throughout the period in question and so has not suffered any actual financial loss. We also record the Secretary of State's undertaking that in the event of the Department's appeal succeeding on the jurisdictional point, the Secretary of State will not seek to recoup any payments of housing benefit made to individuals in the *Carmichael* look-alike class (without prejudice to any other ground for recovery which might apply in any individual case) and will send out a circular to local authorities to the same effect. However, we must recognise that in *Burnip v Birmingham City Council* [2012] EWCA Civ 629 ("*Burnip*") the Court of Appeal held that DHPs "cannot come anywhere near providing an adequate justification for the discrimination in cases of the present type" (*per* Henderson J at paragraph 46; see also paragraphs 55 and 64). Lord Toulson in the Supreme Court in *MA and Others* (at paragraph 48) also agreed that DHPs did not justify the differential treatment of children and adults in respect of the same essential need in regulation B13.

14. There is a fuller account of the policy background to the social housing size criteria changes to the housing benefit regime in the judgment of Laws LJ in the judgment of the Divisional Court in *MA and Others* [2013] EWHC 2213 (QB) (at paragraphs 20-33). That passage is included as Appendix 2 to Lord Toulson's judgment in the Supreme Court and so we do not repeat it in full here. However, we do need to refer in more detail to the decision of the Court of Appeal in *Burnip*. This judgment actually dealt with three appeals, *Burnip*, *Gorry* and *Trengove* respectively. For present purposes only *Burnip* and *Gorry* are relevant.

15. In *Burnip* the severely disabled appellant was a private sector tenant who needed a carer present throughout the night and so required a two-bedroom flat. He

received housing benefit adjusted downwards by reference to the one-bedroom rate, which would ordinarily apply to able-bodied tenants, since under the relevant legislation the carer did not qualify as an "occupier" (as the flat was not the carer's home). In *Gorry* the appellant lived with his wife and their three children in a four-bedroom privately rented house. Two of the children, girls aged 10 and 8, were severely disabled, and it was inappropriate for them to share a bedroom in the way in which able-bodied sisters of the same ages would or might be expected to do. The local authority paid housing benefit by reference to the three-bedroom rate (which would apply to the family if the girls were not disabled and could share a bedroom). By the time of the Court of Appeal hearing, the circumstances in *Burnip* were governed by an amendment to the 2006 Regulations which, from April 1, 2011, provided for "one additional bedroom in any case where the claimant or the claimant's partner is a person who requires overnight care (or in any case where both of them are)" – a provision mirrored by regulation B13(6)(a) as regards the social housing size criteria. This amendment did not assist the claimant in *Gorry*.

16. The Court of Appeal in *Burnip* held that where "a group recognised as being in need of protection against discrimination – the severely disabled – is significantly disadvantaged by the application of ostensibly neutral criteria, discrimination is established, subject to justification" (*per* Maurice Kay LJ at paragraph 13). The Court of Appeal held further that the defence of justification failed in these three appeals: "maintenance of the single bedroom rule is not a fair or proportionate response to the discrimination which has been established in cases of the present type" (*per* Henderson J at paragraph 65). In terms of remedy, paragraph 3 of the Order of the Court of Appeal read as follows:

> "The decision in each case is remitted to the First Respondent [*i.e. the relevant council*] in each case to be remade in accordance with the Court of Appeal's judgment. Each Appellant is entitled to have their case reassessed by the First Respondent in each case, and to receive from the First Respondent payment of such further sum (in addition to any discretionary housing payment or other relevant payment already made) as is necessary to comply with this judgment and Article 14 for the period to which the appeal relates."

17. The Court of Appeal's judgment was handed down on May 15, 2012. Shortly afterwards, in July 2012, the Department issued Circular HB/CTB A4/2012 to local authorities. The Circular's main purpose was to explain the introduction of the social housing size criteria with effect from April 1, 2013. However, it also took the opportunity to comment on the consequences of the Court of Appeal's recent judgment:

> "Due to a Court of Appeal judgment in the cases of Burnip, Trengove and Gorry those whose children are said to be unable to share a bedroom because of severe disabilities will be able to claim Housing Benefit for an extra room from the date of the judgment, 15 May 2012. However it will remain for local authorities to assess the individual circumstances of the claimant and their family and decide whether their disabilities are genuinely such that it is inappropriate for the children to be expected to share a room. This will involve considering not only the nature and severity of the disability but also the nature and frequency of care required during the night, and the extent and regularity of the disturbance to the sleep of the child who would normally be required to share the bedroom. This will come down to a matter of judgment on the facts."

18. An abbreviated version of the same statement was contained in a footnote to a draft FAQ document provided for the benefit of local authorities (see Circular HB/CTB A4/2012 p.38).

19. Further guidance was issued to the same effect in Circular HB/CTB A6/2012 (August 2012), which also informed local authorities that the Secretary of State was seeking permission to appeal the Court of Appeal's decision in *Gorry* to the Supreme Court. A subsequent circular (Circular HB/CTB U2/2013, March 2013) advised that the Department's prospective further appeal in *Gorry* was not being pursued and repeated the advice about *Gorry* look-alikes, including the rather curious statement – at least as regards the use of the word 'now' – that "The Court of Appeal judgment is now considered to be **case law** and as such LAs are legally bound to apply the judgment" (at paragraph 10, emphasis as in the original). The Circular further advised that *Carmichael* look-alikes were not affected:

> "8. It should be noted that the judgment does not provide for an extra bedroom in other circumstances, for example, where the claimant is one of a couple who is unable to share a bedroom or where an extra room is required for equipment connected with their disability."

20. We simply observe that the Department's then clear understanding of the position was therefore that (1) *Burnip* look-alikes could claim housing benefit for the "extra bedroom" on the basis of the change in the regulations effective from April 1, 2011; (2) *Gorry* look-alikes could claim housing benefit for the "extra bedroom" on the basis of the Court of Appeal judgment with effect from the date of the judgment hand-down (May 15, 2012); (3) *Carmichael* look-alikes were not affected by, and so could not take advantage of, the Court's decision.

21. The position of *Gorry* look-alikes was subsequently regularised with effect from December 4, 2013 by the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013 (SI 2013/2828). These amended the 2006 Regulations so as to allow an additional bedroom to be allocated under the size criteria where a severely disabled child who would normally be expected to share a bedroom was not reasonably able to do so, owing to their disability. Thus amongst other changes, regulation B13(5) was amended to include the additional category of "(ba) a child who cannot share a bedroom", with a new definition of that expression in the amended regulation 2 (see regulation 2(2)(a) and 2(3)(a) of the amending regulations). These were accompanied by further guidance to local authorities (Circular HB A21/2013), which included the following advice:

> **"Reassessment of cases awarded under previous guidance**
> 19. LAs will now need to review all cases awarded under previous guidance to ascertain whether or not reassessment is required in light of the amended regulations. These use entitlement to the DLA care component at the middle or highest rates to determine whether a child is severely disabled and so potentially eligible for an additional bedroom.
> 20. Upon reassessment it may be found that HB has been awarded for an additional bedroom, but that the child is not severely disabled within the definition provided in the amended legislation. LAs will need to identify these cases and in these cases the LA can consider whether an award of a DHP is appropriate. We would therefore recommend that LAs identify these cases and invite a claim for DHP where this appears appropriate.
> 21. Any HB paid out by an LA from the date of the Gorry judgement to cover the cost of an additional bedroom for a disabled child in accordance with previous guidance will be treated as correctly paid for subsidy purposes."

22. In other words, the Department envisaged that some claimants might not have been subject to a social housing size criteria deduction for an extra bedroom following *Gorry* in the Court of Appeal because the local authority's application of that rule was more generous than that allowed by the amendments effective from December 4, 2013. In such cases housing benefit entitlement would now have to be adjusted downwards and a claim for DHP invited, where appropriate, to bridge the gap.

23. With that digression into the evolution of the social housing size criteria to provide the context for the present proceedings, we return to the sequence of events in Mr Carmichael's own case.

The background to Mr Carmichael's appeal to the First-tier Tribunal

24. Mr and Mrs Carmichael have been in receipt of housing benefit since at least 2002. Following the publicity given to the proposals to introduce the social housing size criteria, the Carmichaels' local councillor enquired on their behalf in September 2012 as to whether their housing benefit entitlement would be reduced as they had a two-bedroom property. The Council's response was that it was "not sure as yet, the details for vulnerable groups haven't been sorted out as yet, advised as soon as the details are known residents and councillors will be informed".

25. On November 27, 2012 the Council sent a letter giving Mr Carmichael advance notice of the changes due to come into force in April 2013. The letter explained that "Housing Benefit records show that your household currently needs 1 bedroom, and that your home has 2 bedrooms. This means that you have 1 more bedroom than your household needs". The letter added that Mr Carmichael would be responsible for meeting the shortfall of £11.68 a week.

26. On March 5, 2013 the Council issued a benefit decision notice stating that Mr Carmichael's gross rent/council tax was £88.21 a week but his eligible rent/council tax for benefit purposes was £75.86 a week. Mr Carmichael lodged an appeal, stating that he and his wife "believe this is an unfair piece of legislation which has disproportionate negative consequences on disabled people and is therefore discriminatory". He also explained that Mrs Carmichael had been granted permission to apply for judicial review (in the proceedings which became *MA and Others*).

27. On June 13, 2013 the Council wrote to Mr Carmichael explaining that it had reconsidered its decision but not changed it. The letter explained:

> "Unfortunately the Housing Benefit Regulations, as they stand, indicate that only one bedroom is allowed for a couple and there is no discretion to allow a further bedroom if one member of the couple, or indeed both members, require their own room. Therefore, whilst I have every sympathy with your current circumstances, I am satisfied that our decision that you are under-occupying your property is correct, based upon the current legislation, and I cannot revise it at this stage as we do not have the power to override that legislation."

28. Mr Carmichael's appeal was listed for hearing before the First-tier Tribunal on February 11, 2014. On January 27, 2014 the Council helpfully wrote to the Tribunal advising that Mrs Carmichael's appeal in the judicial review proceedings was pending before the Court of Appeal. A District Tribunal Judge postponed the Tribunal hearing. The Council subsequently supplied the Tribunal with a copy of the Court of Appeal's judgment in *MA and Others* (handed down on February 21, 2014), which had upheld the Divisional Court's decision to dismiss the claimants' application for judicial review.

Leigh Day, Solicitors, who were now acting for Mr Carmichael, provided the Tribunal with a written submission on his behalf.

The First-tier Tribunal's decision in *Carmichael v Sefton Council*

29. The First-tier Tribunal heard the appeal on April 9, 2014. The Tribunal allowed Mr Carmichael's appeal and set aside the Council's decision of March 5, 2013. The Tribunal's decision notice recorded that, by virtue of section 3(1) of the Human Rights Act 1998, regulation B13(5)(a) of the 2006 Regulations "can and should be read as follows", namely (with the additional words inserted by the Tribunal italicised):

> "(a) a couple (within the meaning of Part 7 of the Act) *or one member of a couple who is unable to share a bedroom because of his or her disability or the disability of the other member of that couple*".

30. Accordingly, the Tribunal concluded that Mr Carmichael was entitled to two bedrooms under regulation B13(5) and so no under-occupancy requirement of 14% was to be made in relation to his housing benefit entitlement. The Tribunal's statement of reasons explained how it had arrived at that decision. We intend to do the Tribunal Judge no injustice when we say that those reasons relied heavily on the analysis advanced by Leigh Day in their written submission on behalf of Mr Carmichael.

31. The Secretary of State applied to the Tribunal for permission to appeal to the Upper Tribunal, arguing that its decision was in error of law as the Tribunal had "failed to apply the binding case law of the Court of Appeal in *MA*." A District Tribunal Judge refused permission to appeal.

A short account of the long drawn-out proceedings before the Upper Tribunal

32. On July 17, 2014 the Secretary of State renewed the application for permission to appeal direct to the Upper Tribunal. On September 11, 2014 an Upper Tribunal registrar stayed the proceedings pending the outcome of *MA and Others* in the Supreme Court. As discussed below, the judgment of the Supreme Court in *MA and Others* was handed down on November 9, 2016. On January 6, 2017 Judge Lloyd-Davies lifted the stay, posing the question as to whether permission to appeal should not be refused given the outcome of the Supreme Court case. In further correspondence the Secretary of State maintained the application for permission to appeal to the Upper Tribunal and raised what has become known in these proceedings as "the jurisdictional point".

33. On February 28, 2017 Mr Justice Charles, Chamber President, granted the Secretary of State permission to appeal and directed a case management hearing. That hearing took place on March 7, 2017, which resulted in further directions for a hearing before a three-judge panel of the Upper Tribunal, which in turn took place on March 28, 2017. The Secretary of State was represented by Mr J Eadie QC and Mr E Brown of Counsel, instructed by the Government Legal Department, while Mr Carmichael was represented by Mr R Drabble QC, instructed by Leigh Day. We are indebted to all counsel for their oral and written submissions and for adhering to what was a fairly tight timetable both before and after the hearing – a strict timetable for which we make no apology, given the lengthy delay that Mr and Mrs Carmichael (and indeed many other people in similar situations) have had to endure.

34. Mr and Mrs Carmichael have, of course, been fighting their battle on at least two fronts. As well as Mr Carmichael's challenge to the Council's housing benefit decision in his case, Mrs Carmichael was party to the wider and parallel judicial review proceedings in relation to the social housing size criteria. Although unsuccessful in

the Divisional Court and the Court of Appeal, her own case prevailed in the Supreme Court, whose judgment we now turn to.

The Supreme Court's decision in *MA and Others*

35. By the time *MA and Others* reached the Supreme Court the proceedings involved appeals from several judicial review decisions involving a total of seven claimants. In outline, the various claimants challenged the lawfulness of regulation B13 on the basis that it was discriminatory on grounds of disability and gender and did not comply with the public sector equality duty. Five of the claimants were unsuccessful in the Supreme Court. The two who succeeded were Mrs Carmichael – who, as we have seen, was unable to share a bedroom with her husband because of her disability – and Mrs Rutherford (the grandparent of a severely disabled child who needed an additional room for his overnight carer).

36. Lord Toulson gave the leading judgment (with which Lord Neuberger, Lord Mance, Lord Sumption and Lord Hughes agreed; Baroness Hale and Lord Carnwath dissented on the gender discrimination case involving sanctuary scheme accommodation but agreed with the majority on all the disability cases). Lord Toulson explained the Supreme Court's reasoning in the Carmichael and Rutherford cases as follows:

> "43. That brings me to the cases of Jacqueline Carmichael and the Rutherford family. They are counterparts to *Gorry* and *Burnip* respectively.
> 44. Mrs Carmichael cannot share a bedroom with her husband because of her disabilities. Her position is directly comparable to that of the Gorry children, who could not share a bedroom because of their disabilities. But Mrs Carmichael is caught by Reg B13 because para (5)(ba), which was introduced to meet the *Gorry* situation is confined to 'a child who cannot share a bedroom'.
> 45. The Rutherfords need a regular overnight carer for their grandson who has severe disabilities. Their position is comparable to that of Mr Burnip, who needed an overnight carer. But the Rutherfords are caught by Reg B13 because para (6)(a), which covers the *Burnip* situation, does not extend to a child who requires overnight care.
> 46. There is no reasonable justification for these differences. The Court of Appeal in *MA* was persuaded (para 79) that there was an objective reasonable justification for treating Mrs Carmichael less favourably than a child in like circumstances, because the best interests of children are a primary consideration. I can see that there may be some respects in which differential treatment of children and adults regarding the occupation of bedrooms may have a sensible explanation. Expecting children to share a bedroom is not the same as expecting adults to do so. But I cannot, with respect, see a sensible reason for distinguishing between adult partners who cannot share a bedroom because of disability and children who cannot do so because of disability. And the same applies also to distinguishing between adults and children in need of an overnight carer.
> 47. There is also an ironic and inexplicable inconsistency in the Secretary of State's approach in the Carmichael and Rutherford cases which Lord Thomas CJ exposed in the latter at para 73:
>
> > 'He [the Secretary of State] justified the distinction between making provision for a bedroom for disabled children but not for disabled adults by reference to the best interests of the child and explained the different treatment on that basis. On that basis, it seems to us very difficult to justify the treatment within the same regulation of carers for

> disabled children and disabled adults, where precisely the opposite result is achieved; provision for the carers of disabled adults but not for the carers of disabled children.'
>
> 48. Lord Thomas CJ added that the court accepted that DHPs were intended to provide the same sum of money, but it was not persuaded that this justified the different treatment of children and adults in respect of the same essential need within the same regulation. I agree.
> 49. I would therefore dismiss the Secretary of State's appeal in the Rutherford case, but I would allow Mrs Carmichael's appeal and would hold that in her case there has been a violation of article 14, taken with article 8. (In these circumstances A1P1 adds nothing and does not require further consideration.)"

The legislative response to *MA and Others*

37. The hearing in *MA and Others* took place on February 29 and March 2 and 3, 2016. As already noted, the judgment of the Supreme Court in *MA and Others* was handed down on November 9, 2016. On the same day the Department for Work and Pensions issued local authorities with a 'Housing Benefit Urgent Bulletin'. This summarised the Supreme Court's judgment in three short paragraphs and then included the following advice to local authorities (which might have been sub-titled 'Carry on as you were'):

> "**Effect of the judgment**
> 4. No immediate action needs to be taken by local authorities (LAs) following this judgment. The Court did not strike down the legislation underpinning the size criteria. As such LAs must continue to apply the rules when determining Housing Benefit claims as they did before today's judgment and the judgment does not require any LA to re-assess the HB of existing claimants. LAs should continue to award DHPs to claimants who they consider require additional financial support.
> 5. The Department is considering the Court's judgment and will take steps to ensure it complies with its terms in due course. The Department will notify LAs once a decision has been taken."

38. The decision of the Supreme Court in *MA and others* dealt with an issue of considerable importance to many vulnerable people and found that they were being treated unlawfully by public authorities. The Department was able to issue the 'Housing Benefit Urgent Bulletin' on the same day as the judgment but it was not until March 2, 2017, and so over three months later, that the Department laid before Parliament the prospective Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017 (SI 2017/213; "the 2017 Regulations"). These amend several sets of regulations with effect from April 1, 2017, including the 2006 Regulations (see regulation 4 of the 2017 Regulations). Those amendments include the addition of two further sub-paragraphs to regulation B13(5), i.e. the provision which defines the categories of person in respect of whom a claimant is 'entitled' to a separate bedroom (see regulation 4(3)(a)(i) of the 2017 Regulations), namely:

> "(za) a member of a couple who cannot share a bedroom;
> (zb) a member of a couple who can share a bedroom;".

39. The other amendments include the insertion of a new paragraph (6) in regulation 2 of the 2006 Regulations (which deals with matters of interpretation; see regulation

4(2)(c) of the 2017 Regulations). This states, perhaps somewhat counter-intuitively but in the best traditions of the dense drafting of social security secondary legislation, that:

> "(6) For the purpose of these Regulations, reference to a member of a couple who can share a bedroom is to a member of a couple where the other member of the couple is a member of a couple who cannot share a bedroom".

40. There are a number of further consequential amendments as well as parallel amendments (albeit differently formulated) to the Universal Credit Regulations 2013 (SI 2013/376) (universal credit being in the process of (slowly) replacing housing benefit for many claimants). This short summary will suffice for the moment but cannot really do full justice to the complex interstitial drafting of the 2017 Regulations.

41. For present purposes it is enough to note the policy explanation provided in the accompanying Explanatory Memorandum to the 2017 Regulations (emphasis as in the original). The first bullet point in this extract relates to the *Rutherford*-type cases and the second to *Carmichael* look-alike cases:

> ***"Policy Change***
> 7.5 To take account of the Supreme Court's judgment in respect of Rutherford and Carmichael type cases, and to ensure disabled children and adults are treated in the same way, we propose to amend the size criteria rules from 1 April 2017 across both the private and social rented sectors, which will allow the relevant authority to provide funding for an extra bedroom (where one is available) when a:
> • disabled child or non-dependant disabled adult requires, and has overnight care from, a non-resident carer. The qualifying test for both Housing Benefit and Universal Credit will be that the child/non-dependant adult is in receipt of middle or higher rate care component of Disability Living Allowance, Attendance Allowance or the daily living component of Personal Independence Payment. For Housing Benefit only, if the qualifying disability benefit criterion is not satisfied, the local authority can still allow an extra bedroom if it has been provided with sufficient evidence that it is satisfied overnight care is required. This effectively mirrors the current provision in the size criteria for adults who require a non-resident overnight carer.
> • couple cannot share a bedroom because of disability. The qualifying test for this will that be that one member of the couple is in receipt of the middle or higher rate care component of Disability Living Allowance, higher rate Attendance Allowance, the daily living component of Personal Independence Payment or armed forces independence payment; **and** the individual cannot reasonably share a bedroom with the other member of the couple because of his/her disabilities. This will effectively mirror the current provision in the size criteria for children who cannot share a bedroom."

42. Finally, before turning to the parties' submissions on the present appeal, we need to refer to the Supreme Court's decision in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 ("*Mathieson*"). That case was not concerned with the social housing size criteria, but formed the main focus of Mr Drabble QC's submissions, resisting the Secretary of State's appeal in the present proceedings.

The Supreme Court's decision in *Mathieson v Secretary of State*

43. The Supreme Court's decision in *Mathieson* featured prominently in each party's submissions as to the appropriate remedy available to the Tribunal below in the present case. We therefore need to deal with it in some detail here. Cameron

Mathieson was a severely disabled young boy in receipt of the highest rate care component and the higher rate mobility component of disability living allowance (DLA) who was admitted to hospital in July 2010, where he subsequently remained for over a year. At the time regulations 8, 10, 12A and 12B of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890, as amended) provided that a person was not entitled to receive DLA for any period during which he was maintained free of charge while undergoing medical or other treatment as an in-patient in an NHS hospital. However, in the case of children aged under 16 in receipt of DLA this restriction did not apply for the first 84 days of their hospital stay. As a result a DWP decision maker made a decision suspending Cameron's DLA with effect from a date in October 2010.

44. Cameron's father appealed against the decision to suspend DLA on the basis that it breached Cameron's right not to be discriminated against under Article 14 of the European Convention on Human Rights, read with the right to peaceful enjoyment of his possessions in article 1 of the First Protocol to the Convention. The First-tier Tribunal, the Upper Tribunal and the Court of Appeal all dismissed the appeal (Cameron sadly died in October 2012, but his father continued with the case). The Supreme Court allowed the appeal in a judgment handed down on July 8, 2015, holding both that Cameron had been discriminated against and there was no objective and reasonable justification for the rule in question.

45. For present purposes the significance of *Mathieson* lies in the issue of remedies. Lord Wilson, giving the leading judgment (with which Baroness Hale, Lord Clarke and Lord Reed agreed) dealt with the issue of disposal as follows:

> *"Answer*
> 48. I conclude therefore that:
> (a) by his decision dated 3 November 2010 to suspend payment of DLA to Cameron, the Secretary of State violated his human rights under article 14 of the Convention when taken with A1P1;
> (b) there is therefore no need to consider whether he also violated Cameron's human rights under article 14 when taken with article 8;
> (c) in that the Secretary of State was not obliged by any provision of primary legislation to suspend the payment, he acted unlawfully in making the decision dated 3 November 2010: section 6(1) and (2) of the Human Rights Act 1998 ("the 1998 Act");
> (d) accordingly the First-tier Tribunal should have allowed Cameron's appeal against that decision; should have set it aside; and, if only for the sake of clarity, should have substituted a decision that Cameron was entitled to continued payment of DLA with effect from 6 October 2010 to the date from which payment of it was reinstated; and
> (e) this court should allow Cameron's appeal and make the orders at (d) which the First-tier Tribunal should have made.
> 49. Mr Mathieson seeks further relief which the Secretary of State energetically opposes. First, he seeks a formal declaration that the Secretary of State violated Cameron's human rights. The First-tier Tribunal had no power to make a formal declaration and it appears that, by virtue of sections 12(4) and 14(4) of the Tribunals, Courts and Enforcement Act 2007, the jurisdiction of the Upper Tribunal and of the Court of Appeal in relation to Mr Mathieson successive appeals was no wider than that of the First-tier Tribunal. It may well be that this court is not similarly confined but a formal declaration would seem to add nothing to the conclusions articulated in (a) and (c) of para 48 above. Second, more controversially, Mr Mathieson asks this court to discharge its interpretative obligation under section 3 of the 1998 Act by somehow reading the provisions

> for suspension of payment of DLA in regulations 8(1) and 12A(1) of the 1991 Regulations so as not to apply to children. In my view however it is impossible to read them in that way. Anyway, as the Secretary of State points out, it may not always follow that the suspension of payment of a child's DLA following his 84th day in hospital will violate his human rights. Decisions founded on human rights are essentially individual; and my judgment is an attempted analysis of Cameron's rights, undertaken in the light, among other things, of the extent of the care given to him by Mr and Mrs Mathieson at Alder Hey. Although the court's decision will no doubt enable many other disabled children to establish an equal entitlement, the Secretary of State must at any rate be afforded the opportunity to consider whether there are adjustments, otherwise than in the form of abrogation of the provisions for suspension, by which he can avoid violation of the rights of disabled children following their 84th day in hospital."

46. Lord Mance, who delivered a concurring judgment (with which Lord Clarke and Lord Reed agreed), dealt with disposal in the following terms:

> "61. With regard to the appropriate remedy to give effect to these conclusions, I agree that this should be tailor-made and limited to Cameron's particular position, by simply deciding that the decision in his case cannot stand and that he was entitled to continued payment of DLA after 84 days. The Secretary of State may be able to refine the criteria for the receipt or cessation of DLA in other cases in a manner which avoids the inequity involved in its withdrawal in respect of those in Cameron's position. We cannot address in general declaratory terms the position of children receiving DLA and hospitalised for longer than 84 days, as Mr Mathieson invites us to do."

47**.** At this juncture we just make three observations about *Mathieson*.

48. The first (in the context of Lord Mance's closing comment) is that *Mathieson* was a statutory appeal within the social security adjudication machinery, and not an application for judicial review.

49. The second is that the Government subsequently brought forward amending regulations (the Social Security (Disability Living Allowance and Personal Independence Payment) (Amendment) Regulations 2016 (SI 2016/556)), which repealed the 84-day DLA hospitalisation rule for children aged under 16 with effect from June 29, 2016, and indeed extended the benefit of that repeal to all young people under the age of 18.

50. The third is that the DWP advice to decision-makers which accompanied the 2016 amendments (*DLA – Amendment to the hospitalisation rule for claimants who enter hospital under the age of 18*, Memo DMG 14/16) gave the following guidance at paragraph 5:

> "The Supreme Court judgment was handed down on 8.7.15 and therefore from that date until the date at which the Regulations come in to force (29.6.16) the same principles as outlined in this memo apply over the course of that period.
>
> The Supreme Court judgment is a "relevant determination" as it changed a previously held interpretation of the law. Where
>
> - an application is made for a supersession decision relating to entitlement to DLA **and**

- a decision on that application falls to be made in accordance with the relevant determination

then the effective date of that supersession will be the date of the "relevant determination (8.7.15)".

51. That approach to the effect of the Supreme Court's decision was consistent with the guidance of the Department in relation to the effect of the judgment of the Court of Appeal in *Burnip* in relation to *Gorry* look-alikes. In plain English, the DWP were working on the assumption that where the courts found a provision in secondary legislation to be in breach of a person's Convention rights, then from the date of that judgment cases had to be determined in the light of that court ruling even if it took a while for Parliament to catch up and amend the regulations so as to make them ECHR-compliant. We recognise that such guidance is just that, departmental guidance as to what the law is understood to be, and not an authoritative statement of the law itself.

The submissions on behalf of the Secretary of State

52. It is entirely possible, of course, that the Secretary of State's guidance both to his own decision makers and to local authorities as to the consequential treatment of other look-alike cases in the wake of the courts' decisions in *Mathieson* and *Burnip* (which gave immediate effect to the decisions of the court that the reduction in benefit being paid to individual claimants resulted in a breach of their Convention rights) has been both consistent and consistently wrong. Indeed, that is, in short, a necessary corollary of Mr Eadie QC's submissions on behalf of the Secretary of State in the present proceedings. They may be none the worse for that.

53. The Secretary of State's starting point in this appeal was that Sefton Council had correctly applied the social housing size criteria in regulation B13 of the 2006 Regulations as they stood at the material time. Mr Eadie acknowledged that the Supreme Court had ruled that the application of that provision in the circumstances of Mr Carmichael's case had resulted in unlawful discrimination under the ECHR. He noted that in this particular case the consequential reduction in housing benefit had in fact been met by DHPs. He further argued that Mr Carmichael's entitlement under the statutory housing benefit regime had only changed from one bedroom to two bedrooms with effect from April 1, 2017, and so no 14% reduction would apply from that date. The sole issue in the present proceedings, in Mr Eadie's submission, was whether the Tribunal – having found that there was unlawful discrimination – was "obliged to apply the HB Regulations as enacted or was it entitled to allow the appeal and remake the decision providing by way of remedy for a payment of sums not provided for in the legislation" (Appellant's skeleton argument at §6). Put more broadly, the jurisdictional or constitutional issue "is whether statutory tribunals have the jurisdiction to develop bespoke solutions to Convention violations (discrimination or otherwise) on a case by case basis and make decisions as to payment of public monies accordingly" (skeleton argument at §7).

54. Mr Eadie invited us to conclude that the answer to the latter question was in the negative:

> "The Secretary of State's position is the jurisdiction of statutory tribunals does not extend this far. The tribunals, which are creatures of statute, have no inherent powers. Nor are they provided with such a power by the Human Rights Act 1998 ("HRA"). The tribunals are required to apply the legislation enacted by the legislature. If, in a case such as *Carmichael,* legislation is found to lead to a Convention violation, the decision and method of remedying that violation is one for the legislature only. Such an outcome respects ordinary and established

constitutional boundaries as identified in a series of House of Lords and Supreme Court decisions" (skeleton argument at §8).

55. Thus Mr Eadie's submission was that the only permissible way of rectifying the incompatibility with Convention rights that had been identified by the declaration of the Supreme Court in *MA and Others* was by way of amendments to the statutory scheme. The Secretary of State and Parliament were faced with a number of possible options – levelling up, levelling down or something in between – which were quintessentially matters for the executive to formulate and the legislature to enact. The scheme of the Human Rights Act 1998 provided an exhaustive framework for dealing with cases where legislation involved a breach of an individual's Convention rights. In particular, where a person had suffered financial loss, then a court (in England and Wales, the High Court or the county court), and only a court, could award damages under section 8(2) of the 1998 Act, according to ECHR principles of just satisfaction. On being pressed on this point in the course of oral argument, Mr Eadie accepted that the Secretary of State's position was that during the interregnum – the period in between a Court identifying a breach of Convention rights by the operation of secondary legislation (such as regulation B13) and Parliament taking steps to rectify that incompatibility – then ultimately a claimant's only recourse to make good the consequential financial loss (in the absence of full recovery through arrangements such as the DHP scheme) was to bring civil proceedings in a court for damages under section 8(2) of the 1998 Act. Mr Eadie had the good grace to accept that this might not appear to be a particularly attractive argument, given the funding complications. Save to the extent that it cannot award damages, he also accepted that his argument was not based on the limited statutory jurisdiction of a tribunal and so that it would also apply to the High Court (with the qualification that it could award damages under section 8(2)).

The submissions on behalf of Mr Carmichael

56. Mr Drabble QC did not seek to support the "reading in" methodology adopted by the Tribunal in the present case. His central submission was that the analysis of Lord Wilson in paragraph 48 of his judgment in *Mathieson* could be applied in the same way to the operation of regulation B13 in the context of Mr Carmichael's appeal. Mr Drabble argued that the lawful starting point in the latter case was the requirement in regulation B13(2)(a) to identify the eligible rent. The problem came with the statutory directive to make a reduction under regulation B13(2)(b), as the Supreme Court's decision in *MA and Others* made it plain that a decision to make such a reduction in circumstances such as the Carmichaels was necessarily unlawful – as the application of the social housing size criteria in regulation B13(5)-(7), where a couple could not share a bedroom because of disability, unlawfully discriminated against them on grounds of disability. There was no obligation in the primary legislation to make such a reduction; rather, the requirement was contained in the secondary legislation. However, *Mathieson* demonstrated that in such circumstances the Tribunal should allow the appeal, set aside the offending decision by the initial decision-maker and substitute a decision that the claimant was entitled to the continued payment of benefit at a rate unaffected by the action which would otherwise be a breach of the claimant's Convention rights. Thus, Mr Drabble concluded in his skeleton argument, "where delegated legislation proceeds by requiring the lawful calculation of an amount – here, the eligible rent – and appears to mandate an unlawful deduction from that amount, it is the duty of both the original decision-maker and the FTT on appeal not to make the deduction and to award benefit at the full rate" (First Respondent's skeleton argument at §9). As a result, he further contended, it was unnecessary to engage with the broader constitutional or jurisdictional arguments advanced on behalf of the Secretary of State.

The Upper Tribunal's analysis

57. We begin with some first principles underpinning the Human Rights Act 1998. The starting point is that both primary and secondary legislation must be read and given effect to in a way which is compatible with Convention rights (section 3(1)). The courts (and tribunals) have no power to disapply or strike down an incompatible provision in primary legislation (section 3(2)(b)). If primary legislation is not compatible with Convention rights, the only potential remedy (and one only available in certain courts) is a declaration of incompatibility (section 4). Incompatible provisions in secondary legislation must also be given effect if the parent statute prevents the removal of the incompatibility (section 3(2)(c)). Applying those principles, regulation B13 is neither contained in primary legislation nor mandated by primary legislation. The Supreme Court's decision in *MA and Others* also shows that regulation B13 cannot be read or given effect to in a way which is compatible with Mr Carmichael's Convention rights on the facts of his case.

58. So what happens when secondary legislation leads to a Convention breach in circumstances where the parent statute does not mandate the incompatibility? The 1998 Act does not directly answer that question. However, it is unlawful for a public authority – which includes a court or tribunal (see section 6(3)(a)) – to act in a way that is incompatible with an individual's Convention rights (section 6(1)). That principle does not apply if "the authority could not have acted differently" because of a provision in primary legislation (section 6(2)(a)). It is also inapplicable if provisions in or made under primary legislation cannot be read in such a way as to be ECHR-compliant and the authority acts so as to give effect to those provisions (section 6(2)(b)).

59. Mr Eadie's central submission is that in a case such as this, where secondary legislation cannot be interpreted compatibly with Convention rights, and the incompatibility is not the inevitable consequence of primary legislation, then the benefit claimant's only remedy (pending legislative change) is an action for damages in a court under section 8(2) of the 1998 Act. Put another way, someone in Mr Carmichael's situation is stuck with the unlawful consequences of secondary legislation which breaches his Convention rights until such time as Parliament gets round to fixing the incompatibility. We do not accept that the fact that Mr Carmichael has actually been paid DHPs is any answer, for the reasons identified by the Court of Appeal in *Burnip* and the Supreme Court in *MA and Others* (see paragraph 13 above). In effect, Mr Eadie is asking us to accept that a member of the public cannot get an effective remedy on human rights grounds in the First-tier Tribunal. If so, that would be truly remarkable. We do not agree with his central submission for two main reasons.

60. The first is that in our judgment Mr Eadie's approach fails to give sufficient effect to two important provisions in the 1998 Act. The first, as already noted, is that a tribunal must not act in a way which is incompatible with a Convention right (section 6(1) – and neither exception in section 6(2) applies in such a case). The second is that a claimant has the right to "rely on the Convention right or rights concerned in any legal proceedings" (section 7(1)(b) of the 1998 Act). In practice that right would be rendered wholly ineffective and illusory if an individual in Mr Carmichael's position (or a claimant affected by the same rule but without the benefit of DHPs) then had to bring a separate civil claim in the courts for damages.

61. The second reason is that such an approach is inconsistent with the decision of the House of Lords in *Chief Adjudication Officer v Foster* [1993] AC 754 ("*Foster*"), which is authority for the proposition that the specialist tribunal structure is empowered to provide an effective remedy where secondary legislation is *ultra vires*.

In our judgment the analogy is close enough with the case here, where secondary legislation is incompatible with a person's Convention's rights. As Lord Bridge of Harwich explained at 766H:

> "My conclusion is that the Commissioners have undoubted jurisdiction to determine any challenge to the *vires* of a provision in regulations made by the Secretary of State as being beyond the scope of the enabling power whenever it is necessary to do so in determining whether a decision under appeal was erroneous in point of law. I am pleased to reach that conclusion for two reasons. First, it avoids a cumbrous duplicity of proceedings which could only add to the already over-burdened list of applications for judicial review awaiting determination by the Divisional Court. Secondly, it is, in my view, highly desirable that when the Court of Appeal, or indeed your Lordships House, are called upon to determine an issue of the kind in question they should have the benefit of the views upon it of one or more of the Commissioners, who have great expertise in this somewhat esoteric area of the law."

62. So what is the answer to the question posed at the beginning of paragraph 58 above? We conclude that in such cases, and in the light of *Mathieson* and similar authorities discussed below, courts and tribunals ultimately have the power to determine and so order or direct that to the extent that subordinate legislation is incompatible with a person's Convention rights it should not be given effect to in determining the person's lawful entitlement, or should be otherwise applied or disapplied in a way that does not breach the person's Convention rights. In our judgment that is a "relief or remedy" which a court or tribunal may make "within its powers as it considers just and appropriate" under section 8(1) of the 1998 Act. Indeed, an analogous power exists at common law, predating the 1998 Act (see *R v Lord Chancellor ex parte Witham* [1998] 2 WLR 849). For a court, especially one exercising the discretionary judicial review jurisdiction, it may be sufficient to make a declaration to the effect that the individual's rights have been breached. Statutory tribunals, however, are charged with making an actual decision on a person's lawful benefit entitlement.

63. The analysis above takes us to *Mathieson*. We consider the significance of that decision in the present context, and in particular Lord Wilson's concluding observations (or 'answer') as to the appropriate remedy in those proceedings (at paragraphs 48 and 49 of the Supreme Court's judgment). If Mr Drabble's reliance on this passage is misplaced, then his resistance to the Secretary of State's appeal necessarily crumbles. Mr Drabble especially prayed in aid paragraph 48(c), where Lord Wilson ruled as follows: "in that the Secretary of State was not obliged by any provision of primary legislation to suspend the payment, he acted unlawfully in making the decision dated 3 November 2010: section 6(1) and (2) of the Human Rights Act 1998." Mr Drabble submitted there was no material difference between *Mathieson* and the present case. Accordingly, transposed to the current context, the ruling would read along the lines of "in that the *local authority* was not obliged by any provision of primary legislation *to reduce the amount of Mr Carmichael's housing benefit*, it acted unlawfully in making the decision dated *March 5, 2013*: section 6(1) and (2) of the Human Rights Act 1998." As such, it followed that the Tribunal had correctly allowed the appeal and set aside the Council's decision. Accordingly, "if only for the sake of clarity", the Tribunal should have substituted a decision to the effect that Mr Carmichael was entitled to continued payment of housing benefit without a 14% deduction under regulation B13(2)(b) and (3).

64. Put another way, Mr Drabble argued, the question posed by Lord Wilson in paragraph 48 was this: what sum by way of benefit the claimant should receive in

such circumstances? The answer was the full amount of benefit unaffected by the rule which involved a breach of that person's Convention rights (the suspension in *Mathieson* and the reduction in *Carmichael*).

65. We agree with Mr Drabble's analysis. It seems to us as regards the issue of the appropriate remedy that there is no material distinction between the present case and *Mathieson*. We remind ourselves that this is a statutory appeal under the social security adjudication and appeals machinery, just as was *Mathieson*, in which Mr Carmichael was seeking to establish the correct level of his lawful entitlement to housing benefit. In taking such action, and as noted above, he had every right to rely on his Convention rights in any legal proceedings (section 7(1)(b)). It is difficult to see how he can be said to be able to "rely on the Convention right" not to be discriminated against on disability grounds if, having won his statutory appeal, he then has to pursue a separate cause of action for damages in the civil courts under section 8 of the 1998 Act. We do not think that could have been Parliament's intention when framing the 1998 Act.

66. We also accept Mr Drabble's submission that *Mathieson* is not a "one-off" but rather reflects a consistent line of authority. It has long been established that the statutory authorities (as the social security appellate machinery was once called) have the jurisdiction to decide legal issues relevant to issues of both entitlement and the quantification of a successful claim for benefit. We have already referred to *Foster*. Mr Drabble also referred us to *R (on the application of Quila) v Secretary of State for the Home Department* [2011] UKSC 45 (*per* Lady Hale at paragraph 61) and *Humphreys v Her Majesty's Revenue and Customs* [2012] UKSC 18 (*per* Lady Hale at paragraph 34). Another (and perhaps a simpler) analogy is with *In re P and Others* [2008] UKHL 38, a challenge to Northern Ireland secondary legislation which stipulated that an application for an adoption order could only be made by more than one person if the applicants were a married couple. Allowing the (unmarried) prospective adopters' appeal, Lord Hoffmann held as follows:

> "38. It follows, my Lords, that the House is free to give, in the interpretation of the 1998 Act, what it considers to be a principled and rational interpretation to the concept of discrimination on grounds of marital status. For the reasons I have given earlier, I would declare that notwithstanding article 14 of the Order, the appellants are entitled to apply to adopt the child. I say nothing about the conditions which their relationship should satisfy in order to justify the court in making an adoption order, since this is a matter for the court when it considers the interests of the child under article 9. Nor do I say that the fact that they are not married may not be relevant to that question. The House should in my opinion say only that it is unlawful for the Family Division to reject the applicants as prospective adoptive parents on the ground only that they are not married."

67. By the same token, in the present case the Tribunal should have concluded that notwithstanding regulation B13(2)(b) and (3), Mr Carmichael was entitled to payment of housing benefit without the 14% deduction. Whatever other criteria fell to be satisfied under the 2006 Regulations, it was unlawful of the Council to apply the reduction to Mr Carmichael's claim on the ground only that the legislation made no provision for separate bedrooms for the couple in circumstances where that involved a breach of their Convention rights, that provision being discriminatory in that the rules did not properly reflect the medical needs of a seriously disabled person.

68. We now turn to consider Mr Eadie's principal submissions as to why we should reject what he described as the "seductive simplicity" of Mr Drabble's analysis (as set out above).

69. First, Mr Eadie argued *Mathieson* was a case in which the Convention incompatibility turned on the particular facts of the individual case; there would be other cases of children undergoing long-term hospital stays where the operation of the DLA 84-day rule would not involve a breach of the child's Convention rights, and so the hospitalisation rule in secondary legislation could remain in place, leading the Supreme Court to create an individualised solution in Cameron's case. We do not regard this as a material distinction. There will be very many cases – indeed, the great majority of cases – where the statutory assumption underpinning regulation B13(5)(a) that a couple need (or are "entitled to") only one bedroom will be entirely reasonable and not come within a country mile of a potential breach of one or both members' Convention rights. The rule stays in force for all those cases and Mr Carmichael's case falls to be decided by reference to its particular facts.

70. Second, whereas the incompatibility problem identified in *Mathieson* could be addressed by an individualised solution in Cameron's case (see Lord Wilson's judgment at paragraph 48), Mr Eadie submitted that the Convention breach in Mr Carmichael's case could only be resolved by an appropriate legislative amendment. Such an amendment would bring in new criteria to extend a claimant's entitlement to an extra bedroom in carefully defined cases (as indeed the Secretary of State has effected through the complex amendments in force from April 1, 2017: see paragraphs 37-41 above). We do not accept this. For the reasons set out above, it is perfectly possible to arrive at an ECHR-compliant solution in this particular case and on these facts. One way of framing such a solution is to adopt the approach used in *Mathieson*. On that basis both the original decision-maker and the Tribunal should have awarded housing benefit at the full rate based on Mr Carmichael's eligible rent. In doing so, any provision which had the effect of reducing his eligible rent contrary to his Convention rights could be of no application in the light of the Supreme Court's decision in *MA and Others*. An alternative solution, but arriving at the same end point, was in terms specifically to disapply regulation B13(2)(b) and B13(3).

71. Either solution works in the context of the particular facts of this case, in which Mr and Mrs Carmichael rent a two-bedroom flat and are recognised as being 'entitled' to two bedrooms under regulation B13 if their Convention rights are to be properly respected. What if Mr and Mrs Carmichael had occupied a three-bedroom flat (and so, even on an approach that ensured compatibility, there would still have been one "excess" bedroom)? This possibility was raised at the hearing and subsequently addressed by the Secretary of State in a supplementary note. Such a hypothetical scenario is not the case before us, but we consider that an appropriate remedial solution could also be crafted in such a case. The preferred solution would be a direction in terms similar to that in *Mathieson*, which did not involve any express disapplication. If, which we do not consider is necessary, disapplication is required,

then an appropriate remedy on such facts would be to disapply virtually the entirety of regulation B13(3), so that it read simply "(3) The appropriate percentage is – (a) 14%." An alternative solution on such facts might be to disapply regulation B13(5)(a), so that each adult qualified for a bedroom under sub-paragraph (b).

72. Third, Mr Eadie placed great emphasis on the proper constitutional division of responsibilities, namely that where an incompatibility has been identified in social legislation of this type the Secretary of State should have the opportunity to consider how to reshape the statutory scheme and then put his proposals to Parliament. It was constitutionally impermissible for a decision-maker or tribunal to "create an entitlement on different conditions to that set out in the legislative scheme". Were it so, the result would be "a patchwork of benefit provision, whereby the regulations enacted by the legislature are no more than a starting point from which individual decision-makers can then create new and novel entitlements to payment to meet the facts of any given case, free from legislative scrutiny" (Appellant's skeleton argument at §40). In doing so Mr Eadie took us to Lord Wilson's further observation at paragraph 49 of the judgment in *Mathieson*: "Although the court's decision will no doubt enable many other disabled children to establish an equal entitlement, the Secretary of State must at any rate be afforded the opportunity to consider whether there are adjustments, otherwise than in the form of abrogation of the provisions for suspension, by which he can avoid violation of the rights of disabled children following their 84th day in hospital." In the same vein, Mr Eadie referred us to similar passages in the judgments of Lady Hale in *Humphreys v HMRC* (at paragraph 34) and in the benefit cap case *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 (at paragraph 231): "it is obvious that there is sufficient flexibility in the statutory scheme to enable appropriate solutions to be crafted. It is not for this court to suggest any particular way in which the problem might be solved."

73. In our view, this submission ignores the distinction between (i) devising an appropriate lawful remedy on the facts of the given individual case to dispose of that appeal where an ECHR-incompatibility is identified (a job for the Tribunal before which an individual can rely on his or her Convention rights) and (ii) developing through the policy process a legislative solution that can be applied across the board in similar cases (a task for Parliament on the advice of the Secretary of State). Looked at in that way, we concur with Mr Drabble's contention there is no conflict between paragraphs 48 and 49 of Lord Wilson's judgment in *Mathieson*. Very simply paragraph 48 addressed problem (i), while the final sentence of paragraph 49 concerned problem (ii). We do not consider the passages cited from either *Humphreys* or *R (on the application of SG)* advance Mr Eadie's argument. *Humphreys* was a statutory appeal in which primary legislation acted as a bar on the only sensible alternative solution (splitting child tax credit between the separated parents) and the benefit had already been paid to the other parent for the relevant period, with no means of recoupment. *R (on the application of SG)* was an application for judicial review and so any remedy, if appropriate, would be subject to the restrictive criteria of that jurisdiction.

74. Nor are we persuaded that there is any risk that a random patchwork of benefit provision will somehow spring up, generated by rogue decision-makers or tribunals. As we have seen, the housing benefit scheme is a highly regulated regime in which the Secretary of State supplements the legislation with 'soft law' guidance to decision-makers, and local authorities also have wide powers to suspend the payment of benefit (Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 (SI 2001/1002), regulation 11). There are, furthermore, extensive powers both to postpone making decisions in look-alike cases and to

restrict entitlement in look-alike cases following the outcome of test cases (Child Support, Pensions and Social Security Act 2000, Schedule 7, paragraphs 16 and 18).

75. In conclusion, we remind ourselves of Baroness Hale's observation in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2 (at paragraph 41) to the effect that one of the facts of tribunal life is that:

> "the benefits system exists to pay benefits to those who are entitled to them. As counsel put it to us in *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 1 WLR 967, the system is there to ensure, so far as it can, that everyone receives what they are entitled to, neither more nor less."

76. If Mr Eadie is right in his submissions, then at the time his appeal was considered by the First-tier Tribunal what Mr Carmichael was "entitled to, neither more nor less" was a sum in housing benefit that was subject to the 14% deduction under the relevant social housing space criteria, given the strict operation of regulation B13(5) – and even though the Supreme Court has subsequently held that such a reduction involved a breach of his Convention rights. That approach – which effectively means ignoring a person's Convention rights – seems to us to be a curious reading of the concept of being "entitled to" a certain level of benefit. The question for us is whether that is indeed right, and the Tribunal was bound to continue applying the non-compliant aspect of regulation B13 until April 1, 2017 as that was "[as] far as it can" the only way in which it could ensure Mr Carmichael received what he was entitled to. In our view, for the reasons set out above, the law does not require such an unsatisfactory state of affairs.

Conclusion

77. For all these reasons, the First-tier Tribunal reached the right conclusion by the wrong route. Its decision involves an error of law. We could leave its decision intact, given it arrived at the correct outcome. However, in the light of the wider repercussions of this case we consider that we should exercise our discretion to set aside the Tribunal's decision and to re-make it in the terms as set out at the head of these reasons. We therefore nominally allow the Secretary of State's appeal to the Upper Tribunal but re-make the First-tier Tribunal's decision to the same effect, namely that Mr Carmichael's appeal against Sefton Council's decision of March 5, 2013 succeeds (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a) and 12(2)(b)(ii)).

Signed on the original
on 27 April 2017

Mr Justice Charles
Chamber President

Judge Lloyd-Davies
Judge of the Upper Tribunal

Judge Wikeley
Judge of the Upper Tribunal