[2019] AACR 27

(The Secretary of State for Work and Pensions v Rachel Hockley and Nuneaton and Bedworth Borough Council) [2019] EWCA Civ 1080

Longmore LJ **CH/1987/2016**
Hickinbottom LJ
Nicola Davies LJ
24 June 2019

Housing Benefit – meaning of "bedroom" in Regulation B13 of the Housing Benefit Regulations 2006 – whether assessment requires authority to take into account how bedroom would be used by particular family unit

The claimant lives with her husband and their two sons in a property described in the tenancy agreement as having three bedrooms. Two of the bedrooms are small and awkwardly shaped. Originally, the family's housing benefit (HB) covered their whole rent. The local authority, applying regulation B13, decided they had one excess bedroom and reduced their HB by £740 per year. The claimant successfully appealed to the First-tier Tribunal (F-tT). A three-judge panel of the Upper Tribunal set aside the F-tT's decision and held that the regulation B13 assessment required the characteristics of the category of persons to the considered. The Secretary of State appealed to the Court of Appeal.

Held, allowing the appeal, that:

1. "bedroom" is an ordinary word which is neither defined nor qualified in the regulations. The word has to be construed and applied in its context having regard to the underlying principle of the legislation, which is to limit HB entitlement to those occupying social housing. The language of the regulations demonstrates that the criteria identified as limiting such benefit is the entitlement of a tenant to a bedroom for persons listed in subparagraphs (5) and (6). Such an assessment is an objective one (paragraph 38);

2. pursuant to regulation B13(5), the word "bedroom" should be interpreted as meaning a room capable of being used as a "bedroom" by any of the listed categories and not a room capable of being used as a "bedroom" by a particular claimant (paragraph 41).

The Court of Appeal quashed the decision of the Upper Tribunal and, applying regulation B13, decided that the claimant is entitled to a two-bedroomed property.

DECISION OF THE COURT OF APPEAL

Edward Brown (instructed by Government Legal Department) for the Appellant

Tom Royston (instructed by Child Poverty Action Group) for the First Respondent

Alison Meacher (instructed by Nuneaton and Bedworth Borough Council) for the Second Respondent

Approved Judgment

Lady Justice Nicola Davies:

1. The appeal, brought by the Secretary of State for Work and Pensions in respect of a decision of the Upper Tribunal ("UT"), concerns the interpretation of regulation B13 of the

Housing Benefit Regulations 2006 (as amended). Regulation B13 was introduced with effect from 1 April 2013 by way of amendment of the 2006 Regulations by the Housing Benefit (Amendment) Regulations 2012 (SI 2012/3040) as further amended by the Housing Benefit (Amendment) Regulations 2013 (SI 2013/665). It introduced into social sector housing a cap on housing benefit ("HB") in cases of deemed under occupancy. It did so by applying what has been described as the size or bedroom criteria set out in regulation B13.

2. The issue for consideration in this appeal is: what is a "bedroom" for the purpose of regulation B13(5)? The size criteria pursuant to B13(5) entitle an HB claimant to "one bedroom for each of the following categories of person" in occupation of the property. The categories are listed (a) to (e) as at the relevant time of the first respondent's determination.

Regulation B13

3. Regulation B13 of the regulations:

> "Determination of a maximum rent (social sector)
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> B13. (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 paragraph (5), reducing that amount by the appropriate percentage set out in paragraph (3); and
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> (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—
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> (a) 14% where the number of bedrooms in the dwelling exceeds by one the number of bedrooms to which the claimant is entitled; and
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> (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)—
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> (a) a couple (within the meaning of Part 7 of the Act);
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> (b) a person who is not a child;
>
> (c) two children of the same sex;
>
> (d) two children who are less than 10 years old;
>
> (e) a child,

and 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 each of them is)."

4. Subsequent to the decisions in *R (Carmichael & Others) v Secretary of State for Work and Pensions* [2016] UKSC 58 ("*Carmichael*") and *Burnip v Birmingham City Council* [2012] EWCA Civ 629 [2013] AACR 7 further categories have been added to B13(5)(a) to (e) to reflect the findings of the courts, however they postdate the relevant determination in this appeal.

5. The interpretation of regulation B13 is the subject of two contradictory three judge decisions of the UT. The first is the Scottish case of *Secretary of Work and Pensions v David Nelson and Fife Council and James Nelson and Fife Council* [2014] UKUT 0525 (AAC) ("*Nelson*") comprising inter alios Charles J, the Chamber President. The second being the UT decision in this case [2017] UKUT 471 (AAC). There is a further decision, that of the Inner House of the Court of Session, *Secretary of State for Work and Pensions v City of Glasgow Council and IB* [2017] CSIH 35 ("*IB*").

Social policy background

6. HB claimants living in the social rented sector previously had no restrictions placed upon the size of the accommodation occupied. The introduction of size criteria for HB claimants living in the social rented sector was intended to replicate or at least reflect the size criteria applicable to HB claimants in the private rented sector. It applies only to working age HB claimants. Its stated purpose is to contain HB expenditure, encourage greater mobility within the social rented sector, make better use of available social housing stock and improve work-incentives for working age claimants. It was intended to provide a mechanism through which there would be a greater incentive to make the most efficient use of available social housing by ensuring a better match between housing need and the accommodation provided to a tenant.

The facts

7. The first respondent ("RH") lives with her husband and their two sons (born in December 2004 and December 2006) at 51 Wisteria Way, Nuneaton ("the property"). The property is described in the tenancy agreement as having three bedrooms, however bedrooms two and three are small and awkwardly shaped. The landlord permits a maximum of four

occupants. The First-tier Tribunal (F-tT) found that the two small rooms are not capable of sleeping two people, even children. RH and her husband sleep in the double room, one boy sleeps in each of the small rooms. There is no spare room. RH works, her husband had to give up work in 2007 on the grounds of ill health. The family income is sufficiently low so as to entitle them to support with their housing costs through HB.

8. Originally the family's eligible maximum rent at the property was their whole rent. From April 2013 Regulation B13 was applied to them. The local authority decided they had one excess bedroom and reduced their eligible maximum rent and thus their HB by £740 per year. Following the reduction RH applied to the local authority for a discretionary housing payment ("DHP") to meet the shortfall between rent and HB. Her application was refused. Following her successful appeal to the UT in 2017 RH was granted a DHP for the duration of this appeal.

The decision of the Upper Tribunal

9. The UT identified the relevant issue, described as the "connection issue", as being: "Is a room in a dwelling classified without reference to the particular individual or class of individual who may occupy it or must the room in question be one that can be used as a bedroom by the actual occupants or class of occupants?" The UT regarded the connection issue as being distinct from what it described as the "classification issue", namely whether the room could be used as a bedroom at all.

10. The UT analysed regulation B13 as follows:

> "9. The regulation operates to reduce the amount of the claimant's otherwise eligible rent by reference to the number of bedrooms in excess of the claimant's entitlement. Paragraph (5) provides that that entitlement depends on 'the categories of person' occupying the dwelling as their home. That depersonalises the assessment so that the characteristics of the actual individuals concerned are irrelevant. The first task in applying paragraph (5), therefore, is to identify the individuals who occupy the dwelling as their home and then to place them into the categories listed. That was not in dispute.
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> 10. The argument for the Secretary of State and the local authority was that the next task is to identify the number of bedrooms in the dwelling without reference to the categories of person who would have to occupy them. …
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> …
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> 12. … First, to us that is not the natural meaning of the language of paragraph (5). On Mr Brown's approach, the paragraph sets up a calculation by reference to the actual occupants as classified into particular categories but then ignores the inevitable characteristics of the categories, such as that they consist of two people or people of a particular age. The paragraph provides that the claimant is entitled to a bedroom for each category. The natural expectation of that language is that the room would be a bedroom for the persons bearing the characteristics of that category, not a room that ignored those characteristics. This leads on to our second reason. If the legislation were to produce the result that Mr Brown and Ms Meacher contended for, it would need much clearer language to show that it was necessary to sever the claimant's entitlement from

> the characteristics of the categories as set out in paragraph (5). The language does not do that."

11. The UT considered but did not follow *IB*. It did not accept that a decision of the Court of Session was binding upon the UT, further it stated that *IB* was not concerned with the connection issue. The UT considered the authority of *Nelson*, it did not accept its analysis and found that the connection issue did not arise in *Nelson*.

Relevant decisions of the courts or the Upper Tribunal

Secretary of Work and Pensions v Nelson and Others [2014] UKUT 0525 (AAC) [2015] AACR 21

12. Two brothers, as individual respondents, appealed decisions made pursuant to Regulation B13 which had reduced their HB. The central issue of law in the appeals was identified as "the approach that should be taken to determine what is a bedroom for the purposes of the Amended Housing Benefit Regulations".

13. The court identified the approach to be taken to regulation B13 as follows:

> "19. When an ordinary or familiar English word such as 'bedroom' is used in a statutory test and is not defined in the legislation:
>
> i) the test should not be re-written or paraphrased, and
>
> ii) the ordinary or familiar word should be construed and applied in its context having regard to the underlying purposes of the legislation.
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> The decision of the House of Lords in *Utratemp Ventures Ltd v Collins* [2002] 1 AC 301 which was relied on by the Secretary of State is an example of this well established approach.
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> …
>
> 21. It follows that the underlying purposes of the relevant test using such language and the context in which the language is used are important and often determinative factors to be taken into account in determining whether on the facts of a given case the relevant test is satisfied.
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> …
>
> *The application of this approach to regulation B13*
>
> 24. The underlying purpose is to limit the housing benefit entitlement of those under occupying accommodation and the language as a whole shows that the trigger for a reduction is set by reference to the entitlement of a tenant to bedrooms for the occupation of the people listed in sub-paragraphs (5) and (6). Sub-paragraphs (7) to (9) set out how that entitlement is to be assessed.
>
> …

27. In our view, when read as a whole regulation B13 provides that in determining whether there is under occupancy that triggers a reduction in housing benefit:

> i) the use or potential use of the relevant room or rooms can be by any of the people listed in sub-paragraphs (5) and (6),
>
> ii) the impact of this is that it has to be considered whether the relevant room or rooms could be used by any of the listed people, and
>
> iii) designation or choices made by the family as to who should occupy rooms as bedrooms or how rooms should be used is unlikely to have an impact on the application of the regulation.

(We have not expressed point (iii) in absolute terms because it was not the focus of argument in this case and without such focused argument we do not consider that it would be appropriate to say that such designation or choice can never be relevant and the qualification made in paragraph 29 below is relevant.)

28. As to the points made in paragraph 27(ii) and (iii). It is in our view clear:

> i) that the underlying purpose of regulation B13 would be undermined if this was not the case, and
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> ii) that purpose and that interpretation of the regulation shows that the test is focused on the availability of rooms that could be used as bedrooms by any of the listed people and thus essentially the assessment of a property when vacant; rather than how it is actually being used from time to time. It seems to us that this is so because a part of the underlying purpose must be to free up homes that are being under occupied so that they can be used by others with an entitlement to the number of bedrooms in the property or to encourage the existing occupiers to make under occupied bedrooms available to others.

…

31. When an issue arises as to whether a particular room falls to be treated as a bedroom that could be used by any of the persons listed in regulation B13 (5) and (6) a number of case sensitive factors will need to be considered including (a) size, configuration and overall dimensions, (b) access, (c) natural and electric lighting, (d) ventilation, and (e) privacy.

…

60. As already indicated under the heading 'The application of this approach to regulation B13' we do not agree that the language or purposes of the regulation supports the conclusion that under it a bedroom must generally be reasonably fit for full- time occupation of this nature, as opposed to short-term or irregular occupation as a visitor or overnight guest. Rather, as we have said, we consider that the language and purposes of the regulation point firmly in favour of the view that each room should be assessed by reference to occupation by any of the persons referred to in sub-paragraphs (5) and (6) of regulation B13."

Secretary of State for Work and Pensions v City of Glasgow Council and IB [2017] CSIH 35

14. Ms IB is an adult single woman. She has severe learning disabilities and autistic traits and is unable to live alone. IB is a tenant of a property comprising five main rooms plus kitchen and bathroom. She lives with her sister and brother-in-law who care for her. IB is in receipt of HB administered by Glasgow City Council. The HB of IB was reduced by 25 per cent when Glasgow City Council applied Regulation B13(3)(b) of the regulations and concluded that she was under occupying the rented property by two bedrooms.

15. The focus of the case was on the meaning of the word "bedroom" in the regulations. The court considered it essential to consider the statutory context in interpreting the word "bedroom" in regulation B13. In so doing the court stated:

> "19. There was no real dispute in this case about the purpose of the Regulations and we consider that purpose would be frustrated if a tenant who rented what was objectively classified, for example, as a three bedroom property could by his use or unilateral structural changes to the property change the classification to a two or one bedroom property.
>
> 20. … In our opinion the classification and description of a property used as a dwelling is a matter of fact to be determined objectively according to relevant factors such as size, layout and specification of the particular property in its vacant state. That classification cannot be changed except by structural alterations made with the landlord's approval which have the result of changing the classification of the property having regard objectively to its potential use in a vacant state. Thus the classification of a property as having one or more bedrooms does not change depending on the actual needs of the occupants or how they use the rooms for whatever reason from time to time.
> ...
>
> 21. The issue was raised directly at tribunal level in a number of cases. A three judge panel was convened in *SSWP v Nelson* against a background that there were a number of different approaches taken by First-tier Tribunals to the interpretation of the word "bedroom" in regulation B13. We consider that there is merit in the approach of the UT to the extent that they recognised that the assessment should focus on the property when vacant rather than how it is actually being used from time to time (paragraph 28) and in their practical approach to considering what may be relevant factors illustrated in paragraphs 30 to 33. To the extent however that the Upper Tribunal entertained the possibility that the designation or choices made by family members as to who should occupy bedrooms or how rooms should be used had any relevance, we do not agree."

R (Carmichael & Others) v Secretary of State for Work and Pensions [2016] UKSC 58

16. The Supreme Court considered a number of appeals from claimants who have disabilities or who live with dependent family members who have disabilities or who live in what are known as "sanctuary scheme" homes. They all receive or have received HB. The claimants challenged the validity of Regulation B13 as it applied to them on equality grounds, specifically they contended that there had been a violation of their rights under Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") taken with Article 8 and/or Article 1 of the First Protocol ("A1P1") and in MA's

case that there had been a breach by the Secretary of State of the public sector equality duty under the Equality Act 2010.

17. In the Court of Appeal R (on the application of) MA & Ors, v The Secretary of State for Work and Pensions [2014] EWCA Civ 13 accepted that regulation B13 had a discriminatory effect on some people with disabilities, but it held the discrimination was justified, primarily because the Secretary of State was entitled to take the view that it was not practicable to exempt an imprecise class of persons to whom the bedroom criteria would not apply because they needed extra bedroom space by reason of disability. The DHP scheme had the benefit of flexibility and was also appropriate because the nature of a person's disability and disability-related needs may change over time. In reaching this conclusion the court applied the test whether the Secretary of State's policy was "manifestly without reasonable foundation" [21-22].

18. At [29] Lord Toulson JSC cited from the judgment of Baroness Hale in *Humphreys v Revenue and Customs Comrs* [2012] UKSC 18 as follows:

> "15. The proper approach to justification in cases involving discrimination in state benefits is to be found in the Grand Chamber's decision in *Stec v United Kingdom* 43 EHRR 47. …
>
> 16. The court repeated the well-known general principle that:
>
> 'A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.' (para 51)
>
> …
>
> 18. The same test was applied by Lord Neuberger of Abbotsbury … in *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311 …. He concluded, at para 57:
>
> 'The fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable.'"

At [32] and following Lord Toulson stated:

> "32. The fundamental reason for applying the manifestly without reasonable foundation test in cases about inequality in welfare systems was given by the Grand Chamber in *Stec* (para 52). Choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities.
>
> 33. The claimants seek to counter that point by arguing that this case involves no challenge to a decision of that kind. They have no quarrel with the policy of Reg B13. Their complaint is at a lower level and involves no question of economic or social

> judgment. Their complaint is simply that the manner of implementation of the policy discriminates against a vulnerable group, and that it is right to require weighty reasons to justify the discrimination rather than the broader policy itself.
>
> 34. Rejecting that argument, Lord Dyson MR said (paras 54 to 55) that although the precise detail and scope of the Regulations may not be matters of high policy in themselves, they formed an integral part of a high policy decision and could not be dismissed as technical detail; that the law in this area would suffer from undesirable uncertainty if the test were to vary according to whether the challenge were to high level policy or lower level policy; and that there was no hint of such a distinction in the European or domestic case law."

At [41] Lord Toulson concluded:

> "41. In *MA* the Divisional Court and the Court of Appeal concluded after careful scrutiny that the Secretary of State's decision to structure the scheme as he did was reasonable. In general terms I agree. There was certainly a reasonable foundation for the Secretary of State's decision not to create a blanket exception for anyone suffering from a disability within the meaning of the Equality Act (which covers anyone who has a physical or mental impairment that has a more than minimal long term effect on the ability to do normal daily activities) and to regard a DHP scheme as more appropriate than an exhaustive set of bright line rules to cover every contingency."

19. Lord Toulson allowed the appeal of Mrs Carmichael who was unable to share a bedroom with her husband because of her disabilities. He found that her position was directly comparable to that of the Gorry children who required separate bedrooms for disability reasons in a previous decision of the Court of Appeal. The Supreme Court held that there was no reasonable justification for the differences between the two cases and on that basis allowed Mrs Carmichael's appeal.

20. The significance of the *Carmichael* decision is that the Supreme Court accepted that in considering challenges pursuant to Articles 8 and 14 of the ECHR, regulation B13 did have a discriminatory effect upon some people with disabilities. However, it held that the discrimination was justified because the Secretary of State was entitled to take the view that it was not practicable to exempt an imprecise class of persons to whom the bedroom criteria would not apply because they needed extra bedroom space by reason of disability. The DHP scheme had the benefit of flexibility which was appropriate because of the nature of a person's disability and needs. In so doing the court applied the test of whether the Secretary of State's policy was "manifestly without reasonable foundation" and concluded that it was not.

The appellant's case

21. The purpose of regulation B13 is the calculation of rent, it is not intended to provide a particular type of social housing. It requires the local authority/housing authority to look at entitlement under B13(2) irrespective of knowledge of the family unit or property. It is a method of calculating entitlement to housing benefit, the provisions do not attempt to identify actual need. They identify the proxy criteria in order to establish the amount of assistance which is required by way of benefit. Regulation 12(b) provides a mathematical calculation of what is the eligible rent.

22. In applying regulation B13 the relevant authority identifies the number of bedrooms in a property and thereafter identifies what a family is entitled to. If the number of bedrooms exceeds the family's entitlement then the reduction is applied to the housing benefit. Within the legislation there is no definition of bedroom, no concept of the double bedroom. There is nothing of a qualifying character or reference to a special case of particular need, for example medical needs. There is nothing to direct the legislation to look at the facts of specific cases. Qualifications to the regulation have subsequently been introduced following the decisions in *Carmichael* and *Burnip*, the purpose being to identify specific scenarios.

23. RH's family unit, namely a couple and two children of the same sex under 16, *prima facie* entitles them to a two-bedroom house pursuant to B13(5). It is accepted that the two bedrooms in the home in Wisteria Way used by the Hockley sons are small. There is a dispute which has been remitted to the F-tT for consideration as to whether one of the bedrooms is suitable for sharing.

24. The Secretary of State submits that in assessing the maximum rent pursuant to B13 there are two stages:

i) Objectively identify the number of bedrooms in the dwelling, it is accepted in this case that there are three;

ii) Pursuant to the criteria set out in B13(5) interpret the size criteria.

25. For the purpose of quantifying state assistance, entitlement is computed by reference to categories not the persons within them. The categories are depersonalised. Thus, fifteen-year-olds are treated the same as babies even though their needs are different. The language of B13(5) is mandatory, there is no provision for a bedroom which is not qualitatively appropriate for the identified category. The language does not allow for the taking of an individual out of the first category and placing that person into a lower category. The analysis to be performed is the same whatever the number of rooms. The entitlement is to rent not an individual bedroom.

The first respondent's case

26. The focus of the social policy was on properties with spare rooms and the removal of the "spare room subsidy" as evidenced in the Department for Work and Pensions' "Equality Impact Assessment, Housing Benefit – Size Criteria for People Renting in the Social Sector" (June 2012). The legislative language reflects that policy, people with spare rooms are to be affected; people without spare rooms are not. In this case there is no spare room, RH and her family live in a house which fits four people.

27. The natural construction of the legislative language supports the UT's reasoning. Bedroom entitlement is expressed in regulation B13 as being for particular categories of occupants. Its intention was not to treat entitlement to a bedroom as being discharged by a bedroom in which it would be impossible to accommodate the relevant categories of persons.

28. The first respondent accepts:

i) The use of proxies is an inevitable part of social security legislation;

ii) For the purpose of the regulation B13 calculation the property has to be considered in a vacant state;

iii) The UT was correct to find that B13(5) depersonalises the assessment to be performed such that the characteristics of the actual individuals concerned are irrelevant.

29. It is the first respondent's case that B13(5) has to be read in the context of the regulation as a whole. In construing the subsection, the critical word is "applicable". In considering each of the categories (a) to (e), RH's sons would fall within category (c). However the UT looked at the legislation as a whole and asked whether the category was applicable for the two boys who were unable to share the room by reason of its size. Implicit in the word "applicable" is the question whether Parliament intended that category (c) was applicable to the two boys when the bedroom could not in fact accommodate them. In construing the word "applicable" in the context of the legislation as a whole the intention was that the applicable category was one which would entitle any one of the individuals living in the property to a bedroom which could accommodate them.

30. The legislation could not have intended that a person should be entitled to one bedroom for two people in which it was impossible to accommodate them. Regulation B13(5) has to be read as a whole and applicability includes the construction that the room can accommodate the relevant category.

Discrimination

31. The first respondent contends that the provision of HB to families engages article 8 ECHR (*Carmichael* [49]). It is her case that the treatment of the children is upon the basis of a status protected by article 14 ECHR. They were initially required to share a room because both were aged under ten, from 1 December 2014 they had been required to share a room because they are of the same sex. Children aged under ten with a sibling aged under ten are treated differently under Regulation B13 to single adult family members and to child family members aged at least ten with a different sex sibling. The first category of a person must share a room while the latter two categories of persons are permitted a room of their own.

32. This different treatment is said to amount to *prima facie* discrimination on the ground of age, it being a relevant status for the purpose of Article 14 ECHR. Further, children aged at least ten with a sibling of identical sex are treated differently to children aged at least ten with a sibling of a different sex. The first category of person must share a room while the second category of person is permitted his/her own room. This different treatment is said to amount to *prima facie* discrimination since one category is treated less favourably than the other and it is exclusively the ground of sex which leads to the less favourable treatment. Alternatively the categories "Children aged under ten with a sibling aged under ten" and "Children aged at least ten with the same-sex sibling" themselves form a relevant status for the purposes of Article 14.

33. The fundamental difficulty with the first respondent's discrimination arguments is that *Carmichael* determined that the legislation and the overall scheme were compatible with the ECHR and thus lawful, even in cases where there were compelling medical needs for individuals to occupy particular properties. On the facts of this case no such needs arise. The state makes appropriate provision by way of assistance to the family of the first respondent, the problem is that they are in occupation of a property which is not appropriate from the perspective of the scheme.

34. There would be no alleged discrimination if RH's family were in appropriate two-bedroom accommodation. The issue arises because they occupy an inappropriate three-bedroom property when viewed objectively and by reference to other family units who could occupy it. As the size criteria themselves are non-discriminatory they cannot become discriminatory when applied to a particular family unit, particularly when one has regard to the mitigation (DHP) that forms a part of the overall scheme.

The second respondent

35. The second respondent adopts and supports the submissions of the appellant.

Discussion

36. The regulations represent an instrument of social policy applicable to the usage of social entitlement. The intention of the legislation is to: ensure that social housing is used in the most effective way possible; improve the mismatch of property with those living within it; reduce overcrowding; place families in appropriately sized accommodation; increase mobility in the socially rented sector; incentivise work; introduce greater fairness between claimants living in the private and socially rented sector; and reduce public expenditure. The purpose of the regulations is to calculate what, if any, caps are to be applied to welfare benefits, in particular HB. The regulations do not provide social entitlement to physical housing.

37. The methodology of the regulations is that the bedroom is used as a proxy for need. The size criteria/bedroom criteria are a means of quantifying cash entitlement. A "bedroom" does not represent a precise proxy. The Secretary of State accepts that it is an imprecise means of measuring need but it serves the purpose because all persons in housing need a bedroom and thus it is useful. It is also accepted that mismatches can arise but can be met, for example, by DHPs.

38. "Bedroom" is an ordinary word which is neither defined nor qualified in the regulations. The word has to be construed and applied in its context having regard to the underlying purposes of the legislation. The underlying purpose of the regulations is to limit HB entitlement to those occupying social housing. The language of the regulations demonstrates that the criteria identified as limiting such benefit is the entitlement of a tenant to a bedroom for persons listed in subparagraphs (5) and (6). The assessment is to be carried out by the relevant authority in respect of a notionally vacant house. A point accepted by the first respondent. It is also accepted by the first respondent that B13(5) depersonalises the assessment to be performed such that the characteristics of the particular individuals are irrelevant. It follows that such an assessment is an objective one.

39. There is nothing in the regulations to indicate that any such assessment is required to take account of how a property and, in particular, the bedrooms in the property would be used by a particular family unit. Were that to be so, the purpose underlying the legislation would be frustrated as a tenant could, by use of the property, change the objective classification so as to reduce the relevant number of bedrooms. This further demonstrates the objective nature of the assessment and, with it, the interpretation of "bedroom" within B13(5).

40. Such reasoning is consistent with that of the UT in *Nelson* and the Court of Session in *IB* which considered the underlying purpose of the legislation and the use of the word "bedroom" in that context. It is not consistent with the approach of the UT in this case, which

introduced a subjective element into that assessment, which I find is supported neither by the words of the regulation nor the intention of the legislation.

Conclusion

41. For the reasons given I find that pursuant to the size criteria (Regulation B13(5) of the Housing Benefit Regulations 2006, which entitles the housing benefit claimant to "one bedroom for each of the following categories of person" in occupation of the property) the word "bedroom" should be interpreted as meaning a room capable of being used as a "bedroom" by any of the listed categories and not a room capable of being used as a "bedroom" by the particular claimant. In holding that the correct interpretation was a room capable of being used as a "bedroom" by the particular claimant, the UT erred in law and its decision was wrong.

42. The appeal is allowed. The decision of the UT is quashed. In applying r egulation B13 to the property at the centre of this case, I find that RH is entitled to a two-bedroomed property.

Lord Justice Hickinbottom:

43. I agree.

Lord Justice Longmore:

44. I agree also.