C3 2011/1580

IN THE COURT OF APPEAL

ON APPEAL FROM THE UPPER TRIBUNAL

B E T W E E N:

IAN BURNIP

APPELLANT

AND

BIRMINGHAM CITY COUNCIL

FIRST RESPONDENT

AND

SECRETARY OF STATE FOR WORK & PENSIONS

SECOND RESPONDENT

AND

EQUALITY AND HUMAN RIGHTS COMMISSION

INTERVENER

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FOR HEARING 21-22 MARCH 2012

THE EQUALITY AND HUMAN RIGHTS COMMISSION’S INTERVENTION

1. These observations are submitted by the Equality and Human Rights Commission (”the Commission”) which intervened in the *Burnip* case in the Upper Tribunal and continues to do so with the consent of all the parties and the court. The Commission is a non-departmental statutory public body established under the Equality Act 2006, and independent of government. It has operated as the single equality and human rights body in Britain since October 2007. The Commission has been accredited with “A” status by the International Co-ordinating Committee which assesses and reviews the compliance with the Paris Principles for National Human Rights Institutions. This gives the Commission formal status with the Human Rights Council and human rights treaty bodies of the United Nations. It plays an active role in UN treaty monitoring of the UK, and is a key member of the European Group of National Human Rights Institutions.
2. The Commission has statutory duties, *inter alia*, to promote understanding of the importance of human rights, to encourage good practice in relation to human rights issues, and to enforce human rights enactments: s.9(1) Equality Act 2006. It has power to hold formal inquiries or to take judicial review proceedings to prevent breaches of the UK Human Rights Act 1998, and can also make interventions to promote human rights (s.30 Equality Act 2006). It seeks permission to intervene, both in domestic courts and the European Court, in significant cases. It recently intervened in the European Court of Human Rights (ECtHR) to make submissions (which were accepted) as to the relevance of the United Nations Convention on the Rights of Persons with Disabilities in interpreting article 6 of the European Convention on Human Rights in *Seal v UK* (judgment 7 December 2010).
3. The Commission is grateful for permission to continue to intervene in *Burnip* before the Court of Appeal. Technically, it is not an intervener in the *Trengrove*  case (in which the issues are substantially the same), nor the *Gorry* case (which was linked with *Burnip* and *Trengrove*  by Carnwath LJ on 4 January 2012). The observations which the Commission makes are, therefore, primarily addressed to the *Burnip*  case. The Commission hopes, however, that its observations will be of assistance in all three cases. In particular, the observations it makes in relation to discrimination against people with disabilities are of equal application to the cases of those who have family members with disabilities.
4. The Commission intervenes in this case because the Second Respondent’s approach constitutes a real barrier for independent living for disabled people, and undermines their right to genuinely equal independence, choice and control over their lives. In the Commission’s view, this interpretation of the law violates Article 14 ECHR read with Article 8 and/or Article 1 Protocol 1, and is inconsistent with the United Kingdom’s international law obligations under the UN Convention on the Rights of Disabled Persons (CRDP).

SUMMARY OF THE COMMISSION’S SUBMISSIONS

1. Mr Burnip is severely disabled, and suffers from spinal and muscular dystrophy. As a result of his needs, he was assessed as needing a live-in carer. As a result of this, he needed a two bedroom property, and pays rent accordingly. In fact, his carers worked on three eight-hour shifts in a rota, and did not live in, although they sometimes slept, and needed a room. If he was to live independently, he needed a two bedroom property. However, the Housing Benefit Regulations at the relevant time contained no provision which permitted that need for a second bedroom (to meet his care needs for independent living) to be taken into account. The Housing Benefit Authority, Birmingham City Council (BCC) took the view that the relevant statutory regulations in force at the material time[[1]](#footnote-1) meant that none of the carers counted as ‘non-dependent occupiers of property’ and consequently, that Mr Burnip was only entitled to housing benefit based on residing in a one bedroom property, and not at the higher rate for a two bedroom property.
2. Mr Burnip challenged that decision, but it was upheld in the First Tier Tribunal. In the Upper Tribunal (UT), Mr Burnip argued that this interpretation of the Regulations constituted unlawful discrimination against him, because (in order to comply with Articles 8 and 14 read together) and to afford him equality of treatment, the Regulations ought to have been interpreted to treat him as if  he needed a two bedroom property (which he does, by reason of his disability, in order to accommodate his carers, even though they are not technically ‘occupiers’) and to pay him a level of housing benefit commensurate with that. The UT rejected that argument, and it is against that decision that Mr Burnip now appeals.
3. The *Burnip* case concerns the problems with Local Housing Allowance (LHA) as it stood before April 2011, and the effect which it had on the independence of disabled people who required an extra bedroom. LHA was introduced in 2008, and applied when a person was renting in the private sector. LHA was a means of calculating Housing Benefit entitlement, on the basis of a flat rate based on the size of the household and the area in which it was based. A fundamental part of the calculation of HLA was the “size criterion”, ie an allowance based on the number of bedrooms a claimant was entitled to claim for. The size criteria at the relevant time did not make any allowance for disabled people who required an extra bedroom for carers or to accommodate adjustments which were required (eg additional equipment).
4. Although calculation of the LHA was changed from April 2011 so that consideration could be given to the need for an extra room for overnight carers, even those who were not permanent residents, the calculation continues to lack flexibility in relation to disabled family members or other disability-related needs. In any event, the important issue in this case is the correct legal approach to the issue, which has very broad significance.
5. The Commission does not seek to amplify the statement of facts and relevant domestic law set out in the relevant Upper Tribunal (UT) decisions and the skeleton arguments of the parties before that Tribunal. This document seek to assist the court:
   1. By making submissions as to why the legislation has a prima facie indirectly discriminatory effect against people who have disabilities[[2]](#footnote-2), and consequently requires justification (“the ECHR approach to discrimination”);
   2. By drawing the Tribunal’s attention to the effect of the relevant provisions of the European Convention on Human Rights (ECHR) and the UN Convention on the Rights of Persons with Disabilities (CRDP) in the correct disposal of this appeal (“the impact of the CRDP”); and
   3. By making submissions on how, by interpreting domestic law compatibly with the ECHR (itself read in the light of the objects of international law, elaborated by the CRDP), the Court of Appeal should dispose of this appeal (“Conclusions”).
6. The Commission’s overarching submission is that the regulations which applied the LHA before April 2011 contravened Article 14 of the ECHR and were unlawful. Applying the ECHR in the light of the CRDP, the absence of an exceptions mechanism, to be operated on a case-by-case basis, constituted unlawful discrimination on grounds of disability, contrary to Article 14 read with Article 1 Protocol 1 and/or Article 14, and has not been justified.
7. Avoiding unlawful discrimination means treating unlike cases differently in appropriate circumstances as well as treating like cases alike. There is a small but appreciable number of people (of whom the Appellants in these cases are examples) where the size criterion may place them at a particular disadvantage by reason of their disability[[3]](#footnote-3). The absence of any mechanism for allowing exceptions to the generalrule which has a disproportionate impact on disabled people amounts – on proper construction of the law – to *prima facie* indirect discrimination, and so falls to be proportionately justified.
8. For the avoidance of doubt, the Commission does not say that those with disabilities, or with children with disabilities, should never have their housing benefit limited by reason of the number of bedrooms which the household requires. The Commission appreciates that resources are not unlimited, and that the application of a “size criterion” which limits entitlement to housing benefit to properties with a particular number of bedrooms designated by reference to need has a legitimate aim, namely, the avoidance of unnecessary public expenditure.
9. In its view, what falls to be justified is the absence of any provision in the Regulations as they stood at the relevant time to permit the specific care needs of a disabled person to be taken into account in applying the “size criterion”, or any exceptions mechanism to deal with such circumstances. In such a case, the additional cost of making an exception to the rule may be very minor, but very great harm may be caused to the person affected by rigid application of it (in terms of money, health and social ties). The cost of operating a mechanism to permit housing benefit authorities to make exceptions to the general rule in exceptional cases is likely to be relatively low. (If it prevented the exacerbation of health problems, it might even be nil, given potential savings to the health budget). The Secretary of State is under an international law obligation to seek to eliminate rules with a discriminatory effect, by virtue of the CRDP. The very great harm caused by the rigid application of the rule would far outweigh the provision of housing benefit at a slightly higher rate in a small number of cases, and no adequate justification has been given for this.
10. Thus, the Commission considers that the absence of a provision in the relevant regulations at the relevant time to permit exceptions to the size criterion where this was necessary to allow for the specific needs of disabled persons therefore rendered the regulations incompatible with Article 14 ECHR read with Article 1 Protocol 1 and/or Article 8 ECHR.

THE ECHR APPROACH TO DISCRIMINATION

1. Mr Burnip’s argument was based on the decision of the European Court of Human Rights in *Thlimmenos v Greece*  (2001) 31 EHRR 15. That case focuses on the language of the first Article 14 case in Strasbourg (*Belgian Linguistics),* and the idea that non-discrimination means, not only treating like cases alike, but also refraining from treating unlike cases in the same way. In other words, where there is a relevant difference between people’s situations, by reason of their protected status, the two situations should be treated differently.

This principle was considered in the context of disability in detail by the Court of Appeal in *AM (Somalia) v Entry Clearance Officer*  [2009] EWCA Civ 634, [2009] UKHRR 1073. In that case, the Court of Appeal held that an immigration rule which required a spouse joining a partner in the UK to have no recourse to public funds immediately after entry, which remained unadjusted for disabled people, *did*  amount to indirect discrimination against disabled people (in application of the *Thlimmenos*  principle)[[4]](#footnote-4).

1. That decision constituted important recognition (binding at this level) that a ‘bright lines’ rule of universal application, the application of which arguably has a *differential*  adverse impact on those who share a protected status, falls within the ambit of other Convention articles engages Article 14 in principle. Thus, the failure to permit exceptions can require justification.
2. On the facts of that case, the Court of Appeal held that the discrimination was justified, partly because the discriminatory effect on grounds of disability was not clearly made out (there were many circumstances in which a spouse might not be able to support his or her partner, disability related and non-disability related; and many circumstances in which disabled people could do so), and consequently the bright line rule was a proportionate response to the need to have clear immigration rules.
3. The importance of *AM (Somalia)* to the present case is that this Court did *not* say that this was a situation in which that objective differences of situation were insufficient for the Court even to ask the decision-maker to justify its failure to make an adjustment to the normal rule.
4. In the *Burnip* case, in rejecting the Appellant’s argument that the relevant Regulations needed to be ‘read down’ so as to give effect to Article 14, the UT (Judge PL Howell QC) adopted a different reasoning from that adopted by the Court of Appeal in *AM (Somalia).* If the UT approach were to be followed in future cases, this would be extremely damaging for a Convention-compatible approach to equality law.
5. The UT in *Burnip*  erroneously found at paragraphs 37-41, that the *Thlimmenos*  approach was only applicable “in certain circumstances”; and (at paragraph 42) that *in principle*  it could not apply in the context of an argument that a universal benefit which required public expenditure required adjustment to meet disabled persons’ needs. Accordingly, the UT judge found that he did not need to go on to consider the question of justification (a matter which he addressed *obiter*, but in the context of the ‘blended approach’ in paragraph 43 of his judgment). In doing so, the UT judge purported to base himself of the language of the decision of the Grand Chamber in *Stec v UK*  (2006) 43 ECHR 4 at [51]. However, the Commission considers the UT’s approach was wrong in principle, and based on a misreading of the decision of the Grand Chamber of the ECtHR in *Stec.*
6. The principle of non-discrimination is one of general application. It is the very essence of that principle – recognised indeed in the first Strasbourg discrimination case (*Belgian Linguistics (No 2)*  (1968) 1 EHRR 252 that “like cases must be treated alike and different cases must be treated differently” (emphasis added). Thus, contrary to the UT’s observations, there can never be circumstances in which the *Thlimmenos*  principle (that different cases must be treated differently) is simply inapplicable. True it is that, in application of that principle, there may be cases where there is no sufficient material difference between cases to engage the comparison of the different effects of a provision (as in *AM (Somalia))* ; and there may be circumstances in which a challenge to the failure to treat different cases differently would not succeed because it would be justified. But if the suggestion is made that where there is a single, universal rule, a particular case raises special considerations which justify disapplication or modification of that rule, the *Thlimmenos*  principle is in play.
7. The Grand Chamber in *Stec*  did not say otherwise. The context is important. *Stec* was an ordinary claim of direct sex discrimination. The Grand Chamber did not say – and the UT was wrong to understand it to say - that there was some kind of ‘category limitation’ on circumstances in which *Thlimmenos* could apply. Rather, the Grand Chamber merely observed (obiter) that there were only certain cases in which a claim for differential treatment to remediate objectively different circumstances would succeed (and that – as in *DH v Czech Republic*  - there was no such claim for differential treatment in the circumstances of that case).
8. The UT’s gloss on the law in that respect in this case is of potential wide, and potentially damaging, significance for the development of equality law. If it were upheld, it would have the effect of bringing out of the protection of ‘positive’ equality law *at all*  any provisions which required public expenditure. That cannot be right. The emphasis, rather, should be on whether the claim for remediation is made out – in other words, whether the charge to the public purse in a particular case justifies the failure to make a particular adjustment to the normal policy to recognise objective differences in situation.
9. In the *Burnip*  case, it is difficult to see how the UT could properly have held that Mr Burnip’s circumstances did not even raise a *Thlimmenos*  issue. He needed housing benefit, for the same reasons as others (inability to meet his own housing expenses without incurring considerable debts); but he needed an extra room for his carer because of an objective disability-induced difference in his situation (his disability and care needs consequent upon it). Unless an adjustment was made to the amount of his housing benefit entitlement, he will fall into debt or be prevented from living independently.
10. The UT should have recognised that this was potentially a situation in which the same treatment of a disabled person as a non-disabled person might cause discrimination to arise – by reason of different cases being treated the same. It should have asked itself the *Thlimmenos* questions, namely:
    1. is the identified difference between the situations of a disabled and non-disabled housing benefit claimant such that the application of the same treatment in terms of eligibility for housing benefit would impose a particular detriment or disadvantage upon the disabled claimant by reason of his disability, such that treating the two different cases the same would amount to *prima facie*  discrimination; and
    2. if so, whether the public authority can show that there is objective and proportionate justification for the failure to make the adjustment to the normal rule by “reading in” an exception mechanism so that the objective difference in the situation of the disabled person could be recognised by different application of the size criterion so as to meet needs arising from that difference.
11. In this case, the UT’s approach to whether there was a prima facie case of discrimination was wrong. It simply decided that in cases in which what was sought might involve additional public expenditure, justification for declining to do so could never, in principle, be required. There was no warrant for this limited approach – in *Thlimmenos, AM (Somalia)*  or *Stec.*
12. Moreover, the UT’s obiter approach to justification was also wrong. Unlike *AM (Somalia)*, this was not a case in which the justification advanced by the Respondent was that the scheme would cost too much. (Indeed, it is overwhelmingly likely that the alternatives which BCC proposed – including having three carers on waking shifts to obviate the need for an additional room – would have cost far more). Rather, the justification appeared to be for the need to have ‘bright lines’ in the housing benefit scheme, rather than for *this*  bright line.
13. The UT should have asked whether the discriminatory nature of the bright line rule adopted could itself be justified. Where there is a complaint of breach of Article 14, it is the discrimination and not the underlying public policy itself which falls to be justified (see *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 per Lord Bingham at [54] and [68]). Thus, it is the discriminatory nature of the criteria in the scheme (which make no provision for those who need live in carers by reason of their disability) and not the existence of a certain scheme per se which falls to be justified.
14. Moreover, very weighty reasons must be given to justify discrimination on grounds of disability which is an innate and largely immutable characteristic, closely connected with an individual’s personality and life chances (see per Lord Walker in *R(RJM) Secretary of State for Work & Pensions* [2009] 1 AC 311.
15. The Commission submits that this is the correct approach even on the principles in the Strasbourg and domestic caselaw read alone. However, the correctness of this approach is buttressed when the caselaw is read, as it must be, through the prism of the UK’s obligations under the CRDP.
16. The Commission submits that the Court *must*  have regard to these provisions as canons of construction of Article 14 ECHR, and that when due regard is given to these principles, it cannot be correct not to apply the *Thlimennos* principle to the *Burnip*  situation; nor can it be correct to apply so low a test as to permit justification for having eligibility rules for housing benefit at all to stand as justification for having eligibility rules with a seriously detrimental – indeed exclusionary – effect on some applicants for publicly assisted housing, because of their disability.

THE IMPACT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Overview

16. The UN Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol were adopted by the UN General Assembly on 13 December 2006. The CRPD came into force on 3 May 2008. It has 103 states parties. The UK ratified the CRPD on 8 June 2009 and the Optional Protocol on 7 August 2009, and the EU ratified it in relation to powers within its competence on 23 December 2010. Its purposes is described in article 1 as being “to promote, protect *and ensure*  the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity” (emphasis added). In other words, CRPD imposes obligations on states parties to address and remove the obstacles faced by disabled people in realising their rights.

17. The relevant provisions of the CRPD inform the correct approach to deciding whether the Housing Benefit Regulations fall within the ambit of Article 8 ECHR; whether the Regulations can be regarded as discriminating on grounds of disability; and the standard of justification to be required for any such discrimination.

The Relevant provisions of the CRDP

18. The Commission draws the Court of Appeal’s particular attention to the following provisions of the CRDP (italicised emphases added):

Article 1 – as well as the purpose provisions (cited above), Article 1 includes in the definitions of persons with disabilities “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation on an equal basis with others.

Article 2 – definitions defines “discrimination on the basis of disability” as meaning “any distinction, exclusion or restriction on the basis of disability which has the purpose *or effect*  of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination *including denial of reasonable accommodation”* (ie reasonable adjustments)*.*

Article 3 sets out the principles of the Convention. These include non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity and equality of opportunity.

Article 4 requires states parties to “ensure *and promote*  the full realisation for all person with disabilities without discrimination *of any kind*  on the basis of disability”, and to take a number of specific steps to this end.

The obligations under Article 4 include an obligation to “adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the ... Convention”; and – critically in this context **- to** **“take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs or practices that constitute discrimination against persons with disabilities”;** to” take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes”; and “*refrain* from engaging in any act or practice that is inconsistent” with the Convention and “to ensure that public authorities and institutions act in conformity with the ... Convention” (Articles 4 a, b, c, d).

Article 5(3) provides that “in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided”.

Article 5(4) provides that specific measures necessary to achieve de facto equality shall not be considered discrimination.

Article 19 contains a specific right to live independently and to be included in the community. It provides that

“States Parties to this Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that

* 1. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
  2. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
  3. Community services and facilities are *available on an equal basis to persons with disabilities and are responsive to their needs.*

Article 31 requires states parties to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the CRDP.

The jurisprudential basis for adopting an interpretation of the Regulations which complies with the CRDP.

1. The Court of Appeal not only may, but must, take the relevant provisions of the CRDP into account when interpreting the Regulations, and in particular, when assessing their compatibility with Articles 8 and Article 14 ECHR.The requirement to do so is enshrined both in national and ECtHR caselaw.
2. In *AH v West London Mental Health Trust & Secretary of state for Justice*  [2011] UKUT 74, the UT, presided over by Lord Justice Carnwarth, described the relevance of the CRDP thus:

“[15] The CRPD prohibits discrimination against people with disabilities and promotes the enjoyment of fundamental rights for people with disabilities on an equal basis with others ... [ratification history set out].

[16] The CRPD provides the framework for Member States to address the rights of persons with disabilities. It is a legally-binding international treaty that comprehensively clarifies the human rights of persons with disabilities as well as the corresponding obligations on state parties. *By ratifying a Convention, a state undertakes that wherever possible its laws will conform to the norms and values that the Convention enshrines.* [emphasis added]

...

[22] ... article 6 of the European Convention on Human Rights (reinforced by article 13 of the CRPD) requires that a patient should have the same or substantially equivalent right of access to a public hearing as a non-disabled person who has been deprived of his or her liberty, if this article 6 right to a public hearing is to be given proper effect. Such a right can only be denied a patient if enabling that right imposes a *truly disproportionate burden*  on the state [emphasis added]. The European Court of Human Rights has emphasised the need for special consideration to be given to the rights of particularly vulnerable groups such as the mentally disabled (see eg *Kiss v Hungary*  (App no 38832/0, judgment 20 May 2010 para 42)).”

1. As Carnwarth LJ observed, the European Court of Human Rights also regards the CPRD as highly material to interpreting the provisions of the ECHR. Section 2 Human Rights Act 1998 requires ECtHR case law to be taken into account whenever relevant to determining an issue before the domestic court.
2. The ECtHR now regards as mandatory the use of relevant international instruments as interpretative tools for the proper construction of the ECHR – in particular, when considering the definition and scope of discrimination. In *Demir & Baykara v Turkey* (2009) 48 EHRR 54, the Grand Chamber held that “in defining the meaning of terms and notions in the text of the Convention, [it] can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values…” ([85], emphasis added)[[5]](#footnote-5). Likewise, in *Opuz v Turkey* (2010) 50 EHRR 28 the Court concluded ([185]) that “when considering the definition and scope of discrimination against women, in addition to the more general meaning of discrimination as determined in its case-law … the Court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women” (emphasis added).

Relevant ECtHR jurisprudence on the CRPD

1. The ECtHR has used the CRPD in order to interpret the provisions of the ECHR in four substantive decisions: *Kiyutin v Russia*  10/3/11, *Jainski v Latvia*  (21/12/10), *Seal v UK*  (7/12/10) and  *Kiss v Hungary*  (20/5/10). *Kiyutin*  and *Kiss*  both contain observations relevant to these appeals.
2. *Kiyutin* is of particular relevance. In that case, the applicant was, in practical terms, prevented from living in his home because he was refused a residence permit on grounds of his HIV status. He claimed that this amounted to discrimination against him contrary to Article 14 ECHR read with Article 8. The Court recognised that Article 8 imposed no general obligation to respect choice of matrimonial residence, and no right to a residence permit, the State must nonetheless exercise its immigration policies in a manner compatible with the foreign national’s human rights, in particular the right to respect for private or family life and the right not to be subject to discrimination. The dispute fell within the ambit of Article 8 [53]. The ECtHR went on to hold, by reference to the provisions of the CRPD, that

“... a distinction made on account of one’s health status ... should be covered – either as a form of disability or alongside with it – by the term “other status” in the text of Article 14 of the Convention.

It follows that Article 14 of the Convention, taken in conjunction with Article 8, is applicable” [57, 58].

1. In considering the justification advanced by the State for the discrimination in that case, the Court held that the margin of appreciation was narrow and a strict standard of scrutiny was justified because [63]

“If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State’s margin of appreciation is substantially narrower. It must have very weighty reasons for the restrictions in question...”.

1. Notwithstanding that protection of public health was a legitimate aim, the Court found that the Government was unable to adduce compelling and objective arguments to show that this aim could be attained by the measure chosen. The Court added that “a matter of further concern for the Court is the blanket and indiscriminate nature of the impugned measure” (at [72]).
2. The Court concluded (at [74]) that

“Taking into account that the applicant belonged to a particularly vulnerable group, that his exclusion has not been shown to have a reasonable and objective justification, and that the contested legislative provisions did not make room for an individualised evaluation, the Court finds that the Government overstepped the narrow margin of appreciation afforded to them in the instant case. The applicant has therefore been a victim of discrimination on account of his health status, in violation of Article 14 of the Convention taken together with Article 8”.

1. *Kiss v Hungary*  concerned an absolute bar on voting by people under partial guardianship. Whilst the Court held that there should be a wide margin of appreciation as to the procedure for assessing fitness to vote of mentally disabled persons, it observed that there was no evidence that the Hungarian legislature had ever sought to weigh the competing interests or to assess the proportionality of the restriction on voting as it then stood in Hungary. The Court held, by reference to international law instruments, including the CRPD, that strict scrutiny was required of justification of curtailment of human rights based on disabilities [43].

The principles which emerge from the CRDP and the relevant national and ECtHR caselaw

1. So far as is material to the present case, the following relevant principles emerge from the CRDP and the relevant ECtHR caselaw:
   1. The aims of the CRDP are – and the aims of States Party should be - non-discrimination and full and effective participation and inclusion of disabled people in society, with equal opportunity to participate in it, and allowing for and acceptance of differences between persons with disabilities and others (Article 3);
   2. The discrimination which is prohibited and to be eliminated under CRDP includes indirect discrimination (all forms of discrimination, measures which have the *effect*  of impairing the enjoyment of human rights). The prohibited discrimination also includes the failure to make reasonable accommodation and adjustments to generally applicable measures so as to ensure enjoyment by disabled people of human rights on an equal basis with others (Article 2). Measures in domestic law which prohibit discrimination should be interpreted so as to give effect to these definitions.
   3. It is for the states party to collect appropriate statistical and other data so that they can judge the potentially discriminatory effect of particular programmes and measures (Article 31). A state party which has failed to provide statistical data which either proves or disproves discriminatory effects which appear from other research but cannot be proved by reference to statistics, cannot, compatibly with the CRPD, rely upon that failure to establish that there is no discrimination nor that discrimination is justified by cost.
   4. There is a positive obligation on states parties to modify or abolish existing laws which constitute discrimination, and positively to take account of protecting and promoting the human rights of persons with disabilities in state programmes (Articles 4 and 5). Thus, it is not enough for a state party to say it treats everyone ‘the same’. If it does not take steps to remediate the differential adverse *effects*  of a general measure for disabled persons, it must be able to explain why this failure is reasonable.
   5. One of the human rights of disabled people is the equal right to live in the community, with choices equal to others and with effective and appropriate measures to facilitate genuine (full) enjoyment of that right (Article 19).
   6. If and to the extent that such community services and facilities have been adjusted to make special provision for disabled people so far as necessary to achieve de facto equality of opportunity to live in a place of residence of their own choosing, such measures shall not be considered discrimination (Article 5(4)). Thus it is no answer to this case to say that it would be excessively expensive to remove the bedroom limitation/allowance for everyone, without explaining why it is not reasonable to allow for the possibilities of exceptions to it for a limited number of disabled persons to achieve *de facto*  equality.
   7. If and to the extent existing social measures within the ambit of the ECHR discriminate against disabled persons, very strict justification is required for any such discrimination, bearing in mind the historic disadvantages faced by disabled people and the need to make reasonable accommodation for their needs (*Kiyutin, Kiss).*
   8. A measure which prevents a disabled person’s human rights being given proper (ie practical) effect can only be permitted if enabling the right imposes a *truly disproportionate* burden on the State (*AH v West London Mental Health Trust*  at [22]).
   9. Even if a measure with a discriminatory effect has a legitimate aim, such as protection of public health or public funds, the State must be able to adduce “compelling and objective arguments” for its necessity, including (if it is of a blanket and indiscriminate nature) why there is no room for an individualised evaluation or the making of exceptions in exceptional cases if it is to justify the discrimination (*Kiyutin*  at [72]-[73]).
   10. The court should give strict scrutiny to any justification advanced for measures which discriminate on grounds of disability (*Kiss).*

CONCLUSIONS

1. The application of the LHA as it stood at the relevant time engaged, and violated, Article 14.
2. Article 14 applies only within the ambit of other ECHR articles, but does not require breach of such an article. Housing Benefit is a property right within Article 1 Protocol 1. Moreover, in the light of Article 19 CRDP, it cannot seriously be contended that the effect of the Regulations upon the ability to enjoy publicly funded support to maintain a home does not even fall within the ambit of the “right to respect for a home” under Article 8 ECHR. It follows that discrimination as regards the ability to maintain stable, publicly funded, housing within the housing benefit system falls within the ambit of Article 14.
3. Article 14 ECHR regulates indirect as well as direct discrimination (*DH v Czech Republic* (2008) 47 EHRR3). It will not protect a measure from scrutiny under Article 14 to argue that it is not deliberately intended to discriminate, or does not on its face discriminate.
4. Following the adoption of the CRDP, the Commission considers that the discrimination in Article 14 should also be interpreted so as to be compatible with the definition of discrimination in Article 2 CRDP, and thus to include denial of reasonable accommodation to accommodate the rights of disabled persons. That gives support, in this context, to the principle established by the ECtHR in the case of *Thlimmenos* at[44], that the non-discrimination principle is violated not only by unjustifiably treating similar cases differently, but “also ... when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”.
5. In the Commission’s view, on the evidence before the UT, it was not open to the Respondent to dispute that the bright-lines cut-off rule had no *disparate*  adverse effect on those with disabilities or who lived with people with disabilities. The burden therefore shifts to it to establish that the decision is appropriately justified.
6. The test for determining whether a breach of Convention rights is proportionate is set out in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 at [19], namely: (1) whether the rule or policy in question pursues a sufficiently important objective to justify the infringement of rights involved; (2) whether the rule or policy in question is rationally connected with that objective; (3) whether the means adopted are no more than necessary to achieve that objective; and (4) whether the measure in question achieves a fair balance between the interests of the individual affected and the interests of the community. This test was applied in *R(E) v Governing Body of JFS*  [2009] UKSC 15, [2010] 2 AC 728 per Lord Mance at [97]:

“... The standard [of justification] set out in section 1(1A)(c) (Race Relations Act 1976, as it then was) is a high one, adopting “the more exacting EC test of proportionality”: *R (Elias) v Secretary of State for Defence*  [2006] 1 WLR 3213 para 151 per Mummery LJ. The [EU Race] Directive also provides in article 2(2)(b) that “any indirectly discriminatory provision, criterion or practice is only justifiable if it is “objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”, but it refers to the European Convention on Human Rights and the language used equates with the test of proportionality in [domestic discrimination legislation]. An ex post facto justification for a measure which is prima facie indirectly discriminatory can prove difficult to show ... It is for [the decision-maker] to show, in the circumstances, that its aim or objective corresponds to a real need and that the means used are appropriate and necessary to achieving that aim, and any decision on these points must “weigh the need against the seriousness of the detriment to the disadvantaged group” ... The interests of society must also be considered [citing *Huang*].”

1. The Respondent has advanced no “compelling and objective” reasons why it would be unnecessary and/or disproportionate to make an adjustment or exception to the Regulations so as to allow an individual evaluation of the need for bedrooms in the case of a person with disabilities or family member. Nor does it have the data to say what the cost would be of making an exceptions mechanism available for disabled persons, so it cannot rationally be said how great the detriment to it would be of doing so. The Defendant has advanced only justification for having *some*  restrictive criteria for the housing benefit scheme, which does not justify having *discriminatory* criteria.
2. The correct application of the *Thlimmenos*  approach to Article 14 in these circumstances therefore suggests that this Court ought to find that there was unjustified indirect discrimination on grounds of disability in the application of the LHA as it stood at the time of the *Burnip*  case to Mr Burnip’s situation.
3. The Commission submits that the Court can provide an effective remedy for the breach of the Convention identified in these submissions, between the date of claim and 1 April 2011 (when the legislation was prospectively amended) by striking down the restrictions on Housing Benefit contained in the relevant provision (regulation 13D of the Regulations) and/or reading them subject to an exceptions mechanism. For example regulation 13D(3) could be read so as to add the words “(f) any person or equipment whose accommodation is necessary so as to enable a disabled claimant or dependent occupier as defined in regulation 13D(3)(a)-(e) to occupy the property”. The interpretative obligation in respect of primary and secondary legislation in section 3 Human Rights Act 1998 is very wide. Moreover, section 6(2) only applies to prevent a Convention-compatible reading of legislation where the incompatibility is required by the primary parent legislation. That is not this case (see *R(Quila) v Secretary of State for the Home Department*  [2011] UKSC 45, [2011] 3 WLR 858.

HELEN MOUNTFIELD QC

Matrix Chambers

6 March 2012

1. Regulations 13D(2) and (3) of the Housing Benefit Regulations 2006 SI No 213 and Schedule 3B of the Rent Officers’ Housing Benefit Functions Order 1997 SI No 1984. The regulations have been changed with effect from April 2011, so the prospective practical effect of these provisions is no longer relevant. However, the wider legal point of principle in equivalent benefit payment situations is of considerable ongoing practical importance. [↑](#footnote-ref-1)
2. And those with family members with disabilities – as in the *Gorry*  case (in the Commission’s submission, equivalent principles apply). [↑](#footnote-ref-2)
3. Or, in *Gorry*, of the disability of dependent children. [↑](#footnote-ref-3)
4. The case was decided in the Appellant’s favour on a different point in the Supreme Court [2009] UKSC 16, and this point was not considered further at that level. [↑](#footnote-ref-4)
5. In *Demir* the Court took into account the jurisprudence arising under International Labour Organisation Conventions and the European Social Charter to determine the scope of freedom of association under Article 11 of the Convention, over-ruling its previous holdings that the right to bargain collectively and to enter into collective agreements did not constitute an inherent element of Article 11. [↑](#footnote-ref-5)