FIRST TIER TRIBUNAL

SOCIAL SECURITY

Held at Birmingham **on 17/6/10**

[redacted]

Appellant: [redacted]	**Tribunal Ref.** 055/08/00440, 055/09/00456, 032/09/01485
Respondents: Worcester City Council & Warwick District Council	
Second Respondent:	

STATEMENT OF REASONS FOR DECISION

This statement is to be read together with the decision notice issued by the tribunal

1. This statement of reasons is provided at the instigation of the tribunal, as the matters raised in the appeals are of such significance that it did not seem sensible to await a request for a statement from any party. This statement covers the three appeals of [redacted] The first two involved Worcester City Council, and the third Warwick DC. However the matters of law raised are common to all three, and the key facts of each appeal are similar.

2. In each case the appeal concerns the application of the Housing Benefit (HB) rules applicable to someone who has been temporarily absent from his/her home for a period exceeding 52 weeks. Each of the three appellants had been compulsorily detained in psychiatric hospital under the Mental Health Act 1983 (MHA), and, due to the ongoing nature of their mental health problems, had been unable to return to their homes either within 52 weeks, or within a period not substantially exceeding 52 weeks. The case concerned whether HB reg 7(16) & (17), which prevented the payment of HB for temporary absences of more than 52 weeks, was in breach of these three appellants' rights under the ECHR.

3. I had previously considered an application by the Equality & Human Rights Commission to be made a party to the proceedings. It did not seem appropriate or necessary for them to be made a party to the appeal, but I ruled that they would be welcome to make submissions in the course of the appeal. I gave directions for the filing of skeleton arguments by all parties, and for the filing of a statement of agreed facts in respect of each appellant. It appears that due to administrative problems these directions were only served on the parties rather late on, but nevertheless I was provided with skeleton arguments and the statements of agreed facts in advance of the hearing, as well as bundles of authorities.

4. The tribunal held an oral hearing, which was attended by the following: Ms Kate Markus (counsel for all three appellants), Ms Anne McMurdie (Solicitor for all three appellants), Mr Ben McCormack (counsel for the Equality & Human Rights Commission (EHRC)), Mr Rhodri McDonald (solicitor for the EHRC), Ms Debrah Goldfinch & Ms Michelle Aucock (Worcester City Council HB Dept), Mr Jonathan Mytton (solicitor for Worcester CC), Ms Catherine Rowlands (counsel for Worcester CC) & Mr Steve Temple (Warwick DC). I am very grateful to each of the advocates for their submissions, both written and oral.

5. I received written submissions on behalf of the three appellants, from EHRC and from Worcester CC. I also received further documents from Ms Rowlands and Ms Markus. Ms Rowlands handed in an excerpt from the White Book dealing with S.3 Human Rights Act (HRA). Ms Markus handed in some further authorities, a witness statement from the DWP in relation to the earlier judicial review proceedings, extracts from the Equality Act, some statistics from the MIND website, and excerpt from Clayton & Tomlinson, and note on interpretation under s.3 HRA. Mr Temple, for Warwick DC, was content to substantially rely upon the written arguments of Worcester CC, as he felt the matters being argued should properly be considered by the Upper Tribunal. He was content to rely on what he regarded as the clear wording of the relevant HB regulations.

6. In relation to each appellant a statement of agreed facts had been filed. I adopt those statements as setting out the relevant facts found by the tribunal in these cases. Each was supplemented by statements of relatives and key professionals involved in the care of each appellant. Each was, at the time of the decisions under appeal, a tenant of either the Council or a housing association. [redacted] was admitted to hospital under s.2 MHA on 7 November 2006. His landlord, West Mercia Homes, had issued possession proceedings shortly before this on the grounds of alleged nuisance and noise. He remained in hospital until 29 July 2008. WCC, the HB authority, had written to [redacted] solicitor indicating that HB would cease after he had been absent for 52 weeks, on 12 November 2007. [redacted] solicitors argued that while the HB regs prohibited payment beyond 52 weeks, that this would breach his rights under Art 8 & Art 14 ECHR, and so payments should continue. WCC ended HB payments on 11 February 2008. [redacted] solicitors issued judicial review proceedings, and interim relief requiring the continued payments of money equivalent to HB was ordered. The substantive hearing was listed for hearing in November 2008. [redacted] was discharged from hospital on 29 July 2008, and after an initial period with his grandmother, he eventually returned to his home on 7 October 2008. He was re-awarded HB. The judicial review proceedings were then withdrawn, as he had now returned home, and so the risk to his tenancy had passed. However, I accept that the issues in this case remain live, as from the report of his psychiatrist in summer 2008, there was clearly every possibility of him having to be re-admitted to hospital in the future. He was indeed compulsorily detained again between the summer of 2009 and January 2010.

7. [redacted] landlord is Worcester Community Housing. It is sheltered accommodation, which has been adapted to suite his needs. He was detained on 25 September 2007, and HB was in fact paid until 1 December 2008. He was discharged from compulsory detention on 30 September 2009, under a community treatment order. During the period after his HB was stopped [redacted] continued to pay his rent out of his savings. He spent approximately £2,700 from his savings of £3,500 before his HB was restarted on his return home. He also had issued judicial review proceedings, which had been stayed pending the appeal to this tribunal.

8. [redacted] was a tenant of Warwick DC. She was admitted to hospital under s.2 MHA in January 2008. Her HB ceased on 19 January 2009. After this time [redacted] applied for a transfer, as due to her earlier actions in setting fire to her flat, return to this original address would have created significant problems with her neighbours. She used her savings to pay the arrears that had accrued since the ending of her HB, in order to facilitate the transfer application. She commenced a new tenancy in June 2009, but was subsequently re-admitted to hospital.

9. This area of HB is covered by reg 7 HB Regs 2006. Reg 7(16) sets out a variety of situations where someone who is absent from their normal home for a period that is unlikely to exceed 52 weeks (or exceptionally unlikely to substantially exceed 52 weeks) can be regarded as only temporarily absent, and can remain entitled to HB during that absence. Reg 7(17) limits the period during which an absence can be

considered temporary, and so HB can be paid, to 52 weeks. WCC had originally – and this was adopted by Ms Rowlands in her written submission – been of the view that if the absence was unlikely to substantially exceed 52 weeks, then HB could be paid beyond that point. They regarded 15 months – derived from the HB Guidance Manual – as the limit to this provision. By the time of the hearing it was common ground among all parties that the absolute maximum period for which HB could be paid during an absence was 52 weeks. The reference to a situation where the absence was '*unlikely substantially to exceed that period*' defined when an absence could still be considered temporary, but did not permit payment beyond 52 weeks.

10. The case for the appellants is that this rule, which applies to anyone detained in hospital in whatever circumstances and for whatever period, impacts disproportionately on these three appellants. This is because they are mentally ill, and for this reason more likely than other hospital patients to be absent for periods over 52 weeks. They are also in this position by reason of the actions of the state in compulsorily detaining them, preventing them returning home earlier, even if they wished to do so. It is argued that this results for [redacted] in a breach of his rights under Art 8, and for all three in a breach of their rights under Art 14, based on Art 8 and Art 1 Prot 1. They argue that a more flexible approach to the period for wh[redacted] HB can be paid in these circumstances should be read in to the regulation, under s.3 HRA. The respondent councils argue that the regulations should be given their clear meaning, and that no breach of the ECHR arises. The case for the appellants was not reliant on the Disability Discrimination Act or the Equality Act.

11. The case for [redacted] that his rights under Art 8 ECHR were breached is on the basis that the withdrawal of HB meant that he was likely to lose his home, and that this would adversely affect his ability to return to the community and further develop his private life on discharge from detention. The landlord had already issued possession proceedings for non-arrears grounds, and without the interim relief from the judicial review action, the appellant would rapidly have build up rent arrears, giving the landlord a mandatory ground for possession, which there was good reason to suppose would be exercised by the landlord. Ms Markus argues in para 35 of her skeleton that the ending of HB had a direct impact on [redacted] private and family life, and ability to retain his home. He was unable to take any steps to mitigate those consequences as he had no savings, and was compulsorily detained in hospital. He would then have nowhere to go on discharge, with possible further risks to the stability of his health.

12. I have considered the caselaw referred to me on the question of whether Art 8 could require the state[redacted] make payments in this type of situation. It is well established that Art 8 does not require the state to provide any particular type of welfare benefits where these do not otherwise exist, but in my view the cases do require that any scheme for welfare benefits that the state chooses to operate must be compliant with Art 8 in its operation. I was particularly drawn to the case of *Marzari* which found (p.7) that a positive obligation could arise to provide housing assistance to someone suffering from a severe disease. I am satisfied that, in the particular circumstances of this case, the rule preventing payment of HB beyond 52 weeks, irrespective of the circumstances, amounts to an interference with [redacted] Art 8 rights.

13. The next question to be addressed, therefore, is whether such interference is necessary or proportionate under Art 8(2)? Ms Rowlands argued, without conceding there was any breach, that the regulations already amounted to a proportionate response to the situations where people may find themselves away from their homes. The regulations provided a maximum of 13 weeks HB in most situations, but extended this to 52 in certain limited situations, including where someone was in hospital. This was itself a proportionate and flexible response, that balanced the needs of tenants with those of the wider community, and avoided the council having to fund property that was empty for lengthy periods, where those resources could be better employed elsewhere. There was no question of [redacted] being out on the street, as either the Social Services authority or the housing authority would have obligations to ensure his needs were met. The regulations as they stand were well within the state's *margin of appreciation*.

14. In my judgement the scheme set out in reg 7 may well be a reasonable approach to meeting the needs of most appellants. However, I have to consider the proportionality of the limitations on [redacted] rights. I have already concluded that the rules, by their inflexibility, do amount to an interference in his Art 8 rights. I am particularly concerned that the authority has no discretion to consider the particular needs of the appellant in this case. There is no method for considering his particular needs, nor whether the rule reflects a proportionate balance between the interests of the society generally, and the interests of this appellant. There is no reason to think that there would be many cases similar to the [redacted], so taking his needs into account would be unlikely to place a significant financial burden on the community as a whole. No account can be taken of the consequences for this appellant of losing his home, and he has no way of challenging the authority's decision. I consider, therefore, on balance, that the operation of reg 7 (16) & (17) HB Regs in this situation is indeed a disproportionate interference with the appellant's rights under Art 8 ECHR.

15. For all three appellants it is argued by Ms Markus that the HB rule amounts to unlawful discrimination under Art 14, taken with Art 8 and/or Art 1 Protocol 1. The case is summarised in para 43 of her skeleton. Firstly it is argued that the cessation of HB in this situation is within the ambit of Art 8 and Art 1 Prot 1. It is further contended that this rule discriminates against the appellants on the grounds of their mental health or disability, and/or their status as compulsorily detained patients in hospital. The discrimination arises because these appellants, by reason of their status, are at much greater risk of being in hospital over 52 weeks that other hospital patients, and the rule fails to recognise their different situation.

16. It is not necessary for the to be a breach of Arts 8 or Art 1 Prot 1 in order for there to be a breach of Art 14. It is only necessary, at the outset, for me to be satisfied that they are engaged, or that HB is 'within the ambit' of the articles. I note the section in *Clayton & Tomlinson* referred to me by Ms Markus arguing that 'ambit' should be given a generous interpretation. Having considered the cases of *Painter* and *M* I have no doubt that this particular provision within the HB scheme is within the ambit of Art 8 – this is a provision aimed at enabling tenants to maintain a roof over their heads, and to avoid losing their homes during periods of absence. Following the case of *RJM* I am also satisfied that Art 1 Prot 1 is engaged, as a legally enforceable right to a benefit is capable of being a 'possession'.

17. The appellants argue discrimination on the grounds of 'other status', interpreted in the case of *S* to mean a 'personal characteristic'. This is considered further in *RJM*, which included 'homelessness' as a personal characteristic. It also held that a generous meaning should be given to the phrase. I am satisfied that the status of these appellants as being mentally disabled, giving rise to lengthy periods in hospital as compulsory patients, comes within the scope of Art 14. There is plenty of evidence before me concerning the mental disability or ill health of each appellant, and of their likely need for further admissions to hospital in the future.

18. I turn, therefore, to whether there has been discrimination. The case is not argued on the basis of direct discrimination – they have not been subject to different treatment. The case relies on the argument that the right is violated when '*states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.*' *Thlimmenos v Greece* This approach is also supported by *DH v Czech Republic.* It is argued for the appellants that this HB rule has a disproportionately prejudicial effect upon these appellants as they are at greater risk of being in hospital over 52 weeks than others in the population. The rule also has a disproportionately negative effect on compulsory patients in mental hospitals, in comparison to other hospital patients. I have been referred to statistical information from a report 'Count Me In 2008', showing that 30% of mental patients had been in hospital over 52 weeks. M IND research I was shown also shows that only some 20% of those with mental health problems are in employment. Those with mental health problems are particularly affected by social security rules such as this. Information from the Health & Social Care Information Centre shows the

average length of stay for hospital patients to be from 1.5 – 12 days. It is clear to me that while reg 7(16) may address quite satisfactorily the situations and needs of most hospital patients, it impacts in a disproportionately negative way on this particular group. I note that in *AM (Somalia)* it was held that '*Different treatment of persons in analogous situations and same treatment of persons in significantly different situations are both prima facie discriminatory under Art 14 where it is disability that is the reason for the different treatment or that feature that makes the situations different.*'

19. I find that there is such different treatment in these cases, and so turn to whether it has an objective or reasonable justification. While Strasbourg case law establishes that states have a wide margin of appreciation in economic and social policy, discrimination on the grounds of a personal characteristic that the individual cannot change require quire persuasive justification. Discrimination on the grounds of disability is particularly condemned in both UK domestic legislation and ECtHR caselaw. The Secretary of State submitted a statement in the related judicial review proceedings which provided an explanation for the rule in reg 7(16), which can perhaps be summarised by saying that the rules themselves strike a reasonable balance between the needs of individuals with legitimate reasons to be away from their normal home, and the needs of the community in general. However, Ms Markus argues that even if that may be so in general, the rule makes no different provision for people in the appellants' situation whose circumstances are markedly different. I accept the argument that once discrimination has been shown, it is for the state – or the respondents in these cases – to show justification. (*DH v Czech Republic*). Ms Markus sets out a persuasive list of reasons - even without such specific justification – in para 105 of her skeleton as to why such discrimination is not justified in these cases. I agree with those submissions, and adopt them here as part of my finding that the different treatment I have already found is not objectively or reasonably justified.

20. This does not amount to a finding that HB should continue indefinitely for people in the appellants' situation. I consider that in their demonstrably different circumstances the question of the proportionality of the rule to cease HB when they have been in hospital for a lengthy period should be addressed on the basis of the particular circumstances of the case, taking account of all the relevant factors. This requires the council to have the discretion to make such an assessment, even if that involves continuing the HB for a period beyond 52 weeks. It was argued to me by Ms Rowlands that this was impractical, and would place an unreasonable burden on local authorities, involving them in matters outside of the normal range of HB issues. I cannot accept this argument. In the field of homelessness local authorities frequently have to consider evidence from social workers, doctors, and other professionals. The same is true of the field of social care. That taking a decision based on the particular circumstances of one of these cases would involve assessing views from a variety of agencies is not a convincing reason, in my view, for saying that such a task is impractical. I note also that within HB there are several areas when the authority is required to make a judgement based on the individual circumstances of the claimant – eg how long to disregard a property on the market; whether to make a Discretionary Housing Payment; whether to restrict eligible rent under the 'old reg 11'. None of these examples are very common, and neither would be cases such as those before me today.

21. On the question of a remedy, I find that the wording of the regulation itself cannot be read so as to avoid the breach that I have identified in these cases. Equally, s.6(2)(b) HRA does not apply, as the regulation is not required to be in this form to give effect to provisions of primary legislation. I have been pointed to caselaw that makes clear that in a case such as this I can 'read in' words so as to remedy the incompatability in the regulation. I refer in particular to *Ghaidan* & *MB*. A variety of forms of words have been suggested to me. I consider that I can only read in words that remedy the particular breach of the ECHR that I have identified in these cases. I therefore find that reg 7(17) should be read as follows, with the 'read in' words in italics:

'A person to whom para 16 applies shall be treated as occupying the dwelling he normally occupies as his home during any period of absence not exceeding 52 weeks, *or in the case of someone to whom para 16(c)(ii) applies such further period as the authority considers to be proportionate in all the circumstances of the case*, beginning from the first day of that absence.'

22. I therefore allow the three appeals. Having considered the facts as agreed between the parties, and summarised at paragraph 6, 7 & 8 above, I consider that as at the date of decision in each case it would have been a disproportionate and unjustified discrimination against them, in the application of their rights under Art 8, for their entitlement to HB to cease, and so would breach their rights under Art 14. I am prevented by s.12(8) Social Security Act 1998 from considering in my decision now any matters not obtaining at the time of the decision appealed against. I cannot, therefore, go on, in the light of the reports before me dealing with events after the decisions, up to when each appellant was in fact discharged from hospital, to make decisions on how long benefit should have continued for each appellant. While this may seem rather unsatisfactory, I cannot see any way around it. It will therefore be for the two authorities concerned to consider that question, in the light of all the information now available.

After the hearing of this case I received representations from Ms Markus, seeking to direct my attention to a decision of Deputy Social Security Commissioner Mark, in *R(H) 9/05*. I issued a direction that I would consider these further representations, and gave the other parties 21 days to make any further representations of their own. None were received. I have to say that I did not find that the decision referred to assisted me in considering these appeals.

24. I would also make the point that this has been a highly unusual case, involving complex matters of law. The approach I have taken, if followed elsewhere, could have significant repercussions for many other HB claimants, and possibly claimants of other benefits also. I think it would be in the interests of all parties for the issues to be considered by the Upper Tribunal as soon as possible

The above is a statement of reasons for the Tribunal's decision under Rule 34(2)(b) Tribunal Procedure (First Tier Tribunal)(SEC) Rules 2008

Signed Tribunal Judge: [redacted]	Date: 20/8/10
Statement issued to	*Appellant on:* *Respondent on:* 1/9/10. *Second Respondent on:*