THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
DECISION OF THE UPPER TRIBUNAL JUDGE

Before: A J Gamble

Attendances: For the Appellant (Secretary of State): Mr B Gill, Advocate, instructed by Ms A Stewart, Solicitor, of the Office of the Solicitor to the Advocate General for Scotland.

For the First Respondent: (The Claimant): The claimant was not personally present. She was represented by Mr P Cole, Welfare Rights Officer, Inverclyde Council.

For the Second Respondent (Inverclyde Council). No representation

The Secretary of State's appeal is allowed.

The decision of the Greenock First-tier Tribunal of 8 October 2013 is set aside.

That decision is remade as follows:

The decision of Inverclyde Council of 14 March 2013 is confirmed.

REASONS FOR DECISION

1. This is an appeal by the Secretary of State against the decision of the Greenock First-tier Tribunal of 8 October 2013. It is brought with the permission of District Tribunal Judge Walker who constituted that tribunal.

2. The claimant's representative requested an oral hearing. That request was granted by the Registrar. The hearing took place before me on 28 August 2014 when representation was as noted above. The claimant was not personally present. Inverclyde Council, hereafter referred to as "the Council", had intimated in advance that they were not going to be represented at the hearing. Neither Mr Gill nor Mr Cole had any issue with me proceeding in the absence of the claimant and in the absence of representation for the Council. I am grateful to Mr Gill and Mr Cole for their good humoured contributions to the legal debate.

3. On 14 March 2013 the Council decided that from 1 April 2013 the claimant's weekly entitlement to housing benefit fell to be reduced by 14% under regulation B13(3)(a) of the Housing Benefit Regulations 2006 as those regulations had been amended from the latter date.

4. It is undisputed that the claimant is a tenant of a housing association home with two bedrooms. It has been adapted for people with disabilities. She lives there with her husband. The basis of the Council's decision was that the claimant and her husband as "a couple" were entitled to only one bedroom under regulation B13(5)(a).

5. On 9 July 2013 the claimant appealed late against the Council's decision. Her appeal was admitted. The Council's decision of 14 March 2013 was reconsidered by them on 18 July 2013 but left unaltered.

6. The claimant had applied to the Council on 5 April 2013 for a discretionary housing payment under section 69 of the Child Support, Pensions and Social Security Act 2000. On 17 April 2013 her application was refused. On 3 May 2013 she requested a reconsideration of that refusal. The Council reconsidered it on 7 May 2013 but did not change the outcome. The refusal was based on the amount of the weekly income of the claimant and her husband along with their allowable weekly expenditure. At the hearing, Mr Cole, in answer to a question from me, informed me that the claimant has since been awarded a discretionary housing payment following on the agreement relating to the financial cap on such payments made between the Westminster Government and the Scottish Government in May 2014. All of the events described in this paragraph postdated the Council's decision of 14 March 2013. Accordingly, under paragraph 6(9)(a) of Schedule 7 to the above Act, the tribunal were precluded from taking them into account. They did not do so. Mr Gill and Mr Cole correctly concurred that the hearing should proceed on the basis that at the date of the Council's decision the claimant had not been awarded a discretionary housing payment.

7. The claimant's appeal was heard on 8 October 2013. The tribunal convened on that date made the decision recorded as follows in their decision notice, document 33:

> "1. The appeal is allowed.
>
> 2. The decision made on 14th March 2013 is set aside.
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> 3. In terms of section 3(1) of the Human Rights Act 1998 regulation B13(5)(a) of the Housing Benefit regulations 2006 can and should be read as follows: "(a) a couple (within the meaning of Part 7 of the Act) (or one member of a couple who cannot share a bedroom because of severe disability)." Not to so read it would be incompatible with the appellant's rights under Article 14 of the European Convention of Human Rights read with Article 1 of the First Protocol of the European Convention of Human Rights.
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> 4. Applying regulation B13(5)(a) as so read, the appellant is entitled to two bedrooms. Accordingly there should not be an under occupancy reduction of 14% in his housing benefit entitlement from 1st April 2013.

8. The tribunal make commendably detailed findings of fact on the claimant's disabilities and her needs for night-time care from her husband in paragraphs 3 – 6 of their statement of reasons on documents 36 – 37. Those findings were not challenged by Mr Gill. I have decided the appeal on the basis that their accuracy is accepted by all parties.

9. For the sake of completeness, I should record why the claimant did not and could not receive the benefit of regulation B13(6)(a) which allows for "a person who requires overnight care" to be entitled to an additional bedroom. That is because the phrase which I have just quoted is defined in regulation 2(1) so as to only include persons whose night-time care is provided by "people who do not occupy as their home the dwelling to which ... the award of housing benefit relates." Clearly that definition excludes the claimant from the benefit of regulation B13(6)(a) as her husband occupies the dwelling to which her award of housing benefit relates as his home.

10. It is clear from the text of their decision, cited in paragraph 7 above, the tribunal relied on Article 14 of the European Convention on Human Rights read along with Article 1 of the First Protocol to that Convention in reaching their conclusion. Mr Gill accepted that regulation B13 engaged those provisions and constituted discrimination for the purpose of Article 14. However he submitted that such discrimination was justified. By necessary implication the tribunal took the opposite view. In doing so, Mr Gill submitted, they had erred in law.

11. More specifically, Mr Gill submitted that the tribunal's decision involved them in three interrelated errors of law:

(a) They had applied the wrong test for justification

(b) They had not followed the decision of the Court of Appeal in *R(MA and Others) v Secretary of State for Work and Pensions* [2014] PTSR 584.

(c) They had rather relied on the decision of the Court of Appeal in *Burnip v Birmingham City Council* [2013] PTSR 117.

I deal with those submissions and Mr Cole's responses in the following paragraphs.

12. Mr Gill submitted that the present case related to the payment of state benefits as was the situation in *MA*. At one point Mr Cole suggested that that case was rather a decision relating to housing. He did so by reference to a comment in paragraph 2 of *MA* p589 where Lord Dyson, the Master of the Rolls, says:

> "The 2012 regulations were intended to address the problem that some tenants of social housing were occupying more space than they needed, by limiting the HB entitlement of those "under occupying" accommodation to an "appropriate maxim housing benefit."

In so submitting Mr Cole was reading the first clause of the above sentence of Lord Dyson's judgement entirely out of context of the sentence as a whole and of the paragraph in which it appears to say nothing of the totality of his judgement and of that delivered by Lord Justice Longmore. I thus reject that submission both for the purpose for which Mr Cole initially made it which was that I should have regard to the Scotland Act 1998 in deciding this appeal and also for the purpose of determining the appropriate test for justification. In the latter regard Mr Gill drew my attention to *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1548, a decision of the Supreme Court. That case authoritatively establishes that in the context of the payment of state benefits the test for whether discrimination is justified under Article 14 is that of whether it was manifestly without reasonable foundation. That test was also applied by the Court of Appeal in *R(JS and Another) v Secretary of State for Work and Pensions* [2014] PTSR 619. In that decision it was emphasised that the test of being manifestly without reasonable foundation was a stringent one from the point of view of a claimant who sought to challenge the enactment and enforcement of legislative provisions. The manifestly without foundation test was explicitly and applied by the Court of Appeal in *MA* in regard to the same legislative provisions which were challenged in this case. In view of these authorities I hold that the applicable test for justification in this case was that of manifestly without reasonable foundation. The tribunal erred in law in failing to apply it.

13. Mr Gill then went on to emphasise that, applying the test discussed in paragraph 12 above, the Court of Appeal in *MA* had held that regulation B13 was justified. He drew my attention especially to paragraphs 39 – 60 and 65 – 80 of Lord Dyson's judgement. In particular, he stressed that the justification accepted for regulation B13 by the Court of Appeal rested on the totality of the package provided by the Westminster government to deal with the problem of under occupancy. That package very much included the existence of the scheme for discretionary housing payments. In that connection he referred me particularly to paragraphs 40 and 82 of *MA*. In answer to a question from me, he submitted that it was the existence of the discretionary housing payment scheme that mattered for the purpose of justification not whether a particular claimant had received such a payment. He supported that submission by reference to the Annex to the Judgement of the Court of Appeal in *MA*. That Annex showed that not all of the claimants in that case were in receipt of discretionary housing payments. As I narrate in paragraph 6 above, neither was the claimant at the date of the Council's decision. I am persuaded by Mr Gill's submission that that should not preclude me from holding, following the decision of the Court of Appeal in *MA*, that regulation B13 was justified for the purpose of Article 14 of the European Convention of Human Rights in her case. That was what the tribunal should have held. Their failure to do so was a further error of law.

14. In regard to the importance of a claimant (unlike the claimant in this appeal) receiving a discretionary housing payment in deciding a challenge to regulation B13 under the European Convention of Human Rights, I drew Mr Gill's and Mr Cole's attention to the decision of Upper Tribunal Judge Wright QC in CSH/777/13, signed on 15 August 2014. In that decision he held that the factor just referred to was determinative in deciding the appeal against the interests of a claimant. I accept Mr Gill's response that CSH/777/13 fell to be distinguished from the present case. That was on the basis that the challenge to regulation B13 in CSH/777/13 was based on Article 8 of the European Convention on Human Rights and not Article 14 (as was the case here). The tests for engagement and justification were different where Article 8 was relied upon from those applicable when a challenge rested on Article 14. Mr Cole made no contrary submission.

15. Mr Cole submitted that the Court of Appeal in *MA* should have carried out a case by case comparison. In making that submission he relied on the decision of the European Court of Human Rights in *Kiyutin v Russia* [2011] ECHR 439, paragraph 59. Mr Gill countered that submission by pointing out that a case by case comparison was indeed required to establish discrimination. That was explicitly stated in paragraph 59, just referred to. However the Secretary of State had conceded the issue of discrimination in this appeal. The issue before me was rather that of justification. That had been the issue before the Court of Appeal in *MA*. Indeed the issue in *MA* was indistinguishable from that arising in the present proceedings. A case by case approach was not appropriate in deciding on justification when the criterion of manifestly without a reasonable foundation was being applied. Thus there was no error in the Court of Appeal not using a case by case comparison. In any event, *Kiyutin* had been cited in argument to the Court of Appeal in *MA*. Finally, any inference of the need for a case by case approach from CSH/777/13 fell to be rejected because, as emphasised in paragraph 14 above, that case was distinguishable from the present one as being decided on the basis of Article 8 of the European Convention on Human Rights rather than Article 14.

16. Mr Gill also relied on *MA* in support of its third contention that the tribunal had erred in law by following and applying *Burnip*. Although *Burnip* was itself a decision of the Court of Appeal it had been distinguished and not followed in the later decision of *MA*. In that connection he drew my attention particularly to paragraphs 64 and 71 – 72 of the Judgement of Lord Dyson in *MA*. I accept Mr Gill's submission and agree that the tribunal also erred in law by purporting to follow *Burnip*. I reject Mr Cole's counter submission that they were correct to do so.

17. At the end of the day, Mr Gill's case rested on *MA*. All three of his contentions were very largely based upon it as the foregoing paragraphs have shown. In accepting Mr Gill's submissions, I follow *MA*. As a decision of the Court of Appeal in England and Wales it is not technically binding on me when sitting as a Judge of the Upper Tribunal in Scotland. However, as I held in paragraph 13(a) of *RJ v Secretary of State for Work and Pensions* [2012] AACR 28, I would in that role ordinarily expect to follow a decision of the Court of Appeal if it was on a point indistinguishable from one arising before me. In other words I would follow such a decision unless it was in my view clearly wrong. I consider that this approach applies both to decisions of the Court of Appeal on judicial review applications as well as those taken under sections 13 – 14 of the Tribunals, Courts and Enforcement Act 2007. It has, of course, no application if the decision of the Court of Appeal relates to a point of law peculiar to England and Wales. I do not consider that the decision in *MA* was plainly wrong. I thus follow it. I should add in connection with issues of precedent that neither Mr Gill nor Mr Cole invited me to adjourn the hearing or sist the proceedings to await any pending decisions of the Court of Appeal or the Supreme Court.

18. For the sake of completeness I add that Mr Cole drew my attention to the Scottish Social Housing Charter and in particular to its "outcomes and standards" in relation to "equalities". "Disability" is one of the matters referred to under the heading of "equalities". I understood Mr Cole to submit that the Council's decision was wrong in law because they failed to have regard to the above provisions. That submission falls to be rejected. Firstly, in taking their decision the Council were not acting as a social landlord. It is to social landlords that the Charter applies. The decision under appeal to the tribunal was taken by the Council as "an authority administering housing benefit" under paragraph 1(2) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000. Further, I do not consider that the Charter can prevail over legislative provisions.

19. The tribunal's decision was erroneous in law. I exercise my discretion in favour of the Secretary of State and set it aside. It is appropriate for me to remake it. I do so by substituting a decision confirming the Council's decision of 14 March 2013 for that taken by the tribunal.

(Signed)
A J GAMBLE
Judge of the Upper Tribunal
Date: 4 September 2014