



PROTECTION FOR DISABLED TENANTS: RECENT DEVELOPMENTS

- (1) DISABILITY DISCRIMINATION DEFENCES IN POSSESSION PROCEEDINGS; AND**
- (2) CHALLENGES TO THE 'BEDROOM TAX' AND THE BENEFIT CAP**

Introduction

1. Article 8 of the European Convention on Human Rights has a natural place in housing law providing as it does for the right, amongst other things, to respect for a person's home. This seminar will explore recent developments in two areas of housing law affecting disabled tenants, one where the effectiveness of article 8 has been limited but where other rights based legislation has provided an alternative and the other where article 8 is becoming integral in arguments used to secure the right to housing benefit.
2. This breakout session is therefore split into two distinct parts.
3. The first part of the session will briefly consider the limits of article 8 when used as a defence to possession proceedings, even in cases where the tenant is vulnerable or disabled and how this has been counterbalanced by the Equality Act 2010 coming to the forefront in housing cases and a recent line of authority which has facilitated this.
4. The second part of the session will consider cases challenging the application of the 'under occupancy charge' or 'bedroom tax', how article 8 has now come to the forefront in such cases and what the implications of that might be.

1. Disabled tenants and possession proceedings

Article 8

5. In November 2010, the judgement of the Supreme Court in *Manchester City Council v Pinnock* UKSC [2010] 45 established that any tenant of a public authority is entitled to raise a defence relying on article 8 in possession proceedings in the county court challenging the proportionality of the decision taken to evict them (paragraphs 45 and 49).
6. However, the Supreme Court tempered this outcome by stressing that the unencumbered property rights of a public authority will carry real weight in the proportionality assessment and in almost every case where there is no domestic law right to remain, there will be a case for saying that eviction is proportionate (paragraph 54). This dealt with the legitimate aims of a public authority, now referred to as the twin aims of vindicate the local authority's property rights, and secondly, to enable the authority to comply with its statutory duties in the allocation and management of the housing stock available to it.
7. The Supreme Court went on to make six general points (paragraphs 60-64), including that an article 8 defence should be considered summarily dismissed in the event that even if the facts put forward by the tenant were made out, eviction would be proportionate.
8. The sixth point is the most important for the purposes of this session;

“Sixthly, the suggestions put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue “in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty”, and that “the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases” seem to us well made.” [64]



9. The importance lies in the distinction made between vulnerable tenants and other tenants. Although in *Pinnock*, the Supreme Court rejected the proposition that the courts should take the “structured approach” to proportionality when determining article 8 defences, which would require the court to consider if there were less drastic measures than eviction available, concessions were made in respect of vulnerable tenants.
10. After *Pinnock*, a long line of authorities confirmed how difficult it is to succeed on an article 8 defence, whilst being careful to stress that exceptionality was not a guide (see *Hounslow v Powell* [2011] UKSC, *Corby BC v Scott* [2012] EWCA Civ 276 [2012] HLR 23, *Birmingham City Council v Lloyd* (2012) EWCA Civ 969 and *Thurrock BC v West* [2012] EWCA Civ 1435)
11. The only exception has been the case of *Southend-on-Sea Borough Council v Armour* [2014] EWCA Civ 231.
12. Mr Armour was an introductory tenant diagnosed with Aspergers. The council sought to terminate his tenancy after 3 incidents of low-level verbal abuse at the beginning of the tenancy. The trial took place nearly a year after issue.
13. Mr Armour’s case was different to that of the tenants in the other article 8 cases this paper cites because despite his mental health problems, he had been able to adjust his behaviour and manage his tenancy appropriately for the best part of a year. His defence succeeded on this basis and, at least in part, in accordance with paragraph 64 of *Pinnock*.
14. So, depending on the evidence and circumstances, some ‘vulnerable’ tenants can benefit from what is effectively a lowered threshold on proportionality but overall, article 8 will rarely result in successful defence of possession proceedings where there is no domestic law right to remain, even when the tenant is vulnerable.
15. The answer? In part, to look to other rights based legislation like the Equality Act 2010 (‘EA 2010’). Whilst the distinct concept of disability discrimination (s15) requires a link between the conduct leading to the decision to evict and the disability. That is not required where direct (s13) or indirect discrimination (s19) is alleged or where breach of the Public Sector Equality Duty (s149) is alleged.
16. The EA 2010 came into force on 1 October 2010. The Act covers much of the same ground as the Disability Discrimination Act 1995, except for the introduction of the concept of disability discrimination (s15). There has been a steady rise in the use of that concept to defend possession proceedings relying on the duty on managers of premises not to discriminate against occupiers of those premises (s35).
17. This paper only looks at the approach of the higher courts in respect of cases where disability discrimination is raised.

Disability discrimination

***Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15**

18. This case reached the Supreme Court after the Court of Appeal confirmed the finding at first instance, and then on appeal to the circuit Judge, that cases where disability discrimination was raised should be treated in



the same way procedurally. In other words, that they should initially be subject to summary determination when the twin aims of the landlord should be presumed and should almost always establish that the landlord's aims in seeking to evict are proportionate.

19. Baroness Hale gave the main judgement and it is worth reading for its coherent summary of the relevant provisions of the EA 2010 and the way in which they operate.
20. Mr Akerman-Livingstone was a 47 year old man diagnosed with a severe form of Post- Traumatic Stress Disorder which resulted from sustained physical and emotional abuse by his parents when he was a child. Everyone agreed that Mr Akerman-Livingstone's condition meant that he was a disabled person within s6 EA 2010.
21. Mr Akerman-Livingstone became homeless and the council accepted a full duty to house him. The issue arose because Mr Akerman-Livingstone refused a final offer of a property in Wells, a place that he associated with his childhood abuse.
22. Possession proceedings were issued and at the relevant hearing, expert evidence was before the court which supported Mr Akerman-Livingstone's claim that he could not live in the property because of the associations with his past abuse. The defence relied on disability discrimination and article 8.

First instance decision

23. At first instance, the court determined as a preliminary point the question of whether an equality act defence could be raised. HHJ Denyer QC characterised both the equality act and article 8 defences as 'quasi judicial review' arguments and approached them both in the same way – i.e. in the way set out in *Pinnock, Powell* and *Thurrock BC* etc. The effect of this was that the Judge applied the proportionality test used in article 8 cases to the equality act defence, in other words, he applied the presumption that R's actions were proportionate and granted possession.
24. Permission to appeal was granted on the question of whether the equality act defence should be treated in the same way as an article 8 defence – i.e. should they both be subject to summary determination on the basis that the proportionality of seeking eviction should be assumed?

Appeals

25. In the County Court, Cranston J dismissed the appeal on the basis that the same proportionality test should be applied to article 8 and equality act defences because the context was the same, namely the exercise of housing functions. He rejected the argument that a different test of structured proportionality should be applied to the equality act defence, that being a more generous test.
26. The Court of Appeal reached the same conclusions as Cranston J and dismissed the appeal.



Supreme Court

27. The Supreme Court took a different view and held that the test of structured proportionality must be applied to equality act defences and, since the burden of proving that there had not been a contravention of an EA 2010 provision and/or that its actions were proportionate was explicitly placed on the Landlord (by s136 EA 2010), in all but rare cases, an equality act defence should proceed to trial so that the Landlord could seek to discharge that burden.

Reasoning

28. The main judgement was given by Lady Hale with Lord Neuberger and Lord Wilson giving shorter judgements. Lords Clarke and Hughes concurred with the preceding judgements.

29. The following points were made;

- (i) EA 2010 rights applied to both private and public sector Landlords, as opposed to article 8 rights which only applied to the latter, which indicates that the substantive rights under EA 2010 are different to article 8 rights.
- (ii) Disabled people have an extra right in respect of their homes and that is consistent with the obligation imposed by the UN Convention on the Rights of Persons with Disabilities to, amongst other things, ensure that reasonable accommodation is provided in the context of the disabled persons needs (paras 24-26).
- (iii) Lord Neuberger agreed with this and stated that the protection given by EA 2010 is plainly stronger than that given by article 8 and is given to a limited class of occupiers who are considered by Parliament to deserve special protection. He described the protection afforded by s35(1)(b) EA 2010 as a 'more specific, stronger, right afforded to disabled occupiers over and above the article 8 right (paras 55-56).
- (iv) Lady Hale noted that the Convention obligation was not absolute and therefore, in accordance with s15 EA 2010, a landlord can evict a disabled tenant if it is a proportionate means of achieving a legitimate aim (para 27).
- (v) Lady Hale had no hesitation in concluding that this concept of proportionality derived from EU law as set out by Mummery LJ in *R(Elias) v Secretary of State* [2006] 1 WLR 3213 at para 165. Mummery LJ set out the three elements to this test of structured proportionality and Lady Hale added a fourth;
 - (i) Is the objective sufficiently important to justify limiting a fundamental right?
 - (ii) Is the measure rationally connected to the objective?
 - (iii) Are the means no more than is necessary to achieve the objective?
 - (iv) Is the impact of the rights infringement disproportionate to the likely benefit of the impugned measure? (para 28)
- (vi) Lady Hale set out that in *Pinnock and Powell*, the structured approach was not appropriate since the legislation in play was designed for sound reasons of social policy so as not to provide the occupier with a secure tenancy. Therefore, it was right that the twin aims in article 8 cases, of vindicating property rights and to allow the social landlord to comply with its duties of allocation and management of housing stock, should be taken for granted (para 29).



- (vii) However, Lady Hale concluded that those twin aims would not always trump a disabled persons equality rights and it could not be assumed that they would. A landlord is obliged to treat a disabled person more considerately than a non-disabled tenant and the impact of eviction may outweigh the benefits of the landlord regaining possession (paras 30-31).
 - (viii) Lady Hale went on to explain that the policy underpinning general social housing cases, that being the benefit to the public of allowing a housing authority to properly manage the limited resource of housing, is very different from the policy underpinning equality rights, that being to secure equality of treatment and equal respect for 'the human dignity of all people' so that in an equality act case, in addition to the usual landlord issues, the court has to consider whether the landlord has done all that is reasonable to accommodate its tenant's disability and whether the 'twin aims' are sufficient to outweigh the effects on that tenant of eviction. Lady Hale considered that the courts are well equipped to determine those issues (para 32).
 - (ix) Furthermore, whilst in article 8 cases there is no real requirement on the Landlord to prove its actions are justified since the twin aims are assumed, in EA 2010 cases, s136 specifically places the burden on the landlord to establish proportionality (para 34) a factor that Lord Neuberger also gave significant weight to (para 55).
 - (x) In disability discrimination cases, Lady Hale stressed at several point in her judgement that the question when considering proportionality will be whether the landlord could do anything else, it being open to the court to make a wider range of orders than in article 8 cases, and what the impact of eviction would be (paras 31, 32 and 34).
 - (xi) Those differences between Article 8 and EA 2010 cases allowed Lady Hale and Lord Neuberger to conclude that an EA 2010 case should not be summarily disposed of unless the following is made out;
 - (i) The Defendant has no real prospect of proving he is disabled within s6 EA 2010;
 - (ii) It is plain eviction was not sought for something arising in consequence of the Defendant's disability or;
 - (iii) Bringing the claim is plainly a proportionate means of achieving a legitimate aim.
 - (xii) Lord Neuberger felt that those cases would be rare because each of the three stages would often involve disputed issues of fact and summary judgement would not be sensible or adequate to deal with those disputes which would normally require disclosure of documents and expert evidence (para 60).
 - (xiii) Lady Hale stressed that, like Lord Neuberger, she suspected that those cases that could be dealt with summarily would be rare.
30. Unfortunately, *Akerman-Livingstone* was deemed to be one of those rare cases where summary disposal at first instance was appropriate.

31. This approach has been confirmed in a more recent Court of Appeal case.

Birmingham City Council v Stephenson [2016] EWCA Civ 1029

32. The facts were that the Defendant (D) was an introductory tenant diagnosed with paranoid schizophrenia which was managed with anti-psychotic medication. The neighbour below complained of noise nuisance



emanating from D's flat. The Council issued notice under s128 Housing Act 1996 and upheld its decision to do so on review.

33. The council's Housing Officer acknowledged D's condition and that he struggled to keep appointments for his medication which led to lapses in his taking his medication and relapses in his condition.
34. At the first hearing, D was represented by a duty solicitor and the claim was adjourned to allow for a defence to be filed. At the return hearing two months later, there was still no defence. D had approached Community Law Partnership two days before the hearing and therefore the Solicitor only had basic instructions.
35. At the hearing, D's Solicitor sought a short adjournment. The Council accepted that D was disabled for the purposes of s6 EA 2010 but opposed his application. D's Solicitor submitted that eviction would place C in breach of EA 2010 and would be disproportionate contrary to article 8. The Judge refused to adjourn on the grounds that D had been given ample time to prepare his defence and made an outright possession order.
36. An appeal to the Circuit Judge failed and a further appeal was made to the Court of Appeal and Lord Justice Lewison gave the lead judgement. The salient points were;
 - (i) CPR 55.7 and 55.8 envisage a scenario where a tenant may not have filed and served a defence at the first, or even subsequent hearings but that judgement should not be entered in default in those circumstances.
 - (ii) CPR 55.8 allows the court to decide a claim without a full trial but it is also right to say that having a genuine dispute on substantial grounds is not a precondition to the giving of case management directions under CPR 55.8(1(b)).
 - (iii) The finding that D had been given ample time to prepare his defence may have been true for a person without D's disability but it was not true for D who was living on benefits and had been seen begging in the local shopping parade during the last adjournment. The District Judge failed to take account of D's mental health issues and the fact that his Solicitor had only seen him for the first time 2 days before the hearing.
 - (iv) At the first hearing, the representative for the Council explained the framework of the equality act 2010 and the representative for Mr Stephenson made repeated references to 'proportionality'. This should have alerted the Deputy District Judge to the real possibility of a pleadable defence under the Equality Act 2010;
 - (v) *Akerman* was referred to, in particular paragraphs 31, 32 and 34 in which Lady Hale dealt with the structured approach to proportionality and the burden of proof and paragraphs 56 and 59 of Lord Neuberger's judgement which deal with the question of summary disposal. The Deputy District Judge did not approach the case in the way outlined in *Akerman* and if he had, he would have decided that Mr Stephenson was disabled and that it was arguable that there was a causal link between his disability and the reasons for eviction. The burden then shifts to the Council to establish proportionality and show that alternatives to eviction have at least been considered, even if in the end, eviction really is the only answer.
37. The crux of the matter as set out by Lord Justice Lewison was that the Deputy District Judge was wrong to treat the question of proportionality as a binary choice between eviction and doing nothing. He went on to consider a range of possible alternatives to eviction including being given extra support, changing medication, installing sound attenuation measures in the property, considering injunctive action or finding alternative



accommodation. Lord Justice Lewison was clear that he was not indicating that those measures were feasible but that they could not be summarily ruled out.

Discussion points

- How do these two cases improve things for disabled tenants defending possession proceedings?
- What will social landlords in these cases need to be showing?
- What role will community care law take in these sorts of cases?
- What circumstances might result in a summary determination at first instance in these sorts of cases?
- Are there any procedural implications that follow from *Stephenson*?

2. Challenges to the bedroom tax made on behalf of disabled tenants.

38. The Housing Benefit Regulations 2006 (SI 2006/213) were amended by amendment regulations in 2012 (SI 2012/3040) and 2013 (SI 2013/665) to introduce Regulation B13 with effect from 1 April 2013.
39. The effect of Regulation B13 is now commonly referred to as the 'bedroom tax' and it provides that anyone in receipt of housing benefit with one 'spare' room will have their entitlement reduced by 14% and anyone with two or more 'spare' rooms will have their entitlement reduced by 25%.
40. Originally, Regulation B13 offered no exemptions save for in respect of tenants serving in the armed forces. The Discretionary Financial Assistance Regulations 2001 allow for awards of Discretionary Housing Payment ('DHP') to be made on a case by case basis and it was felt that any injustice could be addressed by the award of DHP.
41. However, the housing benefit regulations *were* amended in the wake of *Burnip v Birmingham City Council & Anor* [2012] EWCA Civ 629 which dealt with similar provisions used in the private sector where housing benefit was received in accordance with the Local Housing Allowance rules and was calculated with reference to, amongst other things, the number of bedrooms the claimant was entitled to.
42. Two of the Appellants (Burnip and Trengrove) were disabled tenants living in two bedroom properties and needed overnight carers. They had been assessed as entitled to rent allowance for one bedroom only. The other Appellant (Gorry) had three children, two of whom were disabled and could not share a room but the rent allowance was calculated as if the children could and should share a room.
43. By the time the Appeals came before the Court of Appeal, the government had amended the Housing Benefit Regulations 2006 to allow for an exemption where a claimant or his/her partner needed a room for an overnight carer.
44. The issue was whether the Regulations were discriminatory contrary to Article 14 European Convention on Human Rights.
45. Article 14 sets out a type of discrimination akin to indirect discrimination and is triggered in the event of;



"... a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group."

46. The Appellants argued, and the court accepted, that *Thlimmenos v Greece* (2001) 31 EHRR 15 applied so that article 14 discrimination would be made out "...when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."
47. All of the Appellants succeeded in their arguments and established a prima facie case of discrimination and the Court of Appeal found that the Secretary of State had failed to establish objective and reasonable justification for the discriminatory effect of the statutory criteria.
48. The Court of Appeal rejected the argument that the availability of DHP to make up any shortfall in rent could justify the discrimination given that the award of DHP is discretionary and therefore there was no guarantee that they would cover the shortfall in rent in every case.
49. In anticipation of the judgement, the government amended the housing benefit regulations to provide for some statutory exemptions where claimant or the claimant's partner is an adult who requires overnight care (B13(6)(a)); is a qualifying parent or carer (being a foster parent or carer) (B13(6)(b)); or is a member of the armed forces away on operations (B13(8)).
50. 10 months after the judgement in *Burnip*, B13(5)(ba) was inserted to cover Mr Gorry's case.
51. The government has now been forced to make further amendments to the housing benefit regulations in respect of other classes of disabled persons.

MA & Ors, R(on the application of) v The Secretary of State for Work and Pensions [2016] UKSC 58

52. The appeals of *MA & Ors, R (on the application of) v The Secretary of State for work and pensions* [2014] EWCA Civ 13 came to the Court of Appeal after the Divisional Court rejected the argument that Regulation B13 discriminated against the particular disabled tenants in those appeals contrary to Article 14 European Convention on Human Rights, when read in conjunction with article 1 of the first protocol of the convention, and that the Respondent had breached its duty under s149 Equality Act 2010.
53. One of the cases was agreed on the facts. Mrs Carmichael needed a separate bed with space for carers and to allow her to manoeuvre her wheelchair. She was unable to share a room with her husband since there was no room for another bed.
54. Two arguments were put forward, the first was that Regulation B13 were unlawful because they failed to take account of disability needs generally even when they did not fall within one of the well-defined groups in *Burnip*. The second was that a specific exemption was required for adults who, for reasons of disability, cannot share a room with their partner – if they were children, they would be exempt as a result of the success of Mr Gorry, one of the Appellants in *Burnip*.



55. Both arguments also failed in the Court of Appeal. The first was rejected because the court considered that it would be too complicated to consider every possible disability need through the housing benefit regulations and therefore the provision of DHP was an acceptable alternative. The second argument was rejected on the basis that the government only need satisfy the court that its policy is not ‘manifestly without reasonable foundation’ and it was found to be reasonable to treat children better than adults.
56. The Court of Appeal also rejected an argument that of breach of the PSED in s149 EA 2010. The Appellants appealed.
57. In the same year, the judicial review of *Rutherford and Ors v Secretary of State for Work and Pensions* [2014] EWHC 1613 (Admin) was rejected by the High Court.
58. The first and second claimants are the grandmother and step grandfather of Warren, the third claimant. Warren has a severe disability which means that he needs round the clock care. This is provided by his grandparents and a team of local authority carers. Respite is provided by carers staying overnight two nights a week.
59. The Rutherfords live in a three bedroom property and were assessed as having a spare bedroom and therefore subject to a 14% reduction in their housing benefit entitlement on the basis that extra rooms for overnight carers were only available for housing benefit claimants or their partners, not their children. DHP, initially refused, was granted for 2013/14 and 2014/15.
60. The Court of Appeal agreed with the Appellants that the situation of the Rutherfords was indistinguishable from that of an adult with disabilities requiring an overnight carer and therefore there had been a breach of article 14 which was not justified. The Secretary of State for Work and Pensions appealed.
61. The cases of MA and Rutherford were heard in the Supreme Court together with a number of other appeals in *R(MA & Ors) v The Secretary of State for Work and Pensions* [2016] UKSC 58.
62. The outcome was mixed.
63. The lead judgment was given by Lord Toulson who made it clear that the relevant test was whether the relevant parts of regulation B13 were ‘manifestly without reasonable foundation’. Lord Toulson rejected the submission that an enhanced standard should be applied so that ‘weighty reasons’ were required to justify disability discrimination. The normal standard applies (paragraph 36).
64. In the *Rutherford* (child needing an overnight carer) and *Carmichael* (adult unable to share a room with her husband) appeals, the Supreme Court held that was a clear medical need for an ‘extra’ room in each case and the possibility of DHP payments was not sufficient to justify the discrimination (paragraphs 42-46). These were classes of case which were sufficiently clear so that the regulations should have made an exemption.



65. The Supreme Court pointed out that in those cases there was an ‘inexplicable inconsistency’ in the Secretary of State’s different treatment of adults and children needing separate rooms or overnight carers (paragraph 47). The Secretary of State’s appeal of Rutherford was dismissed and the Carmichael’s appeal allowed.

66. As for the remaining appeals, the Supreme Court found that there was no direct ‘medical need’ rather, the cases were based on a pressing social need related to the particular disability and those cases could therefore not be considered as a distinct class but rather should be considered on their individual facts. The other cases were specifically dealt with in this way;

51. Mr Daly occupies a two-bedroom property. His severely disabled son, Rian, stays with him regularly, but he is not within the list of those who qualify for a bedroom under Reg B13(5) because he spends less than half his time with his father. This has nothing to do with the fact of his disability. Mr Daly may have a powerful case for a DHP award, so that he can continue to pay his rent from state benefits for Rian’s sake, but I accept the Secretary of State’s argument that he has no proper basis for challenging the HB and DHP structure on equality grounds.

52. Mr Drage is the sole occupier of a three-bedroom flat, which is full of accumulated papers. He suffers from an obsessive compulsive disorder. His hoarding of papers is no doubt connected to his mental illness, but that is very far from showing that he has a need for three bedrooms. It is not unreasonable for his claim for benefit to cover his full rent to be considered on an individual basis under the DHP scheme.

53. JD lives with his adult daughter, AD, who is severely disabled, in a specially constructed three-bedroom property. They have no objective need for that number of bedrooms. Because the property has been specially designed to meet her complex needs, there may be strong reasons for JD to receive state benefits to cover the full rent, but again it is not unreasonable for that to be considered under the DHP scheme.

54. Richard Rourke and his step-daughter live in a three-bedroom property. One of the bedrooms is used for the storage of equipment. It is another example of a case where it is not unreasonable for Mr Rourke’s claim for benefit sufficient to cover the whole of the rent to be considered on an individual basis under the DHP scheme.

67. There was also one case of sex discrimination in which the Supreme Court overturned the positive finding by the Court of Appeal that there had been discrimination.

68. As a result of the Supreme Court’s judgement, the housing benefit regulations have been amended to allow for an extra bedroom for the purposes of housing benefit where;

when a disabled child or disabled non-dependant adult reasonably requires, and has, overnight care from a non-resident carer (or group of carers) and is in receipt of a specified disability benefit; and

in respect of a disabled couple, when a LA is satisfied that a couple cannot reasonably share a bedroom as a result of a member of the couple’s disability and that member is in receipt of a specified disability benefit.



69. The amendments to the Housing Benefit Regulations 2006 were put into effect by the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017 which came into effect on 1 April 2017.
70. The amendments provide for certain preconditions for qualification for the exemption and these are explained in the Housing Benefit Adjudication Circular A3/2017.

The role of article 8 in the provision of housing benefit

71. The Supreme Court in *MA & Ors* accepted that article 8 was triggered by the provision of housing benefit and applied to the appeals before it (Paragraphs 10-13).
72. This was a departure from the basis on which previous cases had been decided, i.e. A1:P1. In *MA & Ors*, nothing turned on this but there may be implications – see *DA and Others v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin) which is the recent High Court Judgement about the effect of the recent reduction of the ‘relevant amount’ for the purposes of the benefit cap on lone parents with children under the age of 2.
73. Judgement in *DA* was given by Mr Justice Collins who observed that one of the accepted aims of the regulations is to encourage people to go into work so that children do not suffer from living in workless families. However, this poses a particular difficulty for lone parents with children under two because childcare is often more expensive for children of this age and if a Mother chooses to breastfeed, this will usually be an obstacle to entering into employment.
74. Although Parliament had considered the position of lone parents generally, the Equality Analysis did not consider the specific ability of lone parents of children under 2 to return to work fully.
75. The court had ‘powerful evidence’ before it of the damaging effect of the cap on lone parents with children under the age of 2. It took account of the requirement imposed by article 3.1 of the UN Convention on the rights of the child for the best interests of the child to be a primary consideration. Mr Justice Collins noted that as justification, Parliament seemed to rely solely on the advantage to children of having parents in work but observed that it was difficult to see how that is material to a child under 2. The benefit cap for those children is based on the parent’s circumstances not the child’s needs and therefore is not consistent with the best interests of the child (paragraph 37).
76. Mr Justice Collins referred to *MA & Ors* to confirm that the benefit cap affects article 8 rights and this can include the rights of young children likely to be affected. It follows that article 14 ECHR is in play (paragraphs 39-40).
77. On the basis that the policy could not be objectively and reasonably justified, Mr Justice Collins found that there was discrimination.

Discussion points



- What about those tenants who do not benefit from *MA & Ors*?
- What are the possible implications of the Supreme Court finding that article 8 is triggered by the provision of housing benefit?

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