Neutral Citation Number: [2015] EWHC 890 (Admin)

Case No: CO/16824/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
3 Bull Street, Birmingham, B4 6DS

Date: 30 March 2015

Before :

MR JUSTICE PHILLIPS

- -

Between :

THE QUEEN
(on the application of MICHAEL HARDY)

Claimant

- and -

SANDWELL METROPOLITAN BOROUGH COUNCIL

Defendant

- and -

ZACCHAEUS 2000 TRUST

Intervener

- -
- -

Tim Buley (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Richard Clayton QC (instructed by **Legal Services, Sandwell MBC**) for the **Defendant**
Christopher Knight (instructed by **Leigh Day**) for the **Intervener**

Hearing dates: 31 October, 4 November 2014

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Approved Judgment

Mr Justice Phillips:

1. The issue in this case is whether it is unlawful for a local authority to take into account the care component of disability living allowance ("DLA(c)") when assessing the amount of a discretionary house payment ("DHP").

2. The claimant ("Mr Hardy") and his wife live in a three bedroom council house ("the Property") which has been adapted to help them deal with their disabilities. They are entirely reliant on state benefits for their income. Until April 2013, the rent for the Property was discharged in full by Housing Benefit ("HB").

3. In April 2013 regulations came into force introducing HB "size criteria" for public sector accommodation, measures which were and remain highly controversial. They are referred to by proponents as removing the "spare room subsidy" and by detractors as imposing a "bedroom tax". Their effect in this case was that the Property was deemed to be under-occupied. As a result, Mr Hardy's HB entitlement was automatically reduced by 25%, leaving a shortfall £23.32 per week.

4. Mr Hardy applied to the defendant ("the Council") for DHPs to make up the shortfall. The Council calculated that Mr and Mrs Hardy's income, excluding the mobility component of their disability living allowance ("DLA(m)"), but including DLA(c), exceeded their expenses by £16.63 per week. Assuming that that surplus income could be applied towards their rent, the Council awarded DHPs at the rate of £6.69 per week, a decision which it confirmed on 13 September 2013 after a second reconsideration.

5. Mr Hardy challenges that decision by way of judicial review on the following grounds:

    i) that the Council's policy of taking DLA(c) into account as a matter of course in assessing the rate of DHPs to award is contrary to the Department for Work and Pensions' *Discretionary Housing Payments Guidance Manual Including Local Authority Good Practice Guide* issued in April 2013 ("the DHP Guidance") and an unlawful fetter on the Council's discretion;

    ii) that the Council's decision constitutes unlawful discrimination arising from disability contrary to Article 14 of the European Convention on Human Rights (ECHR);

    iii) that the Council violated the Public Sector Equality Duty ("the PSED") imposed by section 149 of the Equality Act 2010 ("the 2010 Act"); and failed to make reasonable adjustments to its policy as required by section 29(7) of the 2010 Act.

6. The Intervener (a charity providing advice and support to those on low incomes, in particular in dealing with perceived injustices in the welfare system) supports the above grounds of challenge, but further contends (i) that the Council's conduct also constitutes discrimination in the exercise of a public function, contrary to sections 15, 19 and 29(6) of the 2010 Act and (ii) that including DLA(c) as income in a means-assessment process which is not itself related to the provision of care is contrary to the statutory scheme and is therefore irrational.

The factual background

7. Mr Hardy is 60 years old. He worked full-time, most recently as a bus/coach driver, until 2009, when he had to retire on grounds of disability. Mr Hardy emphasises that he worked hard and paid taxes all his adult life until his disabilities became too much to him.

8. Mr Hardy suffers from a heart condition and has had a pacemaker fitted. He also has arthritis and requires a walking stick. He has been assessed as requiring the higher rate of DLA(m) and the middle rate for DLA(c). Mr Hardy's wife also suffers from arthritis and is undergoing regular orthopaedic surgery. It is anticipated that she will soon require the use of a wheelchair. She is in receipt of the higher rate for both DLA(m) and DLA(c).

9. The Property is in Oldbury, in the Council's area. Mr and Mrs Hardy have lived there since 1987. Their children have left home. Although the Property is regarded as having three bedrooms, the third is very small and is now used as a study. The house has been substantially adapted to meet their needs, including the installation of a stair lift, adaptations to the bathroom and shower and alterations to the driveway and the kerb outside the house. These works were paid for by Mr Hardy from his income, including DLA(c).

10. The Council has assessed Mr Hardy and his wife as being in need of at least a two bedroom property in the Oldbury area. This is in part because of their role in caring for Mrs Hardy's mother, who suffers from dementia: although she lives locally, she sometimes has to stay at the Property when her health is particularly bad.

11. Following the 2013 changes to HB, Mr and Mrs Hardy, as a couple, are treated for HB purposes as needing only one bedroom. They are therefore deemed to be under-occupying the Property, resulting in a percentage reduction in their HB of 25% (as they have two "additional" bedrooms; one additional bedroom results in a 14% reduction). Indeed, Mr and Mrs Hardy are not eligible for a one-bedroom council property, so they will inevitably be deemed, for HB purposes, to be "under-occupying" any council property they are allocated. They have bid for numerous smaller council properties suitable to their needs, but have been unsuccessful to date.

12. On 7 January 2013, in anticipation of the shortfall in his rent which would arise from April 2013, Mr Hardy made a written application to the Council for DHPs on the Council's standard form. As required, Mr Hardy provided details of his and Mrs Hardy's monthly income and expenditure. In respect of expenditure, the form provided for a "Monthly Amount" to be identified for each item on a list of ordinary regular expenses (such as utilities, food and travel costs). There was small section at the end for other expenditure, but no specific invitation to provide details of spending (regular or otherwise) on items referable to dealing with or arising from a disability.

13. On 19 March 2013 the Council wrote to Mr Hardy informing him that he would be awarded DHPs at the rate of £6.69 per week for the period 8 April 2013 to 29 September 2013 on the following basis:

> "*The DHP calculation has been made to take into account the level of your ongoing income from April 2013, this includes*

> *your Income Support, your Incapacity Benefit, Carer's Allowance, your [DLA(c)] and your Wife's [DLA(c)], which totals £311.95 per week. The amount you and your wife receive in respect of [DLA(m)] is excluded from the income assessment for DHP purposes.*
>
> *Deducted from the income assessment is the expenditure you declared on your DHP application, which totals £295.32 per week, therefore when your expenditure is deducted from the income used in the DHP calculation you have a surplus income of £16.63 per week (£311.95-£295.32).*
>
> *As you have surplus income of £16.63 per week, this can be used towards your weekly rental shortfall of £23.32 per week, this leaves you may rental shortfall deficit of £6.69 per week and on that basis a DHP award will be given amounting to £6.69 per week to cover that Deficit.*"

14. Mr Hardy requested a review of that decision. By letter dated 4 April 2013 the Council refused to change its position, stating:

> "*Although your [DLA(c)] is disregarded as an income for Housing Benefit purposes there is no provision in the DHP Policy to disregard this income so it is included in the assessment of your income when calculating your eligibility for a DHP.*"

15. In response to a letter before claim from Mr Hardy's solicitors, the Council agreed to reconsider its decision. By letter dated the 27 June 2013 the Council confirmed that it had reconsidered the matter but that the decision remained unchanged. The Council explained its decision as follows:

> "*I have enclosed a copy of the Council's Discretionary Housing Payment policy. Although the Council does not take into account [DLA(m)], and this is not stated in the policy, I can confirm the decision not to include this income has been taken in accordance with Discretionary Financial Assistance Regulations 2001, Part 2 paragraph 1.*
>
> *In the analysis of this regulation it states that specific provision is made for the mobility component of disability living allowance to be disregarded in the calculation of other benefits. Sections 73 (14) of the [Social Security Contributions and Benefits Act 1992] states:*
>
> *'A payment to or in receipt of any person which is attributable to his entitlement to the mobility component, and the right to receive such a payment, shall (except in prescribed circumstances and for prescribed purposes) be disregarded in applying any enactment or instrument under which regard is to be had to a persons[sic] means'*

> *The decision by the council to include [DLA(c)] as an income for [DHP] purposes, has been taken on the basis of Turner v London Borough of Barnet Housing Benefit Review Board ... which confirms that [DLA(c)] can be taken into account as an income for DHP purposes. In this case the court was presented with arguments of disability discrimination but did not consider this was in fact taking place.*
>
> *When calculating the [DHP] entitlement the Council has taken all of your clients [sic] expenditure figures into account and compared this to their income minus [DLA(m)]*."

16. Mr Hardy's solicitors sent a further letter before action on 7 August 2013, as a result of which the Council undertook a further reconsideration of its decision. By letter dated 12 September 2013 the Council gave notice that its decision remained unchanged, stating:

> *"[DHP] by there [sic] very wording are discretionary in nature. There is nothing in the DWP guidance issued by the DWP or the Discretionary Financial Assistance Regulations 2001 to state that incomes received from Disability Living Allowance (DLA) should not be taken into account for DHP purposes. For [HB] purposes it is accepted that DLA is not taken into account as an income in accordance with HB regulations.*
>
> *DLA is an income which is available for the individual to spend as they see fit. If your client produced evidence to show that the income was being spent on personal care etc, then this expense will be offset against the income from DLA when working out the available income to contribute towards the rent. In your client's case* ***all*** *of the expenditure ... which your client and his wife have declared has been accepted without further query, due to their disabilities. ... My client has taken into account your clients [sic] living costs as disabled people in his assessment of your clients [sic] income. The claim for disability discrimination and breach of article 14 is accordingly denied….*
>
> *It is to be noted that following the Burnip decision there has been no amendments to the SSCBA to allow Authorities to disregard [DLA(c)] in their calculations of income. This is despite what you say regarding the Burnip decision having changed the legal landscape in this area."*

17. These proceedings were commenced on 18 October 2013. Permission to proceed was granted by Stewart J on 3 January 2014.

18. On 29 November 2013 Mr Hardy submitted a further application for DHPs, disclosing higher expenditure. As a result the Council awarded DHPs at the higher rate of £19.55 per week, resulting in a reduced shortfall between Mr Hardy's rent and housing

benefits of £3.77 per week. In April 2014 Mr Hardy's DHPs were reduced to £17.87 per week.

19. Mr Hardy explains in his witness statements that he and his wife have not in fact been able to fund the shortfall in rent from their incomes, in part because of one-off expenses not provided for in the Council's application form. Mr Hardy has therefore built up credit card debts and is incurring interest on them. On a short term basis he has borrowed money from his mother-in-law.

The legal and policy background

(a) Housing Benefit

20. HB is a means-tested benefit available to assist tenants to pay their rent, payable in accordance with section 130 of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act"). Schedule 5 of the Housing Benefit Regulations 2006 ("the 2006 Regulations") provides that any disability living allowance shall be disregarded in the calculation of income when assessing entitlement to HB.

21. HB claimed in respect of private sector accommodation has been subject to size criteria since 1989, those criteria having been revised with effect from 2008. Similar size criteria provisions were introduced in relation to social housing as from April 2013, contained in Regulation B13 inserted into the 2006 Regulations.

22. The effect of size criteria on disabled tenants applying for HB in relation to private sector housing was considered by the Court of Appeal in *Burnip v Birmingham City Council* [2012] EWCA Civ 629. In that case the disabilities of the claimants or their children entailed that they needed more bedrooms than permitted by the size criteria then applicable. The Court of Appeal declared that (i) the claimants had established a *prima facie* case that the size criteria discriminated against them on grounds of their disabilities within Article 14 of the ECHR and (ii) the Secretary of State had failed to establish objective reasonable justification for the discriminatory effect of the statutory criteria. The Court's reasoning on the issue of justification was explained by Henderson J, who stated as follows:

> "*45. First, I think it is necessary to draw a clear distinction between the benefits which Mr Burnip was entitled to claim for his subsistence, and those which he was entitled to claim in respect of his housing needs. His incapacity benefit and disability living allowance were intended to meet (or help to meet) his ordinary living expenses as a severely disabled person. They were not intended to help with his housing needs. This is demonstrated, in my view, not only by the availability of HB and discretionary housing payments as separate benefits with separate rules applicable to them, but also by the way in which HB is structured….. It would therefore be wrong in principle, in my judgment, to regard Mr Burnip's subsistence benefits as being notionally available to him to go towards meeting the shortfall between his housing- related benefits and the rent he had to pay.*

> *46. Secondly, it is clear on the evidence that Mr Burnip's objectively verifiable need was for a flat with two bedrooms, and that the maximum [HB] available to him on the one bedroom basis left a substantial shortfall from the rent which he had to pay to his landlord. Discretionary housing payments were in principle available as a possible way of bridging this gap, but they cannot in my judgment be regarded as a complete or satisfactory answer to the problem. This follows from the cumulative effect of a number of separate factors. The payments were purely discretionary in nature; their duration was unpredictable; they were payable from a capped fund; and their amount, if they were paid at all, could not be relied upon to cover even the difference between the one and two bedroom rates of [HB], and still less the full amount of the shortfall. To recognise these shortcomings is not in any way to belittle the valuable assistance that discretionary housing payments are able to provide, but is merely to make the point that, taken by themselves, they cannot come anywhere near providing an adequate justification for the discrimination in cases of the present type.*"

23. The Court of Appeal in *Burnip* accordingly took the view that the potential availability of DHPs, as the scheme then stood, was not an answer to the discriminatory effect of the size criteria given their discretionary nature and limited extent.

24. The question of whether the discriminatory effect of size criteria could be justified was further considered in *R (MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13; [2014] PTSR 584, this time in the context of tenants with disabilities in the social housing sector. The Court of Appeal confirmed that, as a matter of substance, Regulation B13 discriminates against disabled persons on the ground of disability (see [47] in the judgment of Lord Dyson MR). However, the Court of Appeal held that the Secretary of State had shown an objective and reasonable justification for the discriminatory effect of the regulation, distinguishing the reasoning of Henderson J in *Burnip*. A particular factor was that the DHP scheme had changed: further guidance had been issued to local authorities that administer it, the department had made repeated statements that the fund would be kept under review and topped up if necessary and the DHP fund had in fact been increased in size. Lord Dyson MR concluded at [82]:

> "*…. the Secretary of State has explained in detail his reasons for structuring the scheme in the way that he has. In particular, he has explained why he has decided to provide for the disability-related needs of some disabled persons for additional accommodation by means of the 2012 Regulations (as amended) and the needs of other disabled persons by means of DHPs. In combination, his reasons are far from irrational. Central to his thinking is the idea that there are certain groups of persons whose needs for assistance with payment of their rent are better dealt with by DHPs than HB. For the reasons*

> *given … above, I consider that they amount to an objective and reasonable justification of the scheme.*"

25. A further challenge to the effect of Regulation B13 was considered in *R (Rutherford) v Secretary of State for Work and Pensions* [2014] EWHC 1613 (Admin), a case in which the claimants' housing benefit had been reduced notwithstanding their recognised need for an additional bedroom for their disabled grandchild's overnight carer (whereas the regulation had been amended to allow an extra bedroom for an adult's overnight carer). The 14% shortfall in HB was being met by DHPs from the claimants' local authority for limited periods, to that date requiring renewed applications annually. The claimants contended that they did not have adequate assurance of future DHPs to justify the discriminatory effect of Regulation B13.

26. Stuart-Smith J explained (at [48]) that the effect of *MA* and *Burnip* taken together is that, whilst a scheme including the use of DHPs as the conduit for payment may be justifiable, it will not be justified if it fails to provide suitable assurance of present and future payment in appropriate circumstances. He went on to state at [51]:

> "*DHPs are, by definition, discretionary. The evidence in Burnip led to the conclusion that they could not be relied upon to plug the identified discriminatory gap. That is not the evidence in the present case:*
>
> *i) First, it is abundantly clear that the indention of the scheme as a whole is that DHPs <u>should</u> be used to plug the gap where, if Regulations B13 were to be viewed and applied in isolation, a person with an ascertained need for an additional bedroom would otherwise be the subject to discrimination on the grounds of disability ….*
>
> *iii) Third, although the awarding of DHPs remained discretionary, the position of disabled people living in specially adapted accommodation....was specifically identified in the Good Practice Guide as being a category for whose support additional funds had been allocated to the DHP fund …*"

27. Stuart Smith J noted that the local authority was obliged to exercise its discretion in accordance with public law principles and Human Rights legislation and to have regard to the DHP Guidance: no basis had been advanced on which the authority could properly have exercised its discretion to deny the full DHPs awarded in that case. He concluded (at [54]) that "*there is at present adequate assurance that the Claimants will continue to benefit from awards of DHPs to plug the gap that would otherwise exist*", but that if the scheme or other circumstances were to change materially, different considerations might apply. He further referred (at [60]) to evidence that other councils "*are wrongly including DLA when looking at household income*" but that was not the approach of the local authority in the case he was considering.

<u>(b) Discretionary Housing Payments</u>

28. DHP is paid pursuant to sections 69 and 70 of the Child Support, Pensions and Social Security Act 2000 and regulations made thereunder.

29. Regulation 2 of the Discretionary Financial Assistance Regulations 2001, made pursuant to s69(1), provides that a relevant authority may make DHPs to persons who are entitled to housing benefit and appear to require some further financial assistance in order to meet housing costs. The regulation further provides that such authority has a discretion (a) as to whether or not to make DHPs in a particular case and (b) as to the amount of payments and the period for, or in respect of which they are made.

30. The DHP Guidance reminds local authorities that, although the regulations give them very broad discretion, each case must be decided on its own merits and decision making should be consistent. The Guidance includes the following:

> "*3.8 In establishing if the claimant requires further financial assistance, you can decide how to treat any income or expenditure, taking into consideration the purpose of the income where appropriate.*
>
> *3.9 For example, you may decide to disregard income from disability related benefits as they are intended to be used to help pay for the extra cost of disability. As part of the application process you should take care to ascertain whether such money is committed to other liabilities for which it was intended, such as Motability schemes or provision of care, seeking evidence regarding expenditure from the claimant. If you do decide to take such income into account then you should consider providing an explanation to the claimant as to why you have done so….*
>
> *3.11 You will need to decide locally how you treat income and expenses when calculating the amount of DHP. However, in all cases you should consider what is reasonable and not create a process that is too onerous for the claimant.*"

31. The Good Practice Guide attached to the DHP Guidance contains a section dealing with support for claimants affected by the removal of the spare room subsidy, with particular reference to disabled people living in significantly adapted accommodation. The Guidance recommends that local authorities identify people who fall into this group and invite applications for DHP (paragraph 2.5) and refers to the fact that the allocation of additional funding for disabled people broadly reflects the impact of this measure and the additional funding needed to support this group (paragraph 2.7). The Guidance provides an example of a family in a similar position to that of Mr and Mrs Hardy, that is to say, their house has been significantly adapted because of disabilities, but their HB has been reduced by 25% because of deemed under-occupation, leaving a shortfall of £22.50 per week. The Guidance concludes: "*Therefore you should consider awarding a DHP of £22.50 per week to enable the family to remain in their current adapted house*".

32. The Council's own Discretionary Housing Payments Policy ("the Sandwell Policy") for the period 2013-14 states that the Council will give consideration to the DHP Guidance, will treat all applications on their individual merits and will seek to, amongst other aims, "*Support disabled people living in significantly adapted accommodation*". The Sandwell Policy goes on to state that in deciding whether to award a DHP, the Council will take into account various factors, including:

> "*The shortfall between [HB] and the rent liability;*
>
> *The financial and medical circumstances (including ill health and disabilities) of the claimant, their partner and any dependants and any other occupants …;*
>
> *The income and expenditure of the clamant, their partners and any dependants or other occupants …*"

The Council confirmed that the Sandwell Policy was likely to remain unchanged in 2014-2015 in relation to DHPs, although the new version was not disclosed in these proceedings.

(c) Disability Living Allowance

33. Section 71(1) of the 1992 Act provides that Disability Living Allowance shall consist of a care component and a mobility component.

34. Section 72 of the 1992 Act provides that DLA(c) is payable at three fixed rates (*'highest', 'middle'* and *'lowest'*), determined according to the level and effect of the disability. However, pursuant to section 72(8) no DLA(c) is payable if a person is resident in a care home where care is provided for them out of public or local funds.

35. DLA(m) is paid pursuant to section 73 of the 1992 Act. Section 73(14) provides:

> "*A payment to or in respect of any person which is attributable to his entitlement to [DLA(m)], and the right to receive such a payment, shall (except in prescribed circumstances and for prescribed reasons) be disregarded in applying any enactment or instrument under which regard is to be had to a person's means*".

36. In *R (Turner) v London Borough of Barnet Housing Benefit Review Board* [2001] EWHC 204 (Admin), the question was whether, on the proper interpretation of the 1992 Act and the relevant regulations, DLA(c) could be taken into account by a local authority when considering whether an exceptional hardship payment (the predecessor of DHP) should be made to make up a shortfall between rent and HB. Richards J considered that the fact that both types of DLA were ring-fenced for HB purposes, but DLA(m) alone was ring-fenced for the purposes of considering a discretionary award, was striking, concluding at [30]:

> "*In circumstances where the draftsman has been so specific about what is to be disregarded and in what context, I do not think that one can extract any wider statutory purposes to the*

> *effect that disability living allowance is to be disregarded altogether when determining housing benefit. The very fact that the statutory ring-fencing does not apply to the care component in the context of [the regulation permitting a discretionary award] is in my view a strong indicator that ring-fencing is not required.*"

37. Richards J further held (at [31-32]) that taking DLA(c) into account in calculating a discretionary award did not necessarily frustrate the purpose of DLA(c) as it is paid at a fixed rate, does not depend on specific costs being incurred and the recipient has freedom of choice as to the use of the payment: there was nothing wrong in the recipient using DLA(c) using it to pay for larger premises with higher rent, but that meant that an authority was not precluded as a matter of law from taking DLA(c) into account.

Issue 1: Policy

38. The DHP Guidance expressly reminds local authorities that they can decide how to treat any income (or expenditure) and draws attention, in particular, to the power to disregard income from disability related benefits. Mr Buley, counsel for Mr Hardy, contends that the Council failed to take that material consideration into account, either generally or specifically in Mr Hardy's case, but instead adopted an unlawful policy of taking into account all income (other than DLA(m)) in all circumstances, including DLA(c). The Council, he submits, therefore also unlawfully fettered its discretion.

39. Although the Sandwell Policy states that the Council will have regard to the DHP Guidance, it also states that the Council will take into account an applicant's income and expenditure, giving no indication that it has given or will give consideration, as suggested by the DHP Guidance, to excluding disability benefits such as DLA(c). The position has been clarified by Ian Dunn, Team Leader in the Council's Revenue and Benefits Service, who confirms in his witness statement that the Council's approach *"is to look at the applicant's income and outgoings globally"*, excluding only DLA(m). Mr Dunn explains that the Council considers this approach to be fair and compliant with the spirit of the DHP Guidance (to which, he says, his department pays due regard) because the Council also takes into account disability-related expenditure (including costs which might be met from DLA(m)) and does not require the applicants with disabilities prove any of their expenses.

40. Mr Clayton QC, counsel for the Council, submits that Mr Dunn's evidence demonstrates that decisions as to the award of DHPs are taken with the DHP Guidance in mind, the Council properly exercising its discretion in accordance with that guidance to take DLA(c) into account as income because it considers it fair to do so in the light of its generous approach to related expenses.

41. However, it appears from the Council's correspondence with Mr Hardy's solicitors that its blanket policy of taking into account all of an applicant's income (except DLA(m)) is in fact based on a misunderstanding of its powers. In the Council's letter dated 4 April 2013 (see paragraph 14 above), reference is made to there being "*no provision in the DHP Policy to disregard [DLA(c)]*". In the Council's letter dated 12 September 2013 (see paragraph 16 above), signed by a solicitor, it was noted that no amendment has been made to the 1992 Act *"to allow Authorities to disregard*

[DLA(c)]". As it therefore appears that the Council adopted its policy to include DLA(c) as income because it (wrongly) understood that it was not allowed to exclude that benefit, it cannot have given proper consideration to the DHP Guidance (which advises authorities to consider not taking such benefits into account) nor, indeed, can it have exercised its discretion on the issue properly or at all.

42. Further, the Council's letter dated 27 June 2013 (see paragraph 15 above) explained that the Council's decision to include DLA(c) as an income for DHP purposes was taken on the basis of *Turner*, asserting that that decision had considered arguments of disability discrimination but "*did not consider this was in fact taking place*". If that was indeed the basis of the policy decision, it was also flawed. *Turner* was concerned with a decision which pre-dated the introduction of the Human Rights Act 1998. Neither the arguments presented in that case nor Richards J's decision addressed the issue of disability discrimination (let alone discrimination in the context of the size criteria), but were focused on the interpretation of the statutory provisions. Reliance on the decision in *Turner* indicates that the Council did not properly take into account the significant sections of the DHP Guidance and Good Practice Guide which address more recent developments and considerations, in particular, the effect of the size criteria on disabled applicants who have adapted their home.

43. It follows, in my judgment, that the Council's policy of always taking into account DLA(c) as income when assessing awards of DHP, as reflected in the Sandwell Policy, fails to have due regard to the DHP Guidance, constitutes a failure to exercise the Council's discretion and fetters any future exercise of that discretion. The Sandwell Policy is therefore unlawful in that respect. It also follows that the Council's decision of 12 September 2013 in Mr Hardy's case is unlawful, as are the Council's further decisions as to the rate of his DHP.

Issue 2: Discrimination

(a) Whether decisions about DHP engage obligations not to discriminate

(i) Article 14

44. Mr Hardy's case is that the Council's conduct was in breach of Article 14 ECHR, which provides:

> "*The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*"

45. In both *Burnip* and *MA* there was no dispute that Article 14 was engaged, it being established that disability is within the concluding words "*or other status*" (see *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634) and that HB falls within the ambit of Article 1 of the First Protocol ("A1P1") as a "possession": *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311.

46. It is common ground between the parties that the position is less straightforward in the present case as a DHP is a discretionary payment and so cannot, in itself, be classified

47. Mr Buley nevertheless contends that a DHP should be regarded as a possession within A1P1 when considered in the context of the HB size criteria scheme as a whole. He acknowledges, as Mr Clayton emphasises, that Sedley LJ in *Langely v Bradford Metropolitan District Council* [2006] QB 380 stated (at [74]) that, in considering issues of discrimination, it is necessary to examine specific provisions, not the entire housing benefits scheme. However, as Mr Buley points out, it does not appear that this formed part of the reasoning of the other members of the Court of Appeal. Further, Lord Dyson MR in *MA* emphasised that HB size criteria were part of a package, of which DHPs were an important part, "*so the question is whether the scheme as a whole discriminates against disabled persons*" (see paragraphs 39 and 40).

48. In my judgment it is appropriate to consider DHPs in the context of the housing benefits scheme as a whole, not least because it is established that, unless the availability of DHPs is taken into account, Regulation B13 discriminates against the disabled. As recognised by Stuart-Smith J in *Rutherford*, the intention of the scheme as a whole is that DHPs should be used to plug the gap so as to avoid such discrimination. In those circumstances I am satisfied that DHPs form an integral part of HB entitlements for disabled applicants and that they have at least a legitimate expectation that they will be used to supplement a shortfall in HB which would otherwise be unlawful. I therefore find that DHPs come within the ambit of A1P1 in these circumstances and that Article 14 is thereby engaged in decisions as to whether to award DHPs to disabled applicants.

49. In the alternative, Mr Buley contends that Article 14 rights arise in the present case in the context of Mr Hardy's Article 8 right "*to respect for his private and family life, his home and his correspondence*", a point which was left open in *Burnip*. Mr Clayton points out, and Mr Buley accepts, that Article 8 does not confer a right to be provided with a home (see *Anufrijeva v London Borough of Southwark* [2004] QB 1124). However, in *R (JS) v Secretary of State for Work and Pensions* [2014] PTSR 643 it was held that the benefit cap introduced by the welfare reforms in 2013, which might place families in a position where they are unable to remain in their existing accommodation, does engage Article 8. Lord Dyson MR stated at [85]:

> "*One of [the benefit cap's] aims is to force persons who are out of work and in receipt of benefits to take decisions as to how they can live within the means of the capped benefits they receive. As a result, many families will be forced to find cheaper accommodation. In particular, it may be necessary for them to move away from areas of high cost accommodation and, therefore, away from existing support networks provided by their wider families and friends. ... In the circumstances, we consider that the measure does have a sufficient impact on the enjoyment of private and family life to engage article 8 in the sense that it falls within the ambit of the provision.*"

50. In *R (Cotton) v Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin) Males J held that the above reasoning was equally applicable in the context

of a challenge to the lawfulness of Regulation B13 by a divorced mother whose HB had been reduced by reason of the size criteria, notwithstanding that she was in receipt of DHPs to meet the shortfall in rent.

51. Mr Buley further relied on the decisions of the European Court of Human Rights in *Petrovic v Austria* (2001) 33 EHRR 14 and *Okpisz v Germany* (2006) 42 HRR 32 to the effect that Article 14 will be engaged in relation to actions of States which, although not directly engaging a convention right, are "*linked to a right guaranteed*", such as where an allowance is paid to demonstrate the State's respect for family life within the meaning of Article 8. The principle was recognised in *R (Chester) v Secretary of State for Justice* [2014] AC 271 SC by Lord Mance JSC, who stated at [63]:

> "*It is however a general principle of Strasburg law under article 14 of the Convention that additional rights falling within the general scope of any Convention right for which the state has voluntarily decided to provide must in that event be provided without discrimination…*"

52. In my judgment, in the light of the above, decisions concerning the award of DHPs to disabled applicants are sufficiently related to their Article 8 rights that Article 14 is engaged in that regard also. As explained in *MA* and *Rutherford*, the Government has provided additional funding for DHPs for the very purpose of ensuring that disabled persons affected by the HB size criteria are not forced to leave their accommodation (where that would otherwise be the avowed purpose of the reduction in HB), not least because it is recognised that the accommodation may well have been adapted to meet their disability needs. It is therefore plain that DHPs are provided to protect the private and family life of disabled applicants, in particular their recognised need to keep their existing home. Further, the decision of a local authority as to whether to reduce such DHPs below the shortfall in rent directly impacts on those interests.

(ii) The 2010 Act

53. In any event, as Mr Knight (counsel for the Intervener) points out in his skeleton argument, and Mr Clayton has not disputed, the Council is under a duty not to do anything that constitutes discrimination in the exercise of a public function by virtue of section 29(6) of the 2010 Act. It seems clear that a decision as to the award of DHPs is a public function within that section. Previous challenges to the HB size criteria and other welfare reforms have focused solely on Article 14 as the source of a duty not to discriminate because the subject-matter of the challenges was legislation, not the decision of a public body applying it. However, the approach of local authorities to making discretionary awards would seem to fall squarely within the above provisions of the 2010 Act.

54. As for the scope of the duty not to discriminate, section 15(1) of the Act provides:

> "*A person (A) discriminates against a disabled person (B) if —*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*

> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*"

55. Section 19 of the 2010 Act provides that discrimination includes indirect discrimination of the following type (disability being a protected characteristic):

> "*(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*"

(b) Whether the Council's approach to DLA(c) is discriminatory

56. Mr Buley contends that, to the extent that an applicant's DHPs are reduced because DLA(c) is taken into account, the disabled applicant is awarded lower payments than an equivalent applicant who is not disabled, precisely because of a consequence of their disability, that is to say, their disability-related benefit. Mr Buley asserts that this amounts to direct discrimination on the grounds of disability.

57. Mr Clayton's answer is that the reduction in the award of DHPs is not due to the applicant's disability, but because they have more income than the equivalent applicant without a disability, giving rise to a surplus over expenditure which is treated the same as any other surplus. Mr Clayton contends that the Council does not discriminate because it takes into account all income (excluding DLA(m)) and all expenditure in every case, so that any additional expenditure resulting from disability is fully reflected in the Council's calculation. To the extent that income exceeds expenditure, he submits, it matters not that such income includes DLA(c) because the surplus is not required (by definition) to meet disability related expenditure. Indeed, Mr Clayton argues that the Council's approach is positively favourable to disabled applicants because (i) mobility related expenses are included despite the exclusion of DLA(m) and (ii) all expenses are recognised without proof or query (pursuant to its undisclosed practice). Mr Clayton further points out that the exclusion of DLA(c) would result in "double counting" or a "windfall" for the disabled applicant because care-related expenditure (funded by DLA(c)) is allowed in full.

58. In my judgment the Council's approach is an example of indirect or *Thlimmenos* discrimination because it treats disabled applicants and their disability-related income in exactly the same way as it treats others and their non-disability related incomes, giving rise to unfavourable treatment to the disabled applicants. DLA(c) is not the same as any other income, but is awarded specially to enable disabled persons in need of personal care to cope better with their disabilities in the way they see fit. Equally, the pattern of expenditure of a disabled person may well be different and more difficult to predict than that of an applicant without a disability. As set out in the statement of Romin Sutherland of the Intervener, the needs of the disabled may not be consistent or regular and may require considerable one-off expenditure, sometimes at short notice.

59. It should be emphasised that excluding DLA(c) from the income of a disabled applicant would not necessarily result in a "windfall". The most that will happen is that the applicant's shortfall in HB will be discharged. Further, Mr Buley does not contend that it would be wrongful for an authority, which excluded DLA(c), to also exclude expenses related to the provision of care up to the amount of DLA(c) received. The objection is to the perceived "surplus" of DLA(c) being used to fund housing costs.

60. I therefore conclude that Mr Hardy has made out a *prima facie* case that the Council's approach to awarding him DHPs discriminated against him because of his disability.

(c) Justification

61. In relation to whether the discriminatory effect of the Council's approach is contrary to Article 14, the further question is whether it is "*manifestly without reasonable foundation*", that is to say, "*whether the discrimination has an objective and reasonable justification*": *MA* per Lord Dyson MR at [80]. The question which arises under section 15 of the 2010 Act is whether the treatment is "*a proportionate means of achieving a legitimate aim*".

62. Given that the discriminatory effect of the HB size criteria on disabled persons is only justified by the availability of DHPs to "plug the gap", and given that paragraph 2.7 the Good Practice Guide refers to additional funding having been allocated for this purposes, it is difficult to see any reasonable justification for the Council's approach, nor that it is a means of achieving a legitimate aim, let alone a proportionate one. Having analysed the effect of *Burnip* and *MA,* Stuart-Smith J in *Rutherford* took the view that a decision to withhold DHPs in that case "would appear to be unjustifiable" and, more generally, that councils were acting "wrongly" by including DLA(c) in household income: I fully agree with that conclusion.

(d) Summary

63. For the reasons set out above I find that the Council's approach to including DLA(c) as income in calculating Mr Hardy's DHPs amounted to discrimination contrary to Article 14 of the ECHR, alternatively, in breach of section 29(6) of the 2010 Act.

Issue 3: Public sector equality duty/Failure to make reasonable adjustments

(a) Public sector equality duty ("PSED")

64. Section 149(1) of the 2010 Act provides that a public authority must, in the exercise of its functions, have due regard to the need to "*(b) advance equality of opportunity between persons who share a relevant protected characteristic*".

65. The Council adduced late evidence from Mrs Sue Knowles, Monitoring and Development Manager of the Revenue and Benefits Service, in an attempt to discharge the burden of demonstrating that it had fulfilled its PSED in relation to its approach to DHPs. Mrs Knowles exhibited an Equality Impact Assessment which she had undertaken in 2009 in relation to the Sandwell Policy in force at that date. The brief assessment stated that there was no evidence of adverse impact on the grounds of disability, but recommended sample checks on decisions to award and refuse the benefit. Mrs Knowles states that thereafter monthly checks have been undertaken, which have revealed that DHPs are rarely refused for those with a disability.

66. Mr Clayton submits that the Council properly assessed the proposed policy when it was introduced in 2009 and have established a monitoring process thereafter. He points to the following dictum of Elias LJ in *R (Greenwich Community Law Centre) v London Borough of Greenwich* [2012] EWCA Civ 496 at [30]:

> "*I would emphasise the need for the court to ask whether as matter of substance there has been compliance; it is not a tick box exercise. At the same time the courts must ensure that they do not micro-manage the exercise*."

67. It is will be apparent from the above summary of Mrs Knowles' evidence that no assessment has been made of the Sandwell Policy in the light of the changes to HB in April 2013 or the DWP Guidance which deals with the effect of those changes on the approach of local authorities to awarding DHPs. That is perhaps not surprising in view of my finding in relation to issues 1 above that the Council has not taken those matters into account. The monitoring exercise undertaken appears to be a plain case of ticking boxes rather than a substantive consideration of how the Council's discretion is being exercised and its effect on disabled applicants. As Mr Buley submits, there is a clear breach by the Council of its PSED but, as he accepts, that finding adds little to my finding on issue 1.

(b) Failure to make reasonable adjustments

68. Section 29(7) of the 2010 Act provides that a person who exercises a public function that is not the provision of a service owes a duty to make reasonable adjustments. That duty includes, pursuant to section 20(3) of the 2010 Act, the following requirement:

> "*… where a provision, criterion or practice ... puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage*."

69. Mr Buley contends, in writing and orally, that the Council's approach to those in receipt of DLA(c) places them in breach of this duty. Although section 136 of the 2010 Act places the burden of proving that it did not contravene the relevant provision

on the Council, the point has not been addressed by Mr Clayton, perhaps because the point is effectively determined by my decision on issue 2 above and adds nothing to that finding.

Issue 4: Statutory purpose/irrationality

70. Mr Knight mounts a more fundamental challenge to the Council's policy and decisions, submitting that DLA(c), being a benefit provided in respect of the care needed of the disabled, cannot rationally be taken into account for the purposes of assessing entitlement to a housing-related benefit such as DHP, particularly where DHP is intended to meet a shortfall in HB, in respect of which DLA(c) cannot be taken into account. He refers to Henderson J's statement in *Burnip* at [45] that "*It would therefore be wrong in principle, in my judgment, to regard Mr Burnip's subsistence benefits as being notionally available to him to go towards meeting the shortfall between his housing-related benefits and the rent he had to pay.*"

71. Mr Knight points out that similar reasoning was employed in *R (Carlton) v Coventry City Council* [Transcript 30 November 2000]. In that case the council altered its charging scheme to take into account the night component of DLA(c) when determining how much to charge disabled persons for providing day-time care. Sir Richard Tucker held that the scheme was unlawful due to lack of proper consultation, but he added at [19]: "*Moreover, it was irrational, unlawful and unfair for the defendants to apply a new charging policy which treated as income available for day care sums of DLA paid in respect of night care.*"

72. As Mr Clayton points out, the major obstacle in the path of this argument is the decision and reasoning of Richards J in *Turner*, a decision on essentially the same point and therefore one from which I should not depart without very good reason.

73. Mr Knight contends that *Turner* was wrongly decided for a number of reasons. First, the key factor in Richards J's reasoning was that, whilst section 73(14) of the 1992 Act provided that DLA(m) shall be disregarded in assessing means, there was no equivalent provision in relation to DLA(c), indicating Parliament's intention that it was not "ring-fenced" and so could be taken into account for assessing entitlement to benefits other than HB (see paragraph 36 above). However, Mr Knight submits that there is good reason for the distinction. Local authorities themselves provide care for which they charge (ranging from the provision of meals to personal care in the home): it would not make sense if those authorities could not take into account a person's DLA(c) in assessing a person's means for setting its charges for care. The converse situation accounts for section 72(8): if care is provided out of public funds in a care home, DLA(c) cannot be claimed.

74. Second, once the reasons for the absence of an equivalent to section 73(14) is properly understood, Mr Knight submits, the exclusion of both DLA(m) and DLA(c) from the calculation of HB takes on a different significance, demonstrating the general statutory intention that disability related benefits should not be taken into account in relation to assessing housing benefits.

75. Third, DLA(c) is not merely provided to cater for care needs but for specific aspects of such needs, in particular relating to bodily functions attention, preparation of cooked meals or supervision at night, all being factors in assessing the level of the

benefit paid: see *AM v Secretary of State for Work and Pensions* [2014] EWCA Civ 286 per Laws LJ at [35]. Mr Knight submits that decision in *Carlton* recognises those specific purposes and the irrationality of taking DLA(c) into account for a different purpose, even a different care purpose, but that decision was not referred to in *Turner*.

76. In the alternative, Mr Knight submits that *Turner* should not be followed or should be distinguished in view of subsequent developments, the principal one being the role which DHP now plays in "plugging the gap" in HB for those with disabilities under the HB scheme introduced in April 2013. In that context, he submits, the reasoning of Henderson J in *Burnip* should be preferred and applied.

77. In my judgment, despite Mr Knight's able arguments, the key point remains that specific provision is made to ring-fence DLA(m) but no such protection is given to DLA(c) other than in relation to HB. Parliament could have provided such protection (and qualified it as necessary), but did not do so. Identifying certain care-related assessments in which it would make sense to take DLA(c) into account may or may not explain why DLA(c) was not ring-fenced, but in any event the legislative solution chosen was not to provide general protection as was provided for DLA(m). In those circumstances, as Richards J held in *Turner*, is it not possible to extract a wider statutory purpose that DLA(c) should be disregarded in calculating housing benefits. Whether it is right for DLA(c) to be taken into account in assessing another benefit in any particular case may well engage issues of public law and the Human Rights Act, as discussed above in relation to the facts of this case, but taking into account DLA(c) in calculating another benefit is not in itself irrational.

Conclusion

78. For the reasons set out above the Council's decision of 12 September 2013 as to the rate of DHPs to be awarded to Mr Hardy, and the Council's further decisions in that regard, are quashed. I will hear from the parties as to what further orders should be made in the light of this judgment.