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| **HOUSING LAW UPDATE (2)**  **Andy Lane, Hardwicke Social Housing Team** |

1. **Introduction**
   1. I have the privilege of speaking at the Housing Law Practitioners’ Association meeting on 20 November 2013 alongside John Gallagher of Shelter. We have divided up the main topics which have arisen in housing law over the last year and I will be dealing with:

- The Anti-Social Behaviour, Crime & Policing Bill

- Human Rights Act and Public Law defences to possession claims

- The Prevention of Social Housing Fraud Act 2013

- Bedroom tax challenges

1. **The Anti-Social Behaviour, Crime & Policing Bill**
   1. The Anti-social Behaviour, Crime and Policing Bill contains proposals in a range of areas, including anti-social behaviour, dangerous dogs, firearms offences, forced marriage, policing reforms, extradition and criminal justice.
   2. This Bill was published by the Home Office in December 2012 following consultation in the previous year and the publication of a White Paper in May 2012: *“Putting Victims First: More effective responses to anti-social behaviour”* dealing with the ASB elements of the Bill. The primary concerns of the Home Office with current legislation appeared to be three-fold – a lack of flexibility with the current powers, perceived insufficient focus on the victim and a greater need for partnership working in complex cases.
   3. The headline features, in so far as they concern anti-social behaviour in a housing context, are:
2. **The Anti-Social Behaviour Injunction (ASBI), Anti-Social Behaviour Order (ASBO), ASBO on conviction, Drinking Banning Order (DBO), DBO on conviction, Individual Support Order and Intervention Order will be replaced by an Injunction for the Prevention of Nuisance and Annoyance (IPNA) and the criminal behaviour order (CBO): Sections 1-31.**
3. The Community Protection Notice, Public Spaces Protection Order and a new Closure Power replace 10 powers – the Litter Clearing Notice, Street Litter Clearing Notice, Graffiti/Defacement Removal Notice, Designated Public Place Order, Gating Order, Dog Control Order, ASB Premises Closure Order, Crack House Closure Order, Noisy Premises Closure Order and Section 161 Closure Order: Sections 40-85.
4. New Dispersal Powers replace the section 30 dispersal order and section 27 direction to leave: Sections 32-39.
5. The new injunction will be available for landlords and other agencies including local authorities and the police. It will also apply to minors (unlike the anti-social behaviour injunction) – 10 or over.
6. Organisations will be able to include positive requirements for the subject, such as attending drug or alcohol rehabilitation courses or getting help with anger management.
7. Breaching the new injunction will trigger the option of mandatory possession and in the most serious cases, possible eviction.
8. **Part 5 of the Bill strengthens the powers of landlords to evict anti-social tenants: Sections 86-92.**
   1. The **IPNA** is a civil injunction available in the county court[[1]](#footnote-1) for adults and the Youth Court[[2]](#footnote-2) for under 18s (where the maximum length of order is 12 months[[3]](#footnote-3)). Unlike the current ASBI focus on restrictions/prohibitions it will, like the CBO, be able to include positive requirements that can seek to address the underlying causes of the behaviour and prevent future recurrences (for instance, alcohol or drugs misuse). Two conditions have to be met (section 1):

*(2) The first condition is that the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in conduct capable of causing nuisance or annoyance to any person (“anti-social behaviour”).*

*(3) The second condition is that the court considers it just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour.*

* 1. Section 4(3) makes it clear that a housing provider may only make an IPNA application, as now, if it concerns ASB that directly or indirectly relates to or affects its housing management functions. The exclusion provisions, at sections 12 and 13, also remain in similar form to section 153C of the Housing Act 1996 though can be sought under the proposed power by the local authority and police as well as the landlord.
  2. The **Community Protection Notice (CPN)** can be issued to deal with a particular problem negatively affecting the community (e.g. litter or graffiti). The **Public Spaces Protection Order (PSPO)** will provide local authorities with a flexible power to put in place local restrictions to address a range of ASB in public places whilst the new **Closure Power** will provide the police or local authority with new, simpler, closure powers, consolidating four of the powers already available to them.
  3. The police **Dispersal Power** will enable the police to require a person whose behaviour has caused, or is likely to cause, harassment, alarm or distress to leave a specified area and not return for a specified period of up to 48 hours.
  4. As part of an “empowering communities” agenda we also have the **Community Trigger** and the **Community Remedy**. The Community Trigger will give victims of ASB the opportunity to force a case review where their report meets a locally determined threshold. The Home Office have worked with a number of areas to trial the trigger and a Summary Report of the main lessons identified was published in May 2013. Since then, a number of other areas have begun their own trials.
  5. The **Community Remedy** will give victims of low-level crime and ASB a say in the punishment of offenders out of court. This means victims will get justice quickly, and the offender has to face immediate and meaningful consequences for their actions. Punishments could include the offender signing an acceptable behaviour contract, paying compensation to the victim, or doing local unpaid work in the community, or for the victim, such as repairing damage or scrubbing graffiti off a wall.
  6. The **Possession Claim** changes are extensive and include:

1. A mandatory ground for possession in secure tenancy cases (expressly subject to the tenant’s Convention Rights at section 86(1)) – section 84A of the Housing Act 1985 – in cases where a serious offence has been committed, an IPNA/CBO has been breached, a closure order issued, there has been breach of an abatement notice or breach of court order to abate a statutory nuisance. There are corresponding provisions for assured tenancy cases at sections 89
2. New notice requirements at section 87 for use of such a mandatory ground and providing for a right to review (sections 87-8). These do not apply to assured tenancies.
3. Ground 2 of the Housing Act 1985 and Ground 14 of the Housing Act 1988 (nuisance and annoyance discretionary grounds) are amended to include reference to landlords/employees or contractors of the landlord: section 90.
4. There is a new “riot” ground for possession – 2ZA and 14ZA – applied to both local authorities and private registered providers.
   1. The Home Office have published draft guidance alongside the Bill for the ASB provisions and this provides the police, local authorities and landlords with some further information on the new powers. However, how and when to use the powers must still be a local decision.
   2. The Bill was introduced into the House of Commons on 9 May 2013 and received an unopposed Second Reading on 10 June. Oral evidence was given to the Public Bill Committee on 18 and 20 June 2012 and the Committee finished considering ASB provisions in the Bill on 4 July 2013 and concluded deliberations on 16 July 2013.
   3. The Report Stage and Third Reading were completed on 16 October 2013 and the House of Lords began its scrutiny earlier his month with a view to getting Royal Assent within this session and implementation at some point in 2014.
   4. On Monday the House of Lords debated 3 amendments – 19A, 19B and 19C – the most eye-catching of which was moved by Baroness Mallalieu and would have replaced “on the balance of probabilities” with “beyond reasonable doubt” for IPNAs; add a necessity test (necessary and proportionate) as with ASBOs rather than the “just and convenient” test currently applied and replace “nuisance and annoyance” with the ASBO “had caused, or was likely to cause, harassment, alarm or distress”.
5. **Human Rights Act and Public Law defences to possession claims**
   1. Timing is everything and on 19 November 2013 the Court of Appeal handed down judgment in **Leicester City Council v Shearer [2013] EWCA Civ 1467**. In that case Leicester appealed against the dismissal of their possession claim, a claim which had been dismissed because in the words of Mr Recorder Maxwell QC:

*“…in my judgment it cannot seriously be argued that a reasonable Authority would without more on the facts known have refused or omitted to exercise its discretion to grant a Direct Let. I regard that refusal or failure to consider the possibility of a Direct Let had an impact on the decision to seek possession and that failure has had an improper fettering of the discretion. It is a lack of exercising the discretion. It is a removal from the discretion to be exercised of an investigation of the matters which were appropriate to be looked at. That vitiates and compromises their decision to seek possession."*

* 1. The article 8 defence had been rejected because Ms Maxwell was in law a trespasser (her now deceased husband had been the successor tenant) and was not living at the subject property with the permission of Leicester.
  2. In giving the lead judgment Lord Justice Jackson:

1. Rejected the notion that the separation of the Housing Department and Housing Options Department was the reason for misleading allocation information given to Ms Shearer by the former or that if she had “persevered” she would have received the correct information from the latter (57-8).
2. Accepted that a public law defence to a possession claim will only succeed in exceptional circumstances and that this was especially so if the defendant was a trespasser (60-1).
3. Rejected as absurd the “Ingenious” notion that the possession claim could be treated in isolation as to the same landlord’s decision, albeit by a different department, as to whether to make Ms Shearer a direct let of her home (65).
4. The Recorder’s decision and reasoning as therefore upheld, Lord Justice Jackson concluding:
5. *The facts of this case constitute exceptional circumstances, which plainly merited consideration under paragraph 5.6 of the Allocations Policy. Of course, the Council was not bound to make a direct let of 35 Martival to the defendant. But it was under a duty to give serious consideration to doing so. The Council cannot rely upon the defendant's failure to comply with the procedures set out in the Allocations Policy in circumstances where the Council had caused that non-compliance.*
6. *In commencing possession proceedings against the defendant without giving any or any proper consideration to the option of making a direct let under paragraph 5.6 of the Allocations Policy the Council acted unlawfully.* 
   1. With regard to other recent cases:

**Secretary of State for Transport v Margaret Blake/Secretary of State for Defence v Helen Nicholas [2013] EWHC 2945 (Ch)**

**The Secretary of State for Transport and the Secretary of State for Defence were entitled to orders for possession of two properties that had been occupied under a lease and a licence respectively as they had fulfilled their public law duties in considering the occupiers' social needs and there had been no relevant breaches under the** [European Convention on Human Rights 1950 art.8](http://www.lawtel.com/UK/Documents/BP0000059) **and** [art.14](http://www.lawtel.com/UK/Documents/BP0000007)**.** In so far as art.14 was in issue, a statute had to pursue a legitimate purpose through proportionate means, [**Manchester City Council v Pinnock [2010] UKSC 45, [2011] 2 A.C. 104**](http://www.lawtel.com/UK/Documents/AC0126511) followed. The State still enjoyed, however, a margin of appreciation in implementing its policies, which was necessarily wide: in order to breach art.14, the measure had to be manifestly disproportionate to the aim, **Blecic v Croatia (59532/00) (2005) 41 E.H.R.R. 13** considered. In relation to housing and property rights, a balance between the individual and social considerations was required and it was plain that the Government was in the process of examining the blanket exception from statutory protection given to Crown tenancies. The court was not persuaded that it would be just in the instant case to grant a declaration of incompatibility under art.14 in light of the fact that on the facts any statutory protection afforded would not have made any difference and given the margin of appreciation the question was best left to the legislature given the indications that it would consider the issue as to whether Crown tenancies ought to be excluded from statutory protection.

**R (on the application of CN) (Appellant) v Lewisham (Respondent) & Secretary of State for Communities & Local Government (Interested Party): R (on the application of ZH (A child by FI, his litigation friend)) (Claimant) v Newham LBC (Defendant) & Secretary of State for Communities & Local Government (Interested Party) [2013]EWCA Civ 804**

The decision in [**Mohamed v Manek (1995) 27 H.L.R. 439**](http://www.lawtel.com/UK/Documents/AC0002255) that the Protection from Eviction Act 1977 s.3 did not apply to temporary accommodation provided by a local authority on the basis of homelessness pursuant to an interim duty pending enquiries, and the decision in [**Desnousse v Newham LBC [2006] EWCA Civ 547, [2006] Q.B. 831**](http://www.lawtel.com/UK/Documents/AC0111055) which held that that was not inconsistent with an occupier's rights under the [**European Convention on Human Rights 1950 art.8**](http://www.lawtel.com/UK/Documents/BP0000059), remained binding on the Court of Appeal.

**Imran Malik v (1) Keith Fassenfelt (since deceased) (2) Joseph McGahan (3) Persons Unknown [2013] EWCA Civ 798**

A possession order requiring the removal of squatters from private land onto which they had trespassed and established a home was not disproportionate. Whilst the majority of the Court of Appeal declined to comment on the issue, Sir Alan Ward suggested obiter that the [European Convention on Human Rights 1950 art.8](http://www.lawtel.com/UK/Documents/BP0000059) was capable of application where squatters had trespassed onto a private landowner's land and established a home there – and so **McPhail v Persons Unknown [1973] Ch.447** was no longer good law - though it would only be in exceptional circumstances that the squatters' eviction would constitute a disproportionate means of achieving the legitimate aim of enforcing the landowner's property rights.

**R (on the application of JL) v Secretary of State for Defence [2013] EWCA Civ 449; [2013] HLR 27**

Generally, litigation of art.8 issues at the enforcement stage would be an abuse of process. However, there were exceptional cases such as JL's where it would not be, because of a fundamental change in personal circumstances after a possession order, but before its enforcement. Therefore the defence of disproportionate interference in an occupier's right to respect for private and family life under the [European Convention on Human Rights 1950 art.8](http://www.lawtel.com/UK/Documents/BP0000059) could be used, not only against a claim for possession, but also as a defence against enforcement of the order once obtained.

**Fareham Borough Council v Terry Miller [2013] EWCA Civ 159; [2013] HLR 22**

Where a local authority had served notice to quit on the tenant of a non-secure tenancy because of the anti-social behaviour of others occupying the property during the tenant's frequent custodial sentences, it had been entitled to pursue possession proceedings. Its decision, after serving the notice, to give the tenant another chance conditional upon him not being recalled to prison, had not revoked the notice to quit (as a matter of law this was not possible), nor had acceptance of rent (i.e. housing benefit) after service of the notice evinced an intention to create a new tenancy.

* 1. We await the Court of Appeal’s decision in **Southend-on-Sea v Armour [2012] EWHC 3361 (QB)** in which Mr Justice Cranston held that **the good behaviour of a local authority tenant following the making of an application for a possession order based on his abusive and threatening behaviour was a relevant consideration when determining the proportionality of ordering possession. The proportionality review was to be conducted on the evidence available at the date of the hearing, despite a delay of nearly a year caused by the tenant's adjournment applications.**
  2. Finally, at the European Court of Human Rights there have recently been two cases which may start to be cited in possession claims - *Brezec v Croatia* [2013] ECHR 705 (18/7/13) and *Rousk v Sweden* [2013] ECHR 746 (25/7/13). In the former case the applicant’s flat in Dubrovnik was sold by the State to a private company and in 2005 they sought to evict her on the basis that she had no basis to remain there. The relevant law merely stated: *“An owner has the right to seek repossession of his or her property from a person in whose possession it is.”* After several hearings and appeals, the applicant’s eviction took place in November 2010.
  3. She applied to the ECtHR alleging a violation of Article 8 ECHR and the Court found that the Croatian Courts had limited themselves to finding that B’s occupation was without legal basis without proceeding to analyse whether B’s eviction from the flat which she had occupied for 40 years, while paying rent, was proportionate. The Court also noted that the company did not raise any issue about B’s right to occupy the flat when it purchased the property and it delayed 8 years before taking proceedings. The ECtHR found that there had been a breach of the procedural safeguards required by Art 8 and that B’s rights had been violated.
  4. The two noteworthy elements of this case are (1) it involved a private company yet art.8 was still held to apply (though the Croatian Government “had submitted no response as to the privatisation process” and the applicant argued that a state-run agency continued to own a 49% stake in the now private company) and (2) it was relevant to the question of proportionality that the applicant’s occupation had gone unchallenged for a significant period of time (see paragraphs 48 and 49 of the judgment).
  5. In the second case an order for sale was sought of the applicant’s home because of income tax debts, though these were the subject of dispute and challenge (and of very modest amount at the time of eviction). He also suffered from a serious depressive condition.
  6. The ECtHR found that there was a violation of the applicant’s Article 1 Protocol 1 rights. By the time of the eviction, the State could have satisfied itself that his enforcement debts amounted to about 800 EUR and it could have taken alternative enforcement action, which would have avoided the loss of his home (he had other assets, such as a car, which could have been seized and would have covered the decreasing debt – see paragraph 125 of the Judgment). In respect of the Article 8 complaint, the Court found that he was unable to pursue his appeal to the higher courts in an effective way because his eviction and the sale had already taken place, in circumstances where there was genuine dispute about the amount of tax debt owed to the State. This meant that he had been deprived of the benefit of the requisite Article 8 procedural safeguards.
  7. One can see immediately the potential arguments that may be submitted in, say, a non-secure tenancy possession case where the notice to quit was served because of rent arrears which had become extinguished or significantly reduced by a housing benefit payment(s) by the time of the claim/order/eviction.

1. **The Prevention of Social Housing Fraud Act 2013**
   1. In March 2012 the National Fraud Authority (NFA) estimated that tenancy fraud cost local authorities around £90 million every year[[4]](#footnote-4). Later that same year, in November, the Audit Commission carried out its annual fraud survey of local government services and in *Protecting the Public Purse* (*PPP*) *2012* estimated that social landlords had lost control of the allocation of nearly 98,000 properties in England – a substantial increase from its 2011 estimate of 50,000 properties which the NFA had used in its March report. The Commission assumed a 4% level of tenancy fraud in London (higher rent levels in London make subletting for a profit more attractive) and 2% elsewhere.
   2. It was against this background that the Prevention of Social Housing Fraud Act 2013, which received Royal Assent on 31 January 2013, came into force on 15 October 2013 (5 November 2013 in Wales). There had been a remedy for unlawful sub-letting prior to this, most particularly involving prosecutions under the Fraud Act 2006, but they were seen as being cumbersome, ill-fitting and not fit for the particular issue of housing fraud.
   3. The key features of this legislation are:
   4. The creation of unlawful profit orders (UPOs) in both civil (section 5) and criminal proceedings (section 4) allowing the court to order the (former) tenant to repay an amount up to the profit she/he made back to the landlord. It applies to secure and assured tenancies (PRPs/RSLs) but not shared ownership leases.
   5. Possession claims on sub-letting grounds may well include a section 4 application within the body of the claim.
   6. The permanent loss of security of tenure for PRP/RSL assured tenants who sublet or part with possession of the demised premises (section 6), bringing it in-line with section 93 of the Housing Act 1985. This is now section 15A of the Housing Act 1988 and does not apply to shared ownership leases.
   7. Two new criminal offences are created[[5]](#footnote-5) (section 1) - the lesser offence is committed if the tenant ceases to occupy the property as his only or principal home and either sub-lets or parts with possession of it, or part of it, knowing that to be a breach of his tenancy agreement[[6]](#footnote-6).
   8. The greater offence is committed if the tenant acts not merely in knowing breach of his tenancy agreement but dishonestly[[7]](#footnote-7). The elements of the greater and lesser offences are otherwise the same save that in the former case the defences of sub-letting because of violence or threats of violence, or occupation by a spouse, partner or child, for example, are not available.
   9. Local authorities may prosecute both sub-letting and associated offences such as aiding or abetting an unlawful sub-letting. They can do so whether or not they are or were the landlord or the property is within the local authority's area.
   10. The Act – at section 7 - gives the Secretary of State and Welsh ministers power to make regulations enabling persons, to be prescribed, to compel others to provide information for the purposes of housing fraud investigations. They may, in particular, provide local authorities with powers similar to those used to investigate benefit fraud. Regulations may also criminalise a failure to provide information. The intention is to create offences equivalent to those applicable to benefit fraud investigations.
   11. Given the high standard of proof in criminal proceedings, the information-sharing facilitated by the Act may prove crucial to ensuring that there is enough evidence of sufficient quality for a successful prosecution under the Act.
2. **Bedroom tax challenges**
   1. The "bedroom tax", formally known as the Social Sector Size Criteria or even the Spare Room Subsidy, is given effect by the new Regulation B13 of the Housing Benefit Regulations 2006. It came into force on 1 April 2013 and, broadly, reduces the entitlement of Housing Benefit claimants who under-occupy social housing.
   2. A reduction of 14% applies for one unoccupied bedroom; 25% for two or more. The SSSC prescribe members of the claimant’s household expected to share a bedroom. So, for example, they allow one bedroom for a couple, one for children under the age of 10 and one for children of the same sex under the age of 16. A similar scheme – the Local Housing Allowance ("LHA") – limits the entitlement of those occupying accommodation in the private sector.
   3. At the end of September 2013 the First-Tier Tribunal (Social Entitlement) Chamber sitting in Kirkcaldy had heard five challenges to the decisions of Fife Council to reduce the appellants’ eligible rent for housing benefit purposes following on from the introduction of the bedroom tax on 1 April 2013. In four of those cases it effectively “declassified” rooms as bedrooms, an approach followed in London on 20 September 2013 in a case concerning the City of Westminster.
   4. There has been much publicity since about the reasons behind the decisions, including an element of no-doubt unintended misrepresentation as to the question of alternative use of a “bedroom” and the issue of whether the Housing Act 1985/Housing (Scotland) Act 1987 size standards re overcrowding are determinative to such determinations. For the sake of clarity it is worth emphasising the basis for these non-precedent decisions:
3. Government Guidance – as contained in HB/CTB Circular A4/2012 – to the effect that it is up to the landlord to define and designate the property in line with the rent charged is not necessarily in itself determinative.
4. The bedroom tax regulations – paragraph 13(5) of the Housing Benefit Regulations 2006 – *“generally presupposes that to be classified as a bedroom a room should be large enough to be appropriate for use as a bedroom by an adult – or by two children”*. It is relevant to have regard to space standards.
5. In Ms McLeary’s case her accommodation was accepted as "exempt accommodation" and dealt with by the Consequential Provisions Regulations 2006, and as such was outside the bedroom tax provisions.
6. A well-established alternative use of a room which is *“in reality not a matter of choice for the occupant but reasonably required for their continued occupation of the property as their home”* was seen to be an attractive argument, though in Mr Thomson’s appeal not made out on the facts.
7. In the Westminster case the disputed room *“was never intended to be a bedroom, and has never been used as a bedroom. It contains equipment necessary for the appellant to try and overcome his disability.”*
   1. The Department for Work and Pensions has indicated that it will appeal two of these decisions at least (involving space standards) and has in the meantime issued an “Urgent Bulletin” dated 23 September 2013 containing revised guidance. This says that in applying the bedroom tax local authorities should only consider *“the composition of the household and the number of the bedrooms as designated by the landlord, but not by measuring rooms”*.
   2. It goes on to say that a room must be capable of accommodating “at least a single bed” and habitual use for some alternative purpose (such as storage) does not override what would otherwise be a determination of the room as a “bedroom”.
   3. On 26 September 2013, Tribunal Judge Boyd gave judgment in an appeal before the First-Tier Tribunal (Social Entitlement Chamber) in Glasgow, in which Glasgow City Council had argued that the appellant’s entitlement to housing benefit should be reduced because she under-occupied her two-bedroom flat.
   4. Mrs F lives with her husband in a housing association property. She suffers from primary progressive multiple sclerosis and uses an electric wheelchair. Her flat had been adapted significantly to meet her needs. She is unable, however, to share a double bed with her husband, because of her disability, and the flat’s main bedroom will not accommodate a second, single bed. Mrs F sleeps, therefore, in the flat’s second bedroom.
   5. The social sector size criteria - the criteria which regulate operation of the so-called "bedroom-tax" - prescribe that Mrs F is expected to share a bedroom with her husband. The flat’s second bedroom is considered spare. Glasgow City Council had, therefore, reduced Mrs F’s entitlement to housing benefit by 14%. Mrs F had, as a result, had fallen into arrears with her rent.
   6. Tribunal Judge Boyd found that, without qualification, the criteria discriminated against Mrs F, by failing to treat her differently from other claimants with different needs, and breached her rights under Article 14 and Article 1 of the First Protocol to the Human Rights Act 1998. To make them compatible with Mrs F’s human rights, he qualified the criterion in question - Regulation B13(5)(a) of the Housing Benefit Regulations 2006 - by reading into it words (in bold below), which would enable Glasgow City Council to treat Mrs F differently:

**Regulation B13(5)(a), Housing Benefit Regulations 2006**

*(5) The claimant is entitled to one bedroom for each of the following categories of person whom the relevant authority is satisfied occupies the claimant's dwelling as their home (and each person shall come within the first category only which is applicable):*

*(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.***

* 1. Important and interesting though it is, the decision has no binding or precedent value. It cannot yet be said, therefore, that the Regulations must be interpreted or applied by local authorities - Glasgow excepted - in accordance with Tribunal Judge Boyds’s interpretation. The Judge’s decision to read down Regulation B13(5)(a), so as to give effect to his findings about discrimination, was certainly bold and one that might be considered by some as “a stretch too far”.
  2. It remains to be seen whether the Department for Work and Pensions will appeal the judgment. It may prefer to rely on the Divisional Court’s recent judgment in **R (MA and others) v The Secretary of State for Work and Pensions [2013] EWHC 2213 (QB)** - though itself under appeal and due to be heard by the Court of Appeal in January 2014 - in which Laws LJ found that the social sector size criteria were lawful: the provision of discretionary housing payments (DHPs) to help claimants meet their rental liability could not be said to be a disproportionate approach to the difficulties that some disabled people face as a result of reform. Equally, the DWP may be reluctant to risk creating a precedent judgment by taking the case to the Upper Tribunal.
  3. The Department for Work and Pensions is especially keen to know about these First-Tier Tribunal decisions and on 30 October 2013 issued an urgent bulletin – HB U7/2013 – requiring local authorities to forward copies of all FtT decisions and, where the local decision was not upheld, seeking confirmation as to whether or not the authority intend to appeal (the DWP being able to “intervene” and make the appeals themselves) and requiring the authority to seek a statement of reasons from the FtT.
  4. Turning to the **MA case[[8]](#footnote-8)** the claims for a judicial review were brought by ten family groups, whose members included disabled and abused children and disabled adults. They were unable to share a bedroom with others because of their disability or, for example, because of a consequent risk of violence. They challenged the lawfulness of the SSSC on three grounds:

1. Unlawful discrimination: the SSSC discriminated unlawfully against the claimants, in breach of Article 14 ECHR, by adversely affecting a class of individuals, of whom the claimants were representative, for reasons relating to their disability. They contended that the discrimination could not be justified.
2. Breach of the Public Sector Equality Duty ("PSED"): the Secretary of State had breached the PSED imposed by section 149 of the Equality Act 2010 when implementing the SSSC. In particular, he had failed, it was said, to consider the disproportionate impact the SSSC were likely to have on persons in the claimants’ position.
3. Unlawful guidance: the Secretary of State had unlawfully issued guidance prescribing the calculation of Housing Benefit entitlement for claimants with severely disabled children, who were unable to share a room. Following the Court of Appeal’s judgment in **Gorry v Wiltshire Council and another [2012] EWCA Civ 629 [2013] PTSR 117** that, the claimants contended, could only be done by secondary legislation; and in any event, the Secretary of State’s guidance could not cure the discriminatory effect of the SSSC.
   1. The Court rejected claims of direct and indirect discrimination. According to Laws LJ the claimants’ case was best regarded as one of *Thlimmenos* discrimination – an alleged failure to treat different people or classes of people differently, without reasonable and objective justification.
   2. He acknowledged that the SSSC had a markedly disparate and adverse effect on the disabled and on other groups. The fact that it was not possible to define these groups with clarity did not mean the SSSC could not be discriminatory in the *Thlimmenos* sense.
   3. The real question was whether the policy rationale of the SSSC could be justified or, as Laws LJ put it, “*whether the refusal to exclude (some) disabled persons from the ‘bedroom tax’ regime, and the provision made and to be made by way of access to [Discretionary Housing Payments (‘DHPs’)], constituted a proportionate approach to the difficulties suffered by such persons in consequence of the HB policy*.”
   4. That, according to Laws LJ, involved high policy. The appropriate test therefore, applying **Humphreys v HMRC [2012] 1 WLR 1545**, was whether the policy rationale of the SSSC was *"manifestly without reasonable foundation"*. The fact that social policy was at play meant that the Secretary of State enjoyed a wide margin of discretion. Further:

*“Where the discrimination issue is to be resolved, as here, by the requirement of a proportionate judgment, its discipline and that of the PSED are very close. Both demand an informed and conscientious appreciation of the difficulties facing the persons or group adversely affected by the prospective measure. If that has been done, the PSED duty will have been fulfilled; and, most likely, a proportionate decision arrived at.”*

* 1. For the court, therefore, the answers to the first and second grounds of the claim were largely aligned. Laws LJ duly analysed the duty imposed by section 149 of the 2010 Act on public authority decision makers: to have due regard to the need to achieve the goals identified in section 149; to conduct a rigorous examination of a decision or policy’s effects, including due enquiry where necessary; but not to undertake a minute examination of every possible impact and ramification; and the duty did not require a particular result. Importantly, the courts were not to micro-manage the exercise; and the duty should not be treated as a back door by which to challenge the merits of a decision.
  2. The question posed by the court was, therefore, whether the Secretary of State had conducted a rigorous examination of the likely effect of the SSSC and made due enquiry where necessary. It resolved that he had: the criticisms levelled at the Secretary of State were *“an attempt to persuade the court to 'micro-manage' the policy-making process”* and looked *“very like a list objections to the policy under the guise of a litany of matters left unconsidered.”*
  3. Moreover, the policy rational of the SSSC was not manifestly without reasonable foundation. The provision of extra funding for DHPs and advice and guidance about its use could not be said to be a disproportionate approach to the difficulties faced by groups such as the disabled.
  4. As for the third ground of the claim, it was plainly right that a Departmental circular was not a lawful means of prescribing the calculation of Housing Benefit entitlement. That could only be done by secondary legislation. It was also plainly right that the Court of Appeal’s decision in *Gorry* required the Secretary of State to provide by Regulations that a claimant’s Housing Benefit entitlement would not be reduced if he or she required an extra bedroom for a child unable to share because of a disability. No such Regulation had, however, been made and the court was singularly unimpressed:

*“The Secretary of State has no business considering whether to introduce regulations to conform HB provision with the judgment in Gorry. He is obliged to do so.”*

* 1. As the Secretary of State had, however, indicated that drafting was *“under consideration”* the court desisted from ordering the Secretary of State to make Regulations.
  2. Legally, it is suggested respectfully that the judgment sits rather uncomfortably with that of the Court of Appeal in *Gorry* and the appeals joined with it. In *Gorry*, for example, the Court had felt able to identify with sufficient certainty a class of person against whom the LHA discriminated unlawfully: those with a severely disabled child, unable to share a bedroom by reason of his or her disability. It is perhaps difficult to see why, if the court was able to identify such a class in *Gorry*, it felt unable to do so here.
  3. Moreover, the courts’ treatment of the Secretary of State’s reliance on the DHP fund is markedly different. In *Gorry*, reliance on DHP availability, to make up the shortfall between benefit entitlement and rent in appropriate cases, was treated with something marginally short of contempt. The DHP fund is finite, intended as a temporary expedient only and its allocation necessarily uncertain. Here, by contrast, it weighs favourably in the balance of proportionality. The explanation, perhaps, lies in the court’s approach to the question of justification. As the SSSC were found to involve ‘high policy’ - aimed not only at saving public funds but at shifting the place of social security support in society – the threshold for the claims’ success here was particularly high: proof that the SSSC policy was *"manifestly without reasonable foundation"*. Whether that was the right test to apply and whether the court was right to conflate the question of justification with that of PSED compliance are questions the Court of Appeal may well have to consider in due course.

1. Section 4 says the following may apply - (a) local authority,(b) a housing provider,(c) the chief officer of police for a police area,(d) the chief constable of the British Transport Police Force,(e) Transport for London,(f) the Environment Agency,(g) the Natural Resources Body for Wales,(h) the Secretary of State exercising security management functions, or aSpecial Health Authority exercising security management functions on the direction of the Secretary of State, or (i) the Welsh Ministers exercising security management functions, or a

   person or body exercising security management functions on the direction of the Welsh Ministers or under arrangements made between the Welsh Ministers and that person or body. [↑](#footnote-ref-1)
2. Section 1(8)(a) [↑](#footnote-ref-2)
3. Section 1(6) [↑](#footnote-ref-3)
4. National Fraud Authority, *Annual Fraud Indicator*, March 2012 [↑](#footnote-ref-4)
5. The lesser offence carries a sentence of a fine not exceeding 5,000, the greater offence a sentence on summary conviction of up to six months in prison, a fine not exceeding 5,000 or both; and on indictment, up to two years in prison, a fine or both. [↑](#footnote-ref-5)
6. a tenant who does so because of violence or threats of violence made by a person living in the property or in the locality will not commit an offence. Nor will he do so if a person occupying the property because of his actions is entitled to apply for a right to occupy it, or to have the tenancy transferred to him, or a person in respect of whom such an application might be made. In practice, this is likely to include spouses, former spouses, civil partners, co-habitants and children for whose benefit the tenancy might be transferred. [↑](#footnote-ref-6)
7. **R v Ghosh [1982] QB 1053** – ‘dishonesty’ = knowledge that a reasonable and honest person would consider the tenant's actions dishonest. [↑](#footnote-ref-7)
8. This next section is taken from an article written by Dean Underwood, Head of the Social Housing Team at Hardwicke [↑](#footnote-ref-8)