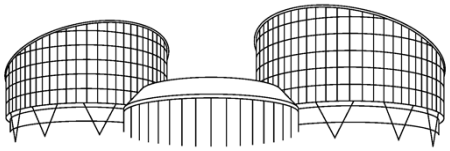

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF J.D. AND A v. THE UNITED KINGDOM

(Applications nos. 32949/17 and 34614/17)

JUDGMENT

Art 14 (+ Art 1 P1) • Discrimination • Possessions • Reduction of benefit in order to incentivise social housing tenants to move into smaller accommodation • No distinction made in favour of certain categories of vulnerable tenants • Disability • Gender • Margin of appreciation • Proportionality • Test to be applied as regards the justification for a measure of social and economic policy

STRASBOURG

24 October 2019

FINAL

24/02/2020

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of J.D. and A v. the United Kingdom,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Ksenija Turković, *President,*
Krzysztof Wojtyczek,
Aleš Pejchal,
Pauliine Koskelo,
Jovan Ilievski,
Raffaele Sabato, *judges,*
Leeona June Dorrian, ad hoc *judge,*

and Abel Campos, *Section Registrar,*

Having deliberated in private on 17 September 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in two applications (nos. 32949/17 and 34614/17 against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two British nationals, J.D. and A ("the applicants"), on 27 April 2017 and 5 May 2017 respectively. The President of the Section acceded to the applicants' request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

2. The first applicant, who had been granted legal aid, was represented by Ms K. Ashton, a lawyer practising at Coventry Law Centre. The second applicant was represented by Ms Rebekah Carrier of Hopkin Murray Beskine Solicitors in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr James Gaughan of the Foreign and Commonwealth Office.

3. The applicants complained that a reduction in their benefit payments discriminated against them on the basis of their disability and gender.

4. On 12 January 2018 notice of the applications were given to the Government.

5. In addition, third-party submissions were received from Ms Rosemary Lloyd on behalf of the Equality and Human Rights Commission and Ms Saadia Chaudary on behalf of the AIRE Centre, who had been granted leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

6. Mr Tim Eicke, the judge elected in respect of the United Kingdom, was unable to sit (Rule 28). Accordingly, the President decided to appoint Lady Leeona Dorrian to sit as judge *ad hoc* (Rule 29 § 1 (a)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The facts of the case, as submitted by the applicants, may be summarised as follows.

A. The background facts

1. The first applicant, J.D.

8. The applicant J.D. has lived with her adult, disabled daughter in a 3 bedroom property in the social rented sector since 1993. Her daughter has a type of brain damage associated with oxygen deprivation, severe physical and learning disabilities, is a permanent wheelchair user and is registered blind. J.D. cares for her daughter full time and their house was specifically designed to accommodate their needs including wide doors, an internal lift, a gradual slope at the front and rear to allow wheelchair access, ceiling hoists in the bathroom and bedroom, an accessible bathroom and a changing bed.

9. In 2012 the Government introduced the Housing Benefit (Amendment) Regulations 2012 (see Relevant domestic law, below). As a result the applicant's Housing Benefit was reduced by 14%, because she is considered to have one more bedroom than that to which she is entitled (as the house has 3 bedrooms for 2 people). Because of the reduction, the applicant's Housing Benefit no longer meets the cost of her rent.

10. The applicant applied for Discretionary Housing Payments ("DHP") to meet the difference, which were awarded on a temporary basis. Her last award expired on 31 March 2017 and at the time of making her application she was awaiting a response to her most recent claim and had not been offered smaller accommodation which would meet her daughter's needs.

2. The second applicant, A

11. The applicant A lives in a 3 bedroom house in the social rented sector with her son. She has lived there for more than 25 years. It appears that she was allocated a 3 bedroom house because of the shortage of 2 bedroom houses.

12. In the past the applicant had a brief relationship with a man known as X who is considered extremely dangerous and has previously served a lengthy prison sentence for attempted murder. After his release from prison in 2002 X came to A's home and violently attacked and raped her. Her son was conceived as a result of the rape. In 2012 X contacted A again and she was referred by the police to the "Sanctuary Scheme". The scheme aims to protect those at risk from the most severe forms of domestic violence. As

provided by the rules of her placement in the scheme, the applicant's home was adapted to include the modification of the attic to render it a "panic room" where A and her son can retreat in the event of an attempted attack by X.

13. The applicant receives Housing Benefit to rent her home. Following the change in legislation in 2012, the applicant's Housing Benefit was reduced by 14%, because the applicant is considered to have one more bedroom than that to which she is entitled (as the house has 3 bedrooms for 2 people). Because of the reduction, the applicant's Housing Benefit no longer meets the cost of her rent. The applicant has applied for DHPs to meet the difference, which have been awarded on a temporary basis.

14. In early 2015, her application for DHP was refused by the local authority and she received a letter threatening her with eviction. The situation was brought to the attention of the Secretary of State who intervened on A's behalf with the local authority, which reversed its decision to refuse her application for DHP. The Secretary of State informed the applicant that the refusal was the result of an 'error in processing' by the local authority where the fact that the applicant's home had been specially adapted was not taken into account when the decision to refuse DHP was made.

B. The Domestic proceedings

1. The first applicant

15. On 1 March 2013 the first applicant brought proceedings for judicial review. The Divisional Court gave its judgment on 30 July 2013. It considered that the relevant Regulations did discriminate against those who had a need to occupy accommodation with a greater number of bedrooms than they were entitled to because of their own disability or that of a family or household member. However, they considered that there was no "precise class of persons" who could be identified as affected by the measure, by reason of their disability. Moreover, such discrimination would only breach Article 14 taken together with Article 8 and/or Article 1 of Protocol No. 1 of the Convention, if it were "manifestly without reasonable foundation", and that test was not satisfied in the case.

16. The applicant together with four other claimants, appealed to the Court of Appeal, which gave its judgment on 21 February 2014. The Court of Appeal held that the Regulations discriminated against disabled people who had a need for additional accommodation as compared with comparable non-disabled people who do not have such a need. The Court of Appeal considered whether it should be classified as direct or indirect discrimination although in its view the type of discrimination was not

material in light of the Strasbourg case-law. The Master of the Rolls (Lord Neuberger) giving the lead opinion concluded on this point:

> "47. In case the classification question is material, I shall content myself with saying that ... the discrimination in this case is one of indirect or *Thlimennos* discrimination. It is not necessary to distinguish between these two. As a matter of substance, Regulation B13 discriminates against disabled persons on the ground of disability ..."

17. However, applying the test of "manifestly without reasonable foundation" the Court of Appeal found that the discrimination was justified for three reasons. First, because the applicant did not form a very limited class, and to include an imprecise class to whom the Regulations would not apply would introduce more complexity into the assessment and be administratively intensive and costly. Second, discretionary payments were suitable to deal with disability-related needs as they can be imposed for shorter periods and demanded more rigorous financial discipline from local authorities. Third, the Secretary of State was entitled to take the view that there were certain groups of persons whose needs for assistance with payment of their rent are better dealt with by discretionary payments rather than Housing Benefits.

18. The applicant appealed to the Supreme Court. The proceedings were joined with that of the second applicant and a number of other claimants (see paragraphs 22-30 below).

2. The second applicant

19. The second applicant brought a claim for judicial review on the basis of gender discrimination on 24 May 2014; the High Court gave judgment on 29 January 2015. It concluded that the Regulations were *prima facie* discriminatory on grounds of gender but that the discrimination was justified. In its judgment, the High Court examined the system of Sanctuary Schemes, summarised as follows:

> "9. Sanctuary Schemes
>
> A Sanctuary Scheme provides for the adaption of a property to make it secure. In particular there may be a secured room or space. The safe room provides a place to which the person can retreat if violence occurs or they are in fear of attack whilst they call the police and wait for assistance. The address is 'tagged' on police computer systems to ensure a quick response to a 999 call or the activation of a panic button. Specialist, tailored support is also provided, and A has (what is termed) a "complex package of multi-agency support".
>
> 10. These Schemes have been successfully established across the country since 2006. Even a brief explanation of their aims and scope are sufficient to demonstrate what a good idea they are. One of the obvious benefits is that victims of domestic violence and the like can remain in their own homes (if they want to) rather than being forced out by the fear of violence. Leaving their home as a result of domestic violence can have serious consequences for the stability of their lives. Government statutory homelessness statistics show that domestic violence is consistently reported as the

main reason for the loss of a last settled home for 12-13% of homelessness acceptances in England; see the witness statement of [P.N.] of Women's Aid at [C4]. [the applicant's representative] submitted that Sanctuary Schemes are a means of homelessness prevention. Whilst the work costs money, it avoids the expense and upheaval of re-housing and (as A's case well illustrates) of losing the support network of friends and neighbours that takes years to build up and which is so important for the continued safety and general wellbeing of people in A's position. It is these people who help provide her with the day to day friendship and sense of community that she needs.

...

16. None of that is particularly controversial. However, there is one further piece of evidence provided by the replies to these requests which was the subject of some argument. Local authorities were asked for the number of households in Sanctuary Schemes affected by the under-occupancy provisions. The answer was 120. The average gap in funding was £16.70 per week (above the average figure). Of that group of 120, the number receiving DHPs was 24 (or 20%). The Claimant relies upon that statistic to show that DHPs are not being provided to 80% of households in Sanctuary Schemes which are affected by these regulations and who should be receiving DHPs. The Defendant says that it proves nothing of the sort. [...] I observed during the course of argument that I would need to know more about the 80% before I could draw any conclusions from these figures. That remains my view. The statistic shows that DHPs are being paid to people in Sanctuary Schemes. Indeed that is A's experience. What we do not know is why they are not being paid. It may be that it is because applications are being refused. Or it may be because claimants are bridging the gap in other ways."

20. The applicant appealed to the Court of Appeal who concluded on 27 January 2016 that the discrimination against the second applicant was not justified, and was unlawful. The case proceeded on the basis that Regulation B13 constituted "*prima facie* discrimination on grounds of sex and disability" (see § 5). The primary question before the court was therefore whether that discrimination had been justified. The court set out the situation of the second applicant:

"10. A has lived in a three bedroom house rented from the local council since 1989. In 1993-4 she had a brief, casual relationship with a man, X, who was subsequently convicted of attempted murder; he has been exceptionally violent to her. Whilst in prison he started to harass her and in 2002 he sought her out. A child was conceived as a result of his rape of her and was born in 2003. The child lives with her. The courts have refused contact between the son and X.

11. In 2012, X contacted A again and made threats of violence to her. The police and other agencies took the threats seriously and under one of the schemes which are known as the "Sanctuary Schemes" her property was adapted. She is protected under that scheme with the support of the police. In consequence of the violence of X and the continued threats from him, she suffers from PTSD and has suicidal ideation.

12. Sanctuary Schemes, which have been operating since 2006, provide for the adaptation of a house or flat to make it secure and for on-going security monitoring to enable people who have been subjected to violence, including what is often referred to a "domestic violence", to remain in their own home. There was powerful evidence

before the judge from [P.N.], the Chief Executive of Women's Aid, about the benefits and importance of Sanctuary Schemes."

In its conclusions under Article 14, the Court of Appeal commented:

"47. A and those in a similar position to A, who have suffered from serious violence, require the kind of protection offered by the Sanctuary Schemes in order to mitigate the serious effects of such violence and the continued threats of such violence. It cannot seriously be disputed that A and those in a similar position, who are within the Sanctuary Schemes and in need of an adapted "safe" room, are few in number and capable of easy recognition. There would be little prospect of abuse by including them within the defined categories in Regulation B13 and little need for monitoring. Moreover, with careful drafting, Regulation B13 could be amended to identify them as a discernible and certain class.

...

54. In these circumstances, whilst we saw great force in the Secretary of State's arguments, which we subjected to serious scrutiny, we feel constrained not to accept them. We acknowledge in particular that DHPs are discretionary, but that that discretion has to be exercised lawfully and in accordance with the guidance issued by the Secretary of State. If they were to be withheld inappropriately, the decision would be subject to review. We acknowledge that the evidence shows that the DHPs would cover the full deficit in Housing Benefit. We acknowledge that, even though the fund for DHPs is capped and may in theory be insufficient, there is no clear evidence that it will be; on the contrary, so far it has been sufficient. Thus, the evidence is that A has received what she would have received had those in her position been brought within a defined class in Regulation B13; she has not been disadvantaged. But that was the position in *Burnip*, and the same justification was not accepted.

55. *Burnip* obliges us also to decide that the Secretary of State was not entitled to decide that the better way of providing for A and those in a similar position was by way of DHPs, even though that would be a more flexible approach.

56. In these circumstances, we have concluded that the appeal in *A* must be allowed on the ground that the Secretary of State has failed to show that his reasons amount to an objective and reasonable justification for the admitted discrimination in Regulation B13."

21. The Government appealed that decision and the second applicant's case was joined with that of the first applicant and a number of others to be heard together, before the Supreme Court.

3. The proceedings before the Supreme Court

22. The Supreme Court gave its judgment on 9 November 2016. Both the applicants' claims were dismissed. Lord Toulson gave the lead judgment, Lady Hale and Lord Carnwath dissented in the case concerning the second applicant.

23. Lord Toulson first addressed the question whether the lower courts had applied the right test in asking whether the discriminatory treatment complained of was "manifestly without reasonable foundation". Where the applicants had argued that in cases such as theirs involving disability or gender discrimination, weighty reasons for justification were required, he

confirmed that the lower courts were correct to apply the test of "manifestly without reasonable foundation". Lord Toulson clarified that:

> "32. The fundamental reason for applying the manifestly without reasonable foundation test in cases about inequality in welfare systems was given by the Grand Chamber [of the European Court of Human Rights] in *Stec* (para 52). Choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities."

24. He then went on to consider whether the domestic courts had misapplied that test. He found that they had not. He said:

> "41. ...There was certainly a reasonable foundation for the Secretary of State's decision not to create a blanket exception for anyone suffering from a disability within the meaning of the Equality Act (which covers anyone who has a physical or mental impairment that has a more than minimal long term effect on the ability to do normal daily activities) and to regard a DHP scheme as more appropriate than an exhaustive set of bright line rules to cover every contingency.
>
> 42. However, that is not the end of the matter, for there are some people who suffer from disabilities such that they have a transparent medical need for an additional bedroom..."

25. He then went on to examine the situation of other claimants in the proceedings in light of the distinction he had identified. In examining the case of the first applicant, he concluded:

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

26. In respect of the second applicant, he considered that whilst A had a strong case for staying where she needed to be, she had no need for a three-bedroom property:

> "59. Notwithstanding my considerable sympathy for A and other women in her predicament, I would allow the Secretary of State's appeal in A's case. I add that for as long as A. and others in a similar situation are in need of the protection of Sanctuary Scheme housing, they must of course receive it; but that does not require the court to hold that A has a valid claim against the Secretary of State for unlawful sex discrimination."

27. He commented:

> "62... It was recognised from the time that [the Regulation (Reg B13)] was mooted that there will be some people who have a very powerful case for remaining where they are, on grounds of need unrelated to the size of the property. For reasons explained in the evidence (to which I have referred in para 40), it was decided not to try to deal with cases of personal need unrelated to the size of the property by general exemptions for particular categories but to take account of them through DHPs.
>
> ...

> 64. So while I agree that there would have been no insuperable practical difficulty in drafting an exemption from the size criteria for victims of gender violence who are in a sanctuary scheme and who need for that reason to stay where they are, deciding whether they really needed to stay in that particular property would at least in some cases require some form of evaluation. I leave aside the question debated in the evidence about whether some people in a sanctuary scheme might safely be able to make use of a spare room by taking in someone else such as a family member. Likewise I do not suppose that there would be insuperable practical difficulties in drafting exemptions to meet other categories of people who may justifiably claim to have a need to remain where they are for reasons unconnected with the size of the accommodation, but this would again require an evaluative process."

28. He considered whether the state has a positive duty to provide effective protection to victims of gender-based violence but decided not to examine the question of whether there was a duty, because this would not mandate the means by which such protection is provided.

29. Lady Hale, dissenting in respect of the second applicant's case considered unfortunate that the cases had been joined underlining that the cases where it is clear that people need an extra room because of their disability, and the case of A are different:

> "72... A's need is not for space but to stay where she is. The effect of the regulation is to deny her the benefit she needs in order to stay in the accommodation she needs. In my view this is unjustified discrimination against her on grounds of her sex. But the reasons are quite different from the reasons in the disability cases.
>
> ...
>
> 76. The state has provided Ms A with such a safe haven. It allocated her a three-bedroom house when she did not need one. That was not her choice. It later fortified that house and put in place a detailed plan to keep her and her son safe. Reducing her Housing Benefit by reference to the number of bedrooms puts at risk her ability to stay there. Because of its special character, it will be difficult if not impossible for her to move elsewhere and that would certainly put the State to yet further expense. Given these very special circumstances, I am tempted to regard this as an interference with her and her son's right to respect for their home. But in any event, denying her the benefit she needs in order to be able to stay there is discrimination in the sense described in *Thlimmenos v Greece* 31 EHRR 15: treating her like any other single parent with one child when in fact she ought to be treated differently.
>
> 77. Indeed, the appellant does not seriously dispute that Ms A needs to stay where she is. The Secretary of State accepts that she needs to stay in a Sanctuary Scheme and probably in this very house. The justification suggested for the interference, or the discrimination, is the availability of discretionary housing payments to make up the shortfall in her rent. But if the discretionary housing payment scheme is not good enough to justify the discrimination against the [other] households, it is not good enough to justify the discrimination against Ms A's household either. Its deficiencies were acknowledged in the Court of Appeal's decision in *Burnip v Birmingham City Council* [2012] EWCA Civ 629; [2013] PTSR 117, para 46. They are well-summed up by Mr Drabble QC [...]: it is discretionary, cash-limited and produces less certainty; it has a stricter means test; it offers different and less attractive routes of judicial challenge; it can be onerous to make applications; and it encourages short term, temporary and conditional awards. For a woman in a Sanctuary Scheme to have

to endure all those difficulties and uncertainties on top of the constant fear and anxiety in which she lives cannot be justified. This is not a question of the allocation of scarce public resources: it is rightly acknowledged that public resources will have to meet this need one way or another."

30. In relation to the first applicant's case she commented:

"78....In the second example, the disability is indeed a status for article 14 purposes, and I have found the case of JD and [her daughter] an extremely difficult one and have been tempted to dissent in their case too. But the distinction between them and the victims of the sex discrimination entailed in gender-based violence, is that the state has a positive obligation to provide effective protection against gender-based violence and for this small group of victims this is the only way to make that protection effective."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Social Security Contributions and Benefits Act 1992

31. Housing Benefit is a means tested benefit provided under section 130 of the Social Security Contributions and Benefits Act 1992 and subordinate regulations. It is a financial payment available to claimants on low incomes who meet certain eligibility criteria**.** Its purpose is to help claimants with their rental costs whether they rent private or social housing. There is a prescribed mechanism for determining in each case the appropriate maximum Housing Benefit.

32. Regulation B13 was introduced into the Housing Benefit Regulations 2006 (SI 2006/213) in 2012. The Regulation provides for adjustment of the eligible rent and "Appropriate maximum Housing Benefit" in the area of social sector housing. Where the number of bedrooms in a dwelling exceeds that to which a claimant is entitled under the relevant provisions, a deduction is calculated in the claimant's entitlement to benefits. The deduction is:

14 % where the number of bedrooms in the dwelling exceeds by one the number of bedrooms to which the claimant is entitled; and

25 % where the number of bedrooms in the dwelling exceeds by two or more the number of bedrooms to which the claimant is entitled.

33. 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:

"(a) a couple (within the meaning of Part 7 of the Act);

(b) a person who is not a child;

(ba) a child who cannot share a bedroom;

(c) two children of the same sex;

(d) two children who are less than ten years old;

(e) a child...

The claimant is entitled to one additional bedroom in any case where -

(a) a relevant person is a person who requires overnight care; or

(b) a relevant person is a qualifying parent or carer.

...

(9) In this regulation 'relevant person' means -

(a) the claimant;

(b) the claimant's partner;

(c) a person ("P") other than the claimant or the claimant's partner who is jointly liable with the claimant or the claimant's partner (or both) to make payments in respect of the dwelling occupied as the claimant's home;

(d) P's partner."

B. Discretionary Housing Payments

34. There is also a statutory scheme for enabling Discretionary Housing Payments (DHPs) to be made to persons who are entitled to Housing Benefit and/or some other benefits. According to the Discretionary Financial Assistance Regulations (set out in Statutory Instrument 2001/1167), a payment may be made for such period as the authority considers appropriate in the particular circumstances of the case, and the authority is required to give reasons for its decision.

35. There is no statutory right of appeal, but such decisions are in principle subject to judicial review. The practice is for the Department of Work and Pensions to make an annual DHP grant to local authorities in respect of their anticipated expenditure.

36. In 2013 the Government issued a DHP guidance manual and good practice guide to local authorities. It was summarised in an Appendix to the Supreme Court judgment in the present cases (see paragraph 22 above) as follows:

"29. This document of April 2013 (the Discretionary Housing Payments Guidance Manual) ("the DHP Guidance Manual") contains very full guidance as to the use of DHPs. It reminds authorities, at para 1.10, that their DHP funds are cash limited. It reviews the whole scheme. It canvasses the possibility of allowing applications in advance from persons affected by the [Housing Benefit], at paras 4.5-6, and making an award not limited in time to a disabled claimant likewise affected, at para 5.3. A "Good Practice Guide" is included in the DHP Guidance Manual. It contains a substantial discussion of the [Housing Benefit]. It states:

"1.10 The Government has provided additional funding towards DHPs following the introduction of the benefit cap. This additional funding is intended to support those claimants affected by the benefit cap who, as a result of a number of complex challenges, cannot immediately move into work or more affordable accommodation."

Specific types of case are then enumerated, at para 1.11, and carefully discussed, and worked examples are given. I should note these passages:

"2.5 For claimants living in specially adapted accommodation, it will sometimes be more cost-effective for them to remain in their current accommodation rather than moving them into accommodation which needs to be adapted. We therefore recommend that local authorities identify people who fall into this group and invite a claim for DHPs.

2.7 The allocation of the additional funding for disabled people broadly reflects the impact of this measure and the additional funding needed to support this group. However, due to the discretionary nature of the scheme, [Local Authority]'s should not specifically exclude any group affected by the removal of the spare room subsidy or any other welfare reform. It is important that LAs are flexible in their decision making."

Other types of case discussed include adopters (paras 2.9-11) and foster carers, in particular (para 2.13) carers for two or more unrelated foster children.

30. At paras 5.4-5.5 the Good Practice Guide poses a series of practical questions under two heads, "The household's medical circumstances, health or support needs" and "Other circumstances". The bullet points under the latter head (13 in number) demonstrate a series of different cases, none of them necessarily involving disability, in which the claimant may encounter particular difficulty or hardship in seeking alternative accommodation in response to the reduction in his/her [Housing Benefit] which the local authority may think it right to consider in deciding whether to make an award of DHP. I will just set out the first two instances:

"Is the claimant fleeing domestic violence? This may mean they need safe accommodation on an emergency basis so the concept of having time to shop around for a reasonably priced property is not appropriate.

Does the household have to live in a particular area because the community gives them support or helps them contribute to the district?"

C. The Human Rights Act 1998 ("HRA")

37. Pursuant to section 6 of the HRA, it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

D. The Equality Act 2010

38. Section 149 of the Equality Act introduced the Public Sector Equality Duty. It provides that:

"(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

...

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to -

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."

39. Disability and sex are among the protected characteristics set out in Section 149 (7) of the Act.

E. Relevant case-law

40. In *Burnip v. Birmingham City Council and others* ([2012] EWCA Civ 629) the Court of Appeal on 15 May 2012 first examined the issue of discrimination in the context of the 'bedroom tax'. The court's conclusions were later summarised as follows by the Court of Appeal in the second applicant's case:

"32. *Burnip* concerned two cases of single severely disabled persons occupying two bedroom flats, and one family with three children including two severely disabled daughters occupying a four bedroom flat. In the third case (*Gorry*), it was inappropriate for the two disabled daughters aged 8 and 10 to share a bedroom because of their disabilities. In each case, their Housing Benefit had been reduced by the effect of [...] Regulation B13. The Court of Appeal (Maurice Kay and Hooper LJJ and Henderson J) held that the claimants had established a *prima facie* case of discrimination under Article 14 of the ECHR, and that the Secretary of State had failed to establish objective and reasonable justification for the discriminatory effect of the statutory criteria (paragraph 24 of Maurice Kay LJ's judgment). Henderson J (with whom the other members of the court agreed) held that DHPs could not be regarded as a complete or satisfactory answer to the problem (paragraphs 46 and 64). He also held in paragraph 64 that there was no question of a general exception from the normal bedroom test for disabled people of all kinds. The exception was sought for only a very limited category of claimants, namely those with a disability so severe that an extra bedroom is needed for a carer to sleep in, or in *Gorry's* case where separate bedrooms were needed for children whose disabilities were so severe they could not be reasonably expected to share a single room. He made clear that such cases were by their very nature likely to be relatively few in number, easy to recognise, not open to abuse, and unlikely to undergo change or need regular monitoring."

41. In the judgment of *Burnip* itself, the Court of Appeal commented in more detail on why it could not regard DHP's as a "complete or satisfactory answer to the problem":

> "46. ...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 replace] the full amount of the shortfall. To recognise these shortcomings is not in any way to belittle the valuable assistance that [DHPs] 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.
>
> 47. A further aspect of the problem is that housing, by its very nature, is likely to be a long term commitment. This is particularly so in the case of a severely disabled person, because of the difficulty in finding suitable accommodation and the probable need for substantial physical alternations to be made to the property in order to adapt it to the person's needs. Before undertaking such a commitment, therefore, a disabled person needs to have a reasonable degree of assurance that he will be able to pay the rent for the foreseeable future, and that he will not be left at the mercy of short term fluctuations in the amount of his housing-related benefits. For the reasons which I have given, [DHP's] cannot in practice provide a disabled person with that kind of reassurance."

42. In *R (Hurley and others) v. Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin), the High Court considered a part of the Housing Benefit Regulations 2006 which introduced a limit (a 'cap') on the total amount of benefits an individual could receive. The claimants provided unpaid care to severely disabled persons for at least 35 hours per week, for which they received a "Carer's Allowance". That allowance was considered a benefit and so 'capped' as a result of the Regulations, resulting in a reduction in the amount that the claimants received.

43. One of the claimants cared for her disabled grandmother in London but as a result of the reduction in her benefits fell into debt with her rent payments and was evicted with her four children from her local authority flat. She was offered homeless accommodation in Birmingham, but refused this as she could not have cared for her Grandmother if she moved to that city with her family. She moved with her children to live in one bedroom in her Grandmother's house in London in "intolerable" conditions (see § 30). She applied to two local, London boroughs for DHP who refused her request on the basis that they had run out of DHP funds (see § 30).

44. In its judgment of 15 May 2019 in *R (on the application of DA and others) (Appellants) v. Secretary of State for Work and Pensions (Respondent), and R (on the application of DS and others (Appellants) v. Secretary of State for Work and Pensions (Respondent)* [2019] UKSC 21 the Supreme Court examined appeals brought by various lone parent mothers and their young children to challenge legislative provisions known as the 'benefit cap', which capped specified welfare benefits at a certain amount per household.

45. The Supreme Court considered the appropriate test by which to assess the justification under Article 14 for "an economic measure introduced by the democratically empowered arms of the state..." (see § 55). Lord Wilson giving the lead judgment stated:

> "65. ... there was - and there still remains - clear authority both in the *Humphreys* case and in the bedroom tax case for the proposition that [...] in relation to the government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it."

46. Lady Hale and Lord Kerr dissented. Lady Hale opined:

> "147. Lord Kerr is surely right to question whether the test which the Strasbourg court will apply in matters of socio-economic policy should also be applied by a domestic court. The Strasbourg court applies that test, not because it is necessarily the proper test of proportionality in this area, but because it will accord a "wide margin of appreciation" to the "national authorities" in deciding what is in the public interest on social or economic grounds. The national authorities are better able to judge this because of their "direct knowledge of their society and its needs" (see *Stec*, para 52). It does not follow that national courts should accord a similarly wide discretion to national governments (or even Parliaments). The margin of appreciation is a concept applied by the Strasbourg court as part of the doctrine of subsidiarity. The standard by which national courts should judge the measures taken by national governments is a matter for their own constitutional arrangements.
>
> 148. Not only that, it has been noted that, in *Stec*, the Grand Chamber cited *James v United Kingdom* (1986) 8 EHRR 123 as authority for its "manifestly without reasonable foundation" standard. But in *James*, it is fairly clear that the Strasbourg court drew a distinction between two questions: first, was the measure "in the public interest" for the purpose of A1P1 (or, in article 8 terms, does it pursue a legitimate aim); and second, was there a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This latter requirement had been expressed in *Sporrong and Lönnroth v Sweden* 5 EHRR 35, at para 69, as "whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" (see *James*, para 50). The "manifestly without reasonable foundation" standard was applied to the first but not the second question."

III. RELEVANT INTERNATIONAL AND EUROPEAN MATERIAL

A. The United Nations Convention on Rights of Persons with Disabilities

47. The United Kingdom signed the United Nations Convention on the Rights of Persons with Disabilities on 30 March 2007 and ratified it on 8 June 2009. The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity (for details see *Guberina v. Croatia*, no. 23682/13, §§ 34-37), 22 March 2016).

48. Article 28 of the Convention states:

> "1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability."

49. In its concluding observations on the initial report of the United Kingdom under the Convention of 3 October 2017 (CPRD/C/GBR/CO/1), the Committee on the Rights of Persons with Disabilities raised concerns under Article 28 of the Convention about the impact of austerity measures and anti-poverty initiatives introduced following the financial crisis in 2008/9 which "resulted in severe economic constraints among person with disabilities and their families".

B. The Council of Europe Convention on preventing and combating violence against women and domestic violence (the "Istanbul Convention")

50. The United Kingdom signed the Istanbul Convention on 8 June 2012. It has not ratified the Convention, nor brought it into force. The Convention aims to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence. It also aims to contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women.

51. Article 18 of Chapter IV "Protection and support", states that:

> "2. Parties shall take the necessary legislative or other measures, in accordance with internal law, to ensure that there are appropriate mechanisms to provide for effective co-operation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities, in protecting and supporting victims and witnesses of all forms of violence covered by the scope of this Convention, including by referring to general and specialist support services ....
>
> 3. Parties shall ensure that measures taken pursuant to this chapter shall:
>
> –be based on a gendered understanding of violence against women and domestic violence and shall focus on the human rights and safety of the victim;
>
> –be based on an integrated approach which takes into account the relationship between victims, perpetrators, children and their wider social environment;
>
> –aim at avoiding secondary victimisation;
>
> –aim at the empowerment and economic independence of women victims of violence ..."

THE LAW

I. JOINDER OF THE APPLICATIONS

52. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1

53. The first applicant complained that she had been discriminated against on the basis of her daughter's disability. She relied in that connection on Article 14 of the Convention in conjunction with Article 8 and Article 1 Protocol 1.

54. The second applicant complained that she had been discriminated against on the basis of her gender as the victim of gender based violence. She relied in that connection on Article 14 of the Convention in conjunction with Article 8.

55. The Government have not disputed that disability and gender are identifiable characteristics and that the applicants can claim to have been discriminated against on the basis of those characteristics. In this connection it recalls that there is no doubt the first applicant may claim to have been discriminated against as a carer for a disabled person (see *Guberina,* cited above, §§ 76-79).

56. The applicants have complained under Article 14 in conjunction either with Article 8 and/or with Article 1 Protocol 1. However, the Court is the master of the characterisation to be given in law to the facts of the case and does not consider itself bound by the characterisation given by an applicant or a government (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018). It notes that the gravamen of the applicants' complaints is their alleged discriminatory treatment contrary to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 resulting from the application of Regulation B13 governing Housing Benefits, and the DHP scheme.

57. Therefore, it considers that the cases fall to be examined under Article 14 in conjunction with Article 1 of Protocol No. 1.

Those provisions read as follows:

Article 14

> "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."

Article 1 Protocol 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

1. The parties' submissions

58. The Government argued that the Court has previously considered inadmissible *ratione materiae* complaints about the failure of public authorities to take positive steps to ensure that special provision be made for disabled people to provide them with support for ordinary living, even where domestic law provided for or even required such steps to be taken. The applicant's cases are therefore inadmissible for the same reason.

59. They also submitted that the applicants have received financial support to meet their housing needs and there is no significant difference between Housing Benefit and DHP. Accordingly, the applicants can no longer be considered victims within the meaning of the Convention, and for the same reasons they have not suffered any significant disadvantage.

60. The applicants argued that their complaints were admissible as they had been directly and disproportionately affected by the reduction in their Housing Benefit under Regulation B13 due to their disability and gender. They submitted that there were significant differences between Housing Benefit under Regulation B13 and DHP, both in terms of the manner of allocation and the available review schemes, which meant that they were put at a disadvantage by applying for DHP.

61. They considered that they remained victims from the perspective of the Convention as the domestic courts have not recognised any violation nor awarded them compensation. Moreover, in light of the differences between the two benefit regimes, they had suffered a 'significant disadvantage' by being made subject to the DHP regime and their cases were therefore admissible.

2. The Court's assessment

62. In respect of the Government's argument that the applicants complaints are inadmissible *ratione materiae*, the Court notes that the Government has made reference to cases concerning treatment of disabled persons. The Court therefore considers that these arguments relate to the first applicant's complaint. The Government relied on a series of

inadmissibility decisions: *Botta v. Italy*, 24 February 1998, *Reports of Judgments and Decisions* 1998-I, *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, *Sentges v. the Netherlands* (dec.), no. 27677/02, 8 July 2003 and *Farcas v. Romania*, no. 32596/04, 14 September 2010). The Court found those cases to be inadmissible because they concerned complaints of a general nature, such as a failure to provide disabled persons with access to beach facilities or public buildings (see *Botta* and *Zehnalová and Zehnal*, cited above), or they were unsubstantiated (see *Sentges* and *Farcas,* cited above). As such, they are significantly different from the present cases and are not relevant to the Court's decision on the admissibility of the present applications.

63. According to the Court's well established case-law the prohibition of discrimination enshrined in Article 14 applies generally in cases under Article 1 of Protocol No. 1. where a Contracting State has in force legislation providing for the payment as of right of a welfare benefit - that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (see *Vrountou v. Cyprus*, no. 33631/06, § 64, 13 October 2015). To assess admissibility the question is whether, but for the condition of entitlement under domestic law about which the applicant complains, he or she would have had a right enforceable under domestic law, to receive the benefit in question (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 55, ECHR 2005-X). It follows that the first applicant's complaint falls within the scope of Article 1 Protocol No. 1 and that is sufficient to render Article 14 of the Convention applicable, and the complaint admissible *ratione materiae*.

64. The Court also rejects the Government's argument that the applicants are not victims from the perspective of Article 34 of the Convention. A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him or her of his or her status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 180, ECHR 2006-V; *Gäfgen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010; *Nada v. Switzerland* [GC], no. 10593/08, § 128, ECHR 2012). The Court does not consider that permitting the applicants to apply for DHP could be considered a measure which was favourable to them in this context. It also notes that the national authorities have not acknowledged, either expressly or in substance a violation and then afforded redress for a breach of the Convention. Accordingly, the Court considers that the applicants can be considered victims under Article 34 of the Convention.

65. As to whether the applicants suffered a 'significant disadvantage', the Court recalls that the admissibility criterion in Article 35 § 3 (b) reflects

the view that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. The severity of a violation should be assessed, taking account of both the applicant's subjective perceptions and what is objectively at stake in a particular case. In the context of allegations of discrimination, the question of what amounts to a 'significant disadvantage' for an applicant requires particularly careful scrutiny. Moreover, an alleged violation of the Convention may concern important questions of principle and thus cause a significant disadvantage without affecting an applicant's pecuniary interest. It may also be that, even in the absence of a "significant disadvantage", a question of principle raised by an application is of a general character affecting the observance of the Convention, such that, under the terms of the second element in Article 35 § 3 (b), "respect for human rights defined in the Convention ... requires an examination of the application on its merits" (see *Daniel Faulkner v. the United Kingdom*, no. 68909/13, § 26, 6 October 2016, with further references).

66. In the present case, what is at a stake, taking into consideration the applicants' subjective perceptions and the discrimination alleged, raises general questions of principle which warrant consideration by the Court. Consequently, without needing to determine whether the applicant can be said to have suffered a "significant disadvantage", the Court is led to dismiss the Government's objections on the basis of the second element in Article 35 § 3 (b) of the Convention (see *Daniel Faulkner*, cited above, § 27).

67. The Court notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

68. The first applicant submitted that she had been discriminated against in the enjoyment of her rights under Article 14 and Article 1 Protocol 1 on the ground of disability because she had been treated less favourably than others as regards entitlement to Housing Benefit. Those who do not have objective housing needs based on their disability will receive a contribution which could cover all of their housing needs, whereas her Housing Benefit contribution does not cover her housing needs. This amounts to a failure to

make a reasonable accommodation in the case of disability within the meaning of *Çam v. Turkey*, no. 51500/08, § 84, 23 February 2016.

69. That difference in treatment was not justified because justification requires a reasonable relationship of proportionality between the legitimate aim and the means; in her case it had been disproportionate. Justification of discrimination on the grounds of disability requires "very weighty reasons"; the Government has not put forward any weighty reasons which could have justified the discrimination.

70. The second applicant submitted that by reducing her Housing Benefit allocation, the government had discriminated against her on the basis of her gender within the meaning of *Thlimmenos v. Greece* ([GC], no. 34369/97, § 44, ECHR 2000-IV), as she was the victim of domestic violence and victims of domestic violence are overwhelmingly women.

71. That discrimination could not be justified. The aim of the Government in implementing the bedroom criteria was to reduce expenditure and encourage social sector tenants to move or to work, such an aim was legitimate but there was no rational connection between the aim and its application. As a consequence of the violence and threats from X, the applicant suffered from post-traumatic stress disorder, depression and suicidal ideation, was unable to work, and lived in constant fear. It was accepted by the Supreme Court that she needed to stay in her adapted accommodation as long as she needed it. DHP payments could not alleviate the disadvantage caused by the reduction in her Housing Benefit because they were discretionary and precarious, in contrast to the entitlement to a benefit.

72. Where there is *prima facie* gender discrimination, the arguments for justification must be subject to "strict scrutiny" and call for "weighty reasons", not a justification of "manifestly without reasonable foundation" even in the context of allocation of benefits. It would only be appropriate to apply a test of "manifestly without reasonable foundation" where the measure was designed to correct a historic injustice, which was not so in her case. Applying the test of "strict scrutiny" and "weighty reasons" in her case meant that the reduction in her Housing Benefit was discriminatory.

(b) The Government

73. The Government argued that the aim of the legislative measures was "saving of public funds in the context of a major state benefit" and "shifting the place of social security support in society". Those are social and fiscal matters which were approved by Parliament.

74. The applicants had not been discriminated against since they have received financial support to meet their actual housing needs (and have received the same payment as the comparators); they have not been evicted from their homes and therefore they cannot contend that they have been discriminated against in the enjoyment of any possession. The scheme does

not require the applicants to move out of their properties. It is designed to effect "behavioural changes" to incentivise families who feel they are under-occupying properties to move but there is no obligation to move and no reason for the applicants in the present cases to move.

75. The requirement for the applicants to apply for DHP cannot be considered discriminatory because there is no uncertainty about whether DHP funds can be allocated. Moreover, whilst payments under the scheme are discretionary, there is a limit on that discretion because local authorities must have regard to their general duties in law, including duties under the Convention. A refusal to grant DHP can be challenged before the courts and it is usual in the context of any benefit payment that applicants must make an application to receive it. The DHP scheme is appropriate and suitable for claimants who cannot mitigate the reduction in of their Housing Benefit by any other available measure (such as moving, working or taking in a lodger, which will be options also available to other disabled and non-disabled persons). Payment by DHP instead of Housing Benefit is therefore justified.

76. There has been no discrimination on the basis of *Thlimmenos,* cited above, because the principle in *Thlimmenos* cannot require a State to take positive steps to allocate a greater share of public resources to a particular person or group, and it has never been applied in the context of allocation of State benefits. The Court should apply an appropriate, prior limit in such cases by applying the principles of direct/indirect discrimination (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-IV), or there must be a "significant difference" in treatment between the comparator groups. In the present cases, there has been no difference of treatment between the applicants and comparator groups. The measure limiting payment of Housing Benefit in some cases is neutral; the only place where a difference of treatment could arise is at the stage of deciding whether to make a DHP payment. However, it cannot be said that the decision at this stage of the proceedings is based solely on the status of disability or gender, and therefore that decision does not require "very weighty reasons" in order to be justified.

77. Even if the applicants have suffered discrimination, such discrimination is justified on the basis that it served a legitimate aim and was not "manifestly without reasonable foundation", which is the relevant test concerning the margin of appreciation in light of the Supreme Court's judgment.

2. Third party interveners

(a) The Equality and Human Rights Commission

78. The Equality and Human Rights Commission ("EHRC") is the United Kingdom's national human rights institution. It intervened in both applicants' cases. With reference to the Court's case-law the EHRC

considered that the Court takes a purposive and practical approach to Article 14. It outlined seven reasons related to the functioning of the DHP Scheme to explain how payments made under the scheme are discretionary and may not be awarded. The EHRC made reference to a number of international legal instruments including the Council of Europe Istanbul Convention, the UN Convention on the Rights of Persons with Disabilities and the UN Commission on the Elimination of All Forms of Discrimination against Women (CEDAW). In respect of the latter it noted that the United Kingdom's sixth periodic CEDAW report relies on the existence of 'Sanctuary Schemes' to discharge its duty to protect women from gender based violence.

(b) The AIRE Centre

79. The AIRE Centre is a non-governmental organisation running a specific project on obligations of states to victims of gender based and domestic violence, it intervened in the second applicant's case. With reference to the Court's case-law it considered that it was well-established that victims of domestic violence have a right to physical and moral integrity under Article 8 of the Convention. The Centre referred to the Council of Europe Istanbul Convention emphasising that this imposes an obligation on states to provide protection to victims. Finally, it underlined that domestic violence frequently raises issues of gender based discrimination and that there is a uniform acceptance of the fact that women and girls are the predominant victims of serious and life threatening forms of violence.

3. The Court's assessment

(a) The general principles

80. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in relevantly similar situations (see, among many other authorities, *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008).

81. The Court also recalls that the provisions of the Convention do not prevent Contracting States from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the interference with the rights of the statutory category or group as a whole can be justified under the Convention (see *Andrejeva v. Latvia* [GC], no. 55707/00, § 83, ECHR 2009 and *Žd*anoka *v. Latvia* [GC], no. 58278/00, § 112, ECHR 2006-IV). Indeed, measures of economic and social policy often involve the introduction and application of criteria which are based on making distinctions between categories or groups of individuals.

82. Furthermore, not every difference in treatment between persons in relevantly similar situations will entail a violation of Article 14. Only differences in treatment based on the grounds enumerated in that Article are capable of resulting in discrimination within the meaning of Article 14 (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010 and *Clift v. the United Kingdom*, no. 7205/07, §§ 56-57, 13 July 2010). Thus, the prohibition enshrined in Article 14 encompasses differences of treatment based on an identifiable characteristic, or "status", (see *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September 2017, with further references). In this regard, the Court has already held that a person's health status, including disability and various health impairments, fall within the term "other status" in the text of Article 14 of the Convention (see *Guberina*, cited above, § 76 with further references). The Court has also considered that a discriminatory treatment of a person on account of the disability of his or her child, with whom he or she has close personal links and for whom he or she provides care, is a form of disability-based discrimination covered by Article 14 of the Convention (ibid., § 79). The Court has further held that victims of gender based violence may be able to invoke the protection of Article 14 in conjunction with the relevant substantive provisions of the Convention (see *Opuz v. Turkey*, no. 33401/02, ECHR 2009; *Bălşan v. Romania,* no. 49645/09, 23 May 2017).

83. For the purposes of Article 14, a difference of treatment based on a prohibited ground is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see *Mazurek v. France*, no. 34406/97, §§ 46 and 48, ECHR 2000-II).

84. Thus, the Contracting States must refrain from subjecting persons or groups to different treatment where, under the above principles, such treatment would qualify as discriminatory. However, this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different (see *Thlimmenos*, cited above, § 44; *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, § 35, 10 May 2007; *D.H. and Others v. the Czech Republic*, cited above, § 175; *Eweida and Others v. the United Kingdom*, no. 48420/10, 15 January 2013; and *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 288, ECHR 2012). The prohibition deriving from Article 14 will therefore also give rise to positive obligations for the Contracting States to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different.

85. The Court has also held that a policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory, regardless of whether the policy or measure is specifically aimed at that group. Thus, indirect discrimination prohibited under Article 14 may arise under circumstances where a policy or measure produces a particularly prejudicial impact on certain persons as a result of a protected ground, such as gender or disability, attaching to their situation. In line with the general principles relating to the prohibition of discrimination, this is only the case, however, if such policy or measure has no "objective and reasonable" justification (see, among other authorities, *S.A.S. v. France* [GC], no. 43835/11, § 161, ECHR 2014 (extracts), and *D.H. and Others v. the Czech Republic*, cited above, §§ 175 and 184-185).

86. Furthermore, Article 14 does not preclude States from treating groups differently even on otherwise prohibited grounds in order to correct "factual inequalities" between them. Moreover, in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article (see *Thlimmenos*, cited above, § 44; *Stec and Others*, cited above, § 51; *D.H. and Others v. the Czech Republic,* cited above, § 175).

87. In the context of Article 1 of Protocol 1 alone, the Court has often held that in matters concerning, for example, general measures of economic or social strategy, the States usually enjoy a wide margin of appreciation under the Convention (see *Fábián,* cited above, § 115; *Hämäläinen v. Finland* [GC], no. 37359/09, § 109, ECHR 2014; *Andrejeva,* cited above, § 83). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".

88. However, as the Court has stressed in the context of Article 14 in conjunction with Article 1 Protocol 1, although the margin of appreciation in the context of general measures of economic or social policy is, in principle, wide, such measures must nevertheless be implemented in a manner that does not violate the prohibition of discrimination as set out in the Convention and complies with the requirement of proportionality (see *Fábián,* cited above, § 115, with further references). Thus, even a wide margin in the sphere of economic or social policy does not justify the adoption of laws or practices that would violate the prohibition of discrimination. Hence, in that context the Court has limited its acceptance to respect the legislature's policy choice as not "manifestly without reasonable foundation" to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality (see *Stec and Others*, cited above, §§ 61-66; *Runkee and White*, cited above, §§ 40-41 and *British Gurkha Welfare*

Society and Others v. the United Kingdom, no. 44818/11, § 81, 15 September 2016).

89. Outside the context of transitional measures designed to correct historic inequalities, the Court has held that given the need to prevent discrimination against people with disabilities and foster their full participation and integration in society, the margin of appreciation the States enjoy in establishing different legal treatment for people with disabilities is considerably reduced (see *Glor v. Switzerland*, no. 13444/04, § 84, ECHR 2009), and that because of the particular vulnerability of persons with disabilities such treatment would require very weighty reasons to be justified (see *Guberina*, cited above, § 73). The Court has also considered that as the advancement of gender equality is today a major goal in the member States of the Council of Europe, very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention (*Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012).

(b) Application to the present case

(i) The issue

90. The Court notes at the outset that, as set out in paragraph 32 above, the changes made in the Housing Benefit Regulations entailed that where the number of bedrooms in a dwelling exceeded that to which a claimant was entitled under the relevant provisions, a deduction is calculated in the claimant's entitlement to benefits. This applied to all beneficiaries under the scheme without any distinction by reference to their characteristics such as disability or gender. In the present case, the applicants have been treated in the same way as other recipients of the Housing Benefit in that their entitlements have been reduced on the same grounds and according to the same criteria as those of other recipients. Thus, the issue arising in this case is one of alleged indirect discrimination.

91. The question to be examined is whether there has been a discriminatory failure by the authorities of the respondent State to make a distinction in the applicants' favour on the basis that their relevant circumstances were significantly different from those of other recipients of the Housing Benefit who were adversely affected by the contested policy. More specifically, the issue is whether, as a result of a failure to make a distinction, the impugned general measure, in the form of the legislative changes affecting the recipients of the Housing Benefit, was put in place in such a manner as to produce disproportionately prejudicial effects on the applicants because of their particular circumstances which, in respect of the first applicant, were linked to her daughter's disability and, in respect of the second applicant, to her gender.

(ii) The treatment of the applicants

92. As regards the effects of the measure, the Court observes that it was an anticipated consequence of the reduction of the Housing Benefit that all benefit recipients who experienced such a reduction could be at risk of losing their homes. Indeed, the Government argued that this precarity was the intention of the scheme; to incentivise families to move (see paragraph 74 above). The Court accepts the applicants' arguments that in this respect, they were in a significantly different situation and particularly prejudiced by the policy because they demonstrated they had a particular need to be able to remain in their specifically adapted homes for reasons directly related to their status. In the case of the first applicant, loss of her home would cause exceptional hardship given her daughter's severe mental and physical disabilities. In the case of the second applicant, loss of her home would risk her personal safety. Thus, for these reasons, the consequence of the measure was much more severe for the applicants than for others whose entitlement to Housing Benefit was reduced.

93. The legislative scheme also anticipated that those who experienced a reduction in their Housing Benefit would be able to mitigate their loss by taking in tenants and/or working (see paragraph 36 above). The Government has argued that these possibilities to make up for the reduction in Housing Benefit were available equally to disabled and non-disabled persons (see paragraph 75 above). However, the Court notes that because of their vulnerable status the applicants were significantly less able than other Housing Benefit recipients to mitigate their loss by taking in tenants or by working (see paragraphs 8 and 71 above). Accordingly, they did not have the same possibilities available to them to mitigate their loss as other recipients of Housing Benefit.

94. The Court concludes that in light of the above the applicants, having been treated in the same way as other recipients of Housing Benefit who were subject to a reduction in their Housing Benefit, were particularly prejudiced by that measure because their situation was significantly different for reasons of disability, as regards the first applicant, and gender, as regards the second applicant.

95. The Government have argued that they eliminated the failure to treat the applicants differently from other recipients of the Housing Benefit by providing the applicants with the option to apply for and receive DHP. The Court considers it would be possible to examine the provision of DHP from this perspective. However, as the domestic courts considered it more appropriate to examine this element in the context of justification for the treatment, the Court will follow the same approach.

(iii) Whether the treatment was objectively and reasonably justified

96. Having established that the applicants, who were treated in the same way as other recipients of the Housing Benefit even though their

circumstances were significantly different, were particularly prejudiced by the impugned measure – because they had a particular need to be able to remain in their specifically adapted homes for reasons directly related to their vulnerable status and were less able to mitigate the reduction in their Housing Benefit – the Court must ask whether the failure to take account of that difference was discriminatory. Such treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Guberina*, cited above, § 69).

97. In the circumstances of the present cases – where the alleged discrimination was on the basis of disability and gender, and did not result from a transitional measure carried out in good faith in order to correct an inequality – very weighty reasons would be required to justify the impugned measure in respect of the applicants (see paragraph 89 above).

98. As to the legitimate aim of the legislation, the domestic courts accepted that it was to curb public expenditure by ensuring that social sector tenants of working age who were occupying premises with more bedrooms than required should, wherever possible, move into smaller accommodation. The applicants also accepted this aim as legitimate in general terms (see paragraph 71 above). It therefore remains to be examined whether the treatment afforded to the applicants was justified on the basis that there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

99. The applicants argued that the measure was disproportionate in its impact on them in the sense of not corresponding to the legitimate aim of the measure. It is true that the Government has not put forward any detailed reasons as to how imposing the measures on the applicants might achieve the stated aims of reducing benefit payments; managing housing local authority stock; and encouraging employment. It was accepted that the applicants should be able to receive DHPs in order that they could remain in their adapted housing (see paragraphs 25 and 26 above). Accordingly, it does not appear that the aims envisaged by the legislative changes could have been achieved by applying them to the applicants.

100. However, as with most complaints of alleged discrimination in a welfare or pensions system, the issue before the Court for consideration goes to the compatibility of the system with Article 14, not only to the individual facts or circumstances of the particular applicants or of others who are or might be affected by the legislation (see *British Gurkha Welfare Society and Others*, cited above, § 63). It is therefore appropriate to look at the system as a whole.

(α) The first applicant

101. Turning to the scheme as a whole, with reference to the case of the first applicant, the Court finds that whilst it has been acknowledged that any move would be extremely disruptive and highly undesirable for the first applicant, it would not be in fundamental opposition to the recognised needs of disabled persons in specially adapted accommodation but without a medical need for an 'extra' bedroom to move into smaller, appropriately adapted accommodation.

102. In that context, the Court takes account of the Government's decision to provide for those who did not fall under the exemptions set out in the Regulation to apply for DHP. The Court acknowledges that the DHP scheme had a number of significant disadvantages which were identified by the domestic courts, namely that the awards of DHP were purely discretionary in nature; their duration was uncertain; they were payable from a capped fund; and their amount could not be relied upon to replace the full amount of the shortfall (see paragraph 41 above). On the other hand, the scheme had some advantages in that it allowed local authorities to take individualised decisions, which the Court has identified as an important element to ensure proportionality (see *a contrario Guberina*¸ cited above, § 93). Moreover, the awards of DHP are made subject to certain safeguards, in particular the requirement on local authorities to take their decisions in light of the Human Rights Act and their Public Sector Equality Duty which in the Court's understanding would prevent them from refusing to award DHP where that could mean the applicant's need for appropriately adapted accommodation was not met. The Court observes that the first applicant has in fact been awarded DHP for several years following the changes to the Housing Benefit Regulation. Whilst the DHP scheme could be characterised as not ensuring the same level of certainty and stability as the previous, unreduced Housing Benefit, its provision with attendant safeguards, amounts to a sufficiently weighty reason to satisfy the Court that the means employed to implement the measure had a reasonable relationship of proportionality to its legitimate aim. Accordingly, the difference in treatment identified in the case of the first applicant was justified.

(β) The second applicant

103. In the case of the second applicant the Court notes that the legitimate aim of the present scheme – to incentivise those with 'extra' bedrooms to leave their homes for smaller ones – was in conflict with the aim of Sanctuary Schemes, which was to enable those at serious risk of domestic violence to remain in their own homes safely, should they wish to do so (see paragraphs 19-20 above).

104. Given those two legitimate but conflicting aims the Court considers that the impact of treating the second applicant, or others housed in Sanctuary Schemes, in the same way as any other Housing Benefit recipient

affected by the impugned measure, was disproportionate in the sense of not corresponding to the legitimate aim of the measure. The Government have not provided any weighty reasons to justify the prioritisation of the aim of the present scheme over that of enabling victims of domestic violence who benefitted from protection in Sanctuary Schemes to remain in their own homes safely. In that context, the provision of DHP could not render proportionate the relationship between the means employed and the aim sought to be realised where it formed part of the scheme aimed at incentivising residents to leave their homes, as demonstrated by its identified disadvantages (see paragraph 102 above).

105. Accordingly, the imposition of Regulation B13 on this small and easily identifiable group has not been justified and is discriminatory. In coming to that conclusion, the Court also recalls that in the context of domestic violence it has found that States have a duty to protect the physical and psychological integrity of an individual from threats by other persons, including in situations where an individual's right to the enjoyment of his or home free of violent disturbance is at stake (see *Kalucza v. Hungary*, no. 57693/10, § 53, 24 April 2012).

(iv) Conclusion

106. There has accordingly been no violation of Article 14 in conjunction with Article 1 Protocol 1 of the Convention in respect of the first applicant.

107. There has been a violation of Article 14 in conjunction with Article 1, Protocol 1 of the Convention in respect of the second applicant.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

108. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

109. The second applicant claimed twelve thousand euros (EUR 12,000) in respect of non-pecuniary damage.

110. The Government considered that nothing in the second applicant's case justified an award of just satisfaction.

111. The Court considers that the second applicant has undoubtedly suffered some distress and awards her ten thousand euros (EUR 10,000) in respect of non-pecuniary damage.

B. Costs and expenses

112. The second applicant did not submit any claim for costs and expenses. Accordingly, the Court makes no award in that respect.

C. Default interest

113. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Decides*, unanimously, to join the applications;

2. *Declares,* unanimously, the applications admissible;

3. *Holds,* in respect of the first applicant, unanimously, that there has been no violation of Article 14 in conjunction with Article 1 Protocol 1 of the Convention;

4. *Holds,* in respect of the second applicant, by five votes to two, that there has been a violation of Article 14 in conjunction with Article 1 Protocol 1 of the Convention;

5. *Holds*, by five votes to two,
   (a) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), to be converted into GBP at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 24 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Ksenija Turković
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Wojtyczek and Pejchal is annexed to this judgment:

K.T.U.
A.C.

JOINT PARTLY DISSENTING OPINION OF JUDGES WOJTYCZEK AND PEJCHAL

For if the persons be not equal, their shares will not be equal; and this is the source of disputes and accusations, when persons who are equal do not receive equal shares, or when persons who are not equal receive equal shares (Aristotle, *Nicomachean Ethics*, book V, translated by F.H. Peters, London, Kegan Paul 1893, p. 145).

1. We respectfully disagree with the view of the majority that the Convention has been violated in respect of the second applicant. We recognise that the two applicants are in a very difficult personal situation, nonetheless we agree in substance with the approach of the Supreme Court of the United Kingdom in the instant case. Moreover, we have serious reservations concerning the majority's reasoning which, we have to admit, we are not able to fully understand.

2. Litigation under the principles of equality and non-discrimination is very specific and differs in many respects from other fundamental rights cases. Legal scholarship, in one of the fundamental works on social justice, explains the reasons for this peculiarity in the following terms:

> "From whatever side we approach the problem, we see that there is no way in which we can make judgment that a particular legal system excludes certain groups of citizens (or discriminates against them in the distribution of rights) on the basis of purely formal features of legal rules. We must [...] appeal to more substantive judgments about the value of the ends of those rules and the relevance of legal means to achieving those ends. We say that the law is equal because we believe that it is just and not the other way round. The illusion that equality before the law can be ascertained independently of the substantive justness of the law is well expressed in these words by Justice Jackson: 'Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation'. [footnote omitted] But we had better realize that our opinions about equality in law are unavoidably determined by our opinions about what law is just (in terms irreducible to standards of legal equality) and not by some objective properties of this law." (W. Sadurski, *Giving Desert Its Due. Social Justice and Legal Theory*, D. Reidel Publishing Company, Dordrecht-Boston-Lancaster 1985, p. 96)

3. The Court's case-law has established a methodology for the application of Article 14, clearly inspired by the Aristotelian tradition. This settled approach may be summarised as follows (see *Guberina v. Croatia*, no. 23682/13, 22 March 2016, emphasis added):

> "68. The Court has established in its case-law that only differences in treatment based on **an identifiable characteristic, or status**, are capable of amounting to discrimination within the meaning of Article 14 (see *Eweida and Others v. the United Kingdom*, nos. 48420/10 and 3 others, § 86, ECHR 2013).
>
> 69. Generally, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see *X and Others v. Austria* [GC], no. 19010/07, § 98, ECHR 2013). However, not

every difference in treatment will amount to a violation of Article 14. A difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Fabris v. France* [GC], no. 16574/08, § 56, ECHR 2013; *Weller v. Hungary*, no. 44399/05, § 27, 31 March 2009; and *Topčić-Rosenberg v. Croatia*, no. 19391/11, § 36, 14 November 2013).

...

71. The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a *de facto* situation (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV, and *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 388, ECHR 2012). This is only the case, however, if such policy or measure has no 'objective and reasonable' justification, that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realised (see S.A.S. v. France [GC], no. 43835/11, § 161, ECHR 2014)."

The established case-law further underlines the following points (see *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV):

"44. The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification (see the *Inze* judgment, cited above, p. 18, § 41). However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.

...

46. The next question to be addressed is whether Article 14 of the Convention has been complied with. According to its case-law, the Court will have to examine whether the failure to treat the applicant differently from other persons convicted of a serious crime pursued a legitimate aim. If it did the Court will have to examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see the *Inze* judgment cited above, ibid.)."

The Court has also highlighted (in *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 388, ECHR 2012) that:

"... in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV, and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 44, ECHR 2009)."

Under the well-established case-law, the application of Article 14 is a two-stage exercise. The first stage consists in identifying the class of

persons in analogous, or relevantly similar, situations as well as the class of persons in relevantly different situations. This identification is necessarily based upon fundamental primary axiological choices and therefore entails a very broad judicial discretion.

The second stage is the test of "objective and reasonable" justification for either (i) differentiating between persons in similar situations or (ii) not differentiating between persons in significantly different situations. The justification is deemed objective and reasonable if the authorities pursue a "legitimate aim" and if there is a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised. The answer to these questions requires a balancing of conflicting values. It is also based upon fundamental primary axiological choices and again entails a very broad judicial discretion.

We note, moreover, that in some cases the Court, while assessing the reasonable relationship of proportionality, examines the contested legislative measures *in abstracto,* looking at general issues, i.e. those concerning whole classes of persons affected (see for instance the judgment in *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §§ 54-67, ECHR 2006-VI) while in other cases it also assesses the impact of the measures *in concreto*, i.e. by looking into the individual situation of the applicant (see for instance the judgment in *Glor v. Switzerland*, no. 13444/04, §§ 89 and 96, ECHR 2009).

4. The majority state the following in paragraph 94 (emphasis added):

> "The Court concludes that in light of the above the applicants, having been treated in the same way as other recipients of Housing Benefit who were subject to a reduction in their Housing Benefit, were particularly prejudiced by that measure because their situation was significantly different for reasons of disability, as regards the first applicant, **and gender, as regards the second applicant**."

The majority further point to two characteristic features of the two applicants: (1) they demonstrated that they had a **particular need to be able to remain** in their specifically adapted homes for reasons directly related to their status (paragraph 92) and (2) because of their vulnerable status the applicants were significantly less able than other Housing Benefit recipients to mitigate their loss by taking in tenants or by working (paragraph 93).

We note in this context that the majority do not explain clearly which characteristic is relevant for the purpose of identifying: (i) similar situations and (ii) significantly different situations. In other words, the judgment does not delimit with precision the class of persons which is treated similarly in spite of being in a different situation. If we correctly understand our colleagues, in the class of persons receiving Housing Benefit one has to distinguish between three sub-classes of persons: (i) persons with disabilities or disabled children who demonstrate a particular need to be able to remain in their specifically adapted homes, (ii) victims of gender-

based violence who demonstrate a particular need to be able to remain in their specifically adapted homes, and (iii) all other persons entitled to Housing Benefit. The situation of sub-classes (i) and (ii) would be significantly different from sub-class (iii). Therefore – for the majority – legislation reducing Housing Benefit has not differentiated between persons in significantly different situations.

There is no doubt that persons with certain disabilities have legitimate special needs in respect of housing – needs exceeding those of an average, ordinary family. It is also evident that many victims of domestic violence require special protection and that a specially adapted home may to a certain extent provide such protection. However, all these legitimate special needs in respect of housing may be satisfied in different homes. In particular, it has not been shown that effective protection against a potential aggressor could not be offered in new accommodation. It is therefore difficult to agree with the assertion that "[i]n the case of the second applicant, loss of her home would risk her personal safety" (see paragraph 92). For these reasons, it is difficult to understand why a particular need to be able to remain in the same home is a special characteristic justifying enhanced protection under the Convention. The relevant characteristic for the purpose of the discrimination test in the instant case should rather be presented as the existence of legitimate special needs in respect of housing – needs exceeding those of an average, ordinary family. We note in this context that there may be individuals with legitimate special needs in respect of housing not belonging to sub-classes (i) and (ii). In our view, the assumption that all individuals belonging to sub-class (iii) are in a situation which is significantly different from that of individuals belonging to sub-classes (i) and (ii) is problematic.

5. In the above-quoted passage, the majority take, as their point of departure for the assessment of the second applicant's case, the premise of gender-based differentiation. We note in this respect that there are numerous victims of domestic violence who were not affected by the impugned legislative measures. Firstly, domestic violence affects all social classes and not all victims of domestic violence are on low incomes. Secondly, not all victims of domestic violence apply for protection under the Sanctuary Scheme. Thirdly, not all victims of domestic violence who receive Housing Benefit and who have been given protection under the Sanctuary Scheme will be forced to move out. Fourthly, not all victims of domestic violence insist on remaining in the same accommodation. On the contrary, many victims of domestic violence prefer to leave the place where the domestic violence occurred. The old accommodation reminds them of stressful moments and they want to start a whole new life somewhere else. Fifthly, no evidence based upon statistical data was provided which would show that the impugned legislation affects mainly victims of gender-based violence or, more generally, that it affects, for instance, a clearly higher

percentage of women than men (compare the decision in *Hoogendijk v. the Netherlands*, no. 58641/00, 6 January 2005).

On the other hand, the new legislation affects many individuals who are not victims of domestic violence and who have legitimate special needs in respect of housing, such as disabled persons, persons with strong psychological difficulties to adapt to any new housing, families with several children, etc.

We also note that domestic violence does not always significantly impact upon the capacity of the victims to work and to earn money. Not all victims of domestic violence are significantly less able than other Housing Benefit recipients to mitigate their loss by working.

For all these reasons, we cannot agree with the view that the second applicant was particularly prejudiced because her situation was significantly different *for reasons of gender*. The impugned legislation appears to be gender-neutral. Following the path adopted by the majority, one could also say that the same legislation affects a numerically significant class of low-income persons belonging to ethnic minorities, so there would be a *prima facie* case for racial discrimination. It also affects a numerically significant class of low-income immigrants so there would be a *prima facie* case for anti-immigrant bias.

6. The second applicant, in her submissions, expressed strong anxiety about the idea of having to move to another home. In addition, the minority judges in the domestic courts had taken into consideration the fact that the she might have difficulty adapting to a new living environment (see paragraph 29).

We would like to note here briefly that we do not have at our disposal any scientific evidence which would show that particular difficulties with adapting to a new living environment are a typical consequence of domestic violence.

7. According to the above-presented methodology of the Court, after identifying a situation in which, without objective and reasonable justification, there has been a failure to treat differently persons whose situations are significantly different, it is necessary to answer the question whether there is an "objective and reasonable" justification for such a failure. For this purpose it is necessary to examine whether the failure to treat the applicant differently from other persons pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

In cases concerning a reduction in social security benefits, in order to answer these questions it is necessary to assess, among other elements, the actual economic burden placed upon the persons affected as well as the impact of the savings upon the budget. It is therefore necessary to take into consideration, in particular, the financial situation (income bracket) of the persons affected, the existence of other sources of income and – if any –

their amount, the range of amounts of Housing Benefit provided, the financial needs to be met (in this case the range of rental payments), the price of satisfying the same need on the market (in this case the amounts of rent payable on the free market). The majority have failed to establish all these elements. Without all this data the proportionality assessment becomes irrational. In our view, there are no sufficient reasons to conclude that the British authorities failed to achieve a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

8. In performing the proportionality assessment, the majority take into consideration the aims of the Sanctuary Scheme. In their view, its main aim is to enable the victims of domestic violence to stay in the same accommodation. In other words, it is the perpetrator of domestic violence who should move out whereas the victim should have the possibility to remain.

We agree with this assertion. There is, however, one important *caveat* to be added. The right of the victim to stay in the same home is not absolute. It is always granted *rebus sic stantibus*. The underlying implicit premise is that the victim should not be removed from accommodation as a result of domestic violence, but in some circumstances she may have to leave for other – legitimate – reasons. The victim may stay in the same accommodation as long as she is validly entitled to stay there. The legislation does not protect against other factors which may force someone to move, such as a loss of income, the termination of the lease agreement by the landlord, the fact that a person is no longer eligible for social housing, etc. Domestic violence does not entail reinforced protection of the tenant in relations with the landlord. The real aim of the legislation – interpreted in the broader context of all relevant provisions – appears to be that of enabling victims of domestic violence who benefited from protection in Sanctuary Schemes to remain in their own homes safely **as long as** they are not forced to move out for other reasons.

9. The majority stress the fact that two different pieces of legislation followed *two legitimate but conflicting aims*. In their view, "[t]he Government have not provided any weighty reasons to justify the prioritisation of the aim of the present scheme over that of enabling victims of domestic violence who benefitted from protection in Sanctuary Schemes to remain in their own homes safely" (see paragraph 104). This allegedly erroneous prioritisation is presented as the main reason for finding a violation of the Convention.

The majority seem to attach particular importance to the argument that *enabling victims of domestic violence who benefitted from protection in Sanctuary Schemes to remain in their own homes safely* is the actual purpose of the law-maker. The relevant question is rather whether enabling victims of domestic violence who benefitted from protection in Sanctuary

Schemes to remain in their own homes safely is a value protected under the Convention. What could be relevant is the weight of this value, as well as the weight of the conflicting values, attributed to them within the axiological system underlying the Convention. In our view, the Convention remains silent on this question. In any event, the majority do not explain why the Convention would require the prioritisation, over other aims, of the aim of enabling victims of domestic violence who benefitted from protection in Sanctuary Schemes to remain in their own homes safely.

In our view, the fact that two different pieces of legislation follow conflicting aims is irrelevant for the solution of the instant case. We note in this respect that the legislator pursues numerous aims which are often in conflict, as they cannot be fully achieved simultaneously. A conflict of aims pursued by the legislator is a typical situation. These conflicts are resolved in practice by specific and detailed legal provisions which express the preferences of the legislator in respect of specific situations. The impugned measures reflect the trade-off (between two conflicting aims) which the British legislator found most appropriate.

Moreover, if one piece of legislation initially has an objective O1 and a subsequent piece of legislation has an objective O2 which is in apparent conflict with objective O1, the latter will usually be understood as a redefinition of the initial objective O1 into a new objective O1bis, which is the resultant of both pieces of legislation read in a systemic way.

10. The majority do not define with precision the class of persons who have been affected by differentiation contrary to Article 14. If we understand this part of the reasoning correctly, the impugned measures are considered disproportionate in so far as they concern persons who fulfil cumulatively the following criteria: (i) receive Housing Benefit; (ii) benefit from protection under the Sanctuary Scheme and (iii) live in a home with "extra" bedrooms. The impugned measures are considered proportionate in so far as they concern all other persons who *demonstrated that they had a particular need to be able to remain in their specifically adapted homes for reasons directly related to their status*.

We would like to note here that the first applicant is in a very difficult position. The disability of her child requires accommodation which is adapted to the child's situation. Her family has legitimate special needs in respect of housing. The adaptation of their home to the disability is probably more costly than the application of the Sanctuary Scheme. We do not see any real reason to differentiate between the two applicants. In our view, a similar reasoning based upon erroneous prioritisation could have been applied to the first applicant. It would be equally justified – or equally unjustified – to say that *the Government have not provided any weighty reasons to justify the prioritisation of the aim of the present scheme over that of enabling disabled persons to remain in their own homes*.

11. Judicial independence, be it at national or international level, means that there should be no interference of the executive and legislative branches of government in the judicial process. The implicit assumption is that of reciprocity. Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated.

As explained above, the principles of equality and non-discrimination entail a very broad discretionary power and thus also a risk of undue interference in the sphere of political choices. The instant case is another illustration of this danger.

Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts. As a result of this, the broad discretionary judicial power under these principles may be exercised quite frequently. The problem becomes even more acute when differentiation concerns the distribution of public resources. A review of non-discrimination in the distribution of resources easily turns into decision-making about the distribution of those resources. We are not persuaded that judicial proceedings are the most appropriate forum for such decision-making. Rational allocation of public (or more precisely tax-payers') money requires a comprehensive view, taking into account the totality of available funds and all legitimate needs. Given the scarcity of available resources and immensity of legitimate needs, not all of them can be satisfied and very painful trade-offs are unavoidable. Judicial proceedings in discrimination cases necessarily bring a very fragmentary and limited view of the question: they focus on a specific area, while all other areas of social life are completely overlooked. In our view, the judge and in particular the European judge, has to be extremely cautious in exercising his or her discretion in equality and discrimination cases, especially if their gist lies in an allegedly deficient allocation of financial resources. The majority, by addressing the issue of prioritisation of legislative aims in complete isolation from the Convention values, leave the area of judicial enforcement of Convention rights and enter the field of policy-making. Not only our views about what law is just, but also our views about what this Court's mandate is, are very different.