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SPECIAL ISSUE • Disability and Conditional Social Security Benefits

policy and practice

Welfare conditionality and disabled people in the UK: claimants' perspectives

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Introduction

In order to fully understand the impact of the extension of conditionality in the UK to include people with impairments, it is vital to give voice to those with direct experience of the welfare system. The case studies that follow are taken from interviews carried out as part of a project called 'Welfare Conditionality: Sanctions, Support and Behaviour Change'. This is a major five-year programme of research running from 2013 to 2018, funded under the Economic and Social Research Council's Centres and Large Grants Scheme (ESRC grant ES/K002163/2). The project aims to create an international and interdisciplinary focal point for social science research on welfare conditionality and brings together teams of researchers working in six English and Scottish universities. The team interviewed 58 disabled people (welfare service users) in 2014/15 as one cohort of a larger qualitative, longitudinal panel study conducted with 480 welfare service users. The intention is to interview each participant a total of three times over a two-year period.

The following case studies of Brenda[1] and Steve provide a summary of two real-life stories of our participants. While these individuals live in different locations and have different impairments, their accounts share the challenges inherent in claiming Employment and Support Allowance (ESA) and the feelings of stigma often experienced as part of that process. While we were able to track Brenda's journey

over the two-year period through three repeat interviews, despite several attempts to re-contact Steve, we were unfortunately unable to speak to him again after his first interview.

Brenda

Brenda is 50 years old, owns her own home and lives alone as her children routinely live with their father since she and her husband divorced. She has been diagnosed as bipolar and has suffered from depression for most of her life. She is also a recovering alcoholic. Educated to university level, Brenda worked most of her life until 10 years ago but has struggled to find secure employment since then. Over the years, she has undertaken temporary agency work and voluntary work, and continues to look for work. However, she became increasingly depressed at being unable to secure employment and started drinking heavily, which worsened her mental health. At the point that we first interviewed Brenda, she was claiming Jobseekers Allowance (JSA) but was moved into the Work-Related Activity Group (WRAG) of ESA during the course of our fieldwork.

Reflecting on her experiences with two different jobcentre advisors, Brenda was relatively positive and had initially felt "excited" about their offers of "extra support" to find work, and their understanding of her personal situation and impairments. However, this changed when she was referred to attend the Work Programme (WP),[2] which clashed with a referral appointment to a specialist drug and alcohol treatment programme. Although she informed the Department for Work and Pensions (DWP) of her need to attend her treatment appointment, she was sanctioned for non-attendance at the WP, which led to a suicide attempt:

> "When I'd had my benefit stopped, I had the sanction, that's when I emailed the adviser, and I basically had been up all night, and I'd drunk quite a lot, and I felt suicidal, and I actually wrote to her and said, 'I feel suicidal about this', which sounds really extreme, but I just thought I'm living in a crazy world where I try and get help and I'm punished for trying to get help, and I'm actually going to be more of a drain on society if I continue to drink and can't work, whereas if I get help, get sorted, hopefully, I will be able to contribute, be a meaningful member of society."

As a result of Brenda's suicide attempt, she was signed off sick by her general practitioner (GP) who advised her to put a claim in for ESA and continue getting help with her drinking.

At the time of our second interview, Brenda had been reassessed and placed in the WRAG for ESA and was therefore still expected to actively engage with the WP, of which she is particularly critical. She describes it as "demeaning" and likens it to a "conveyor belt" of poor-quality job opportunities and irrelevant training: "It's all about targets. It wasn't meaningful, it was just about literally, getting bodies into a room, so they could tick a box and then they'd get their quota … but we all have to jump through these hoops".

When we visited Brenda for a third and final interview, she had finished the WP but still lived with an ongoing fear of being sanctioned; she describes it as like living "on tenterhooks.… I just feel like if I put a foot out of place, the money will be

withdrawn". We also discovered that she had moved out of her home as she was struggling financially, and so was now renting out her house for additional income. Some time between our second and third interview, she had started to receive Personal Independence Payment (PIP) but this had recently been stopped as she "didn't score enough points", a decision that she was in the process of appealing. Reflecting the views of many other disabled people we have interviewed, Brenda spoke of the difficulty that she faced in having her mental health impairments taken seriously:

> "I always thought this could stop because it was awarded due to depression obviously, and that is so – it's very intangible isn't it? It's not like a permanent physical disability … the doctor writes depressive disorder on my notes … so that helps me in a way, that I'm not making this up, actually. You know, because I think sometimes people think what's her problem? Like, why isn't she working?"

Brenda's overall assessment of her experience of welfare conditionality was profoundly negative:

> "I've tried to do things positively and it's backfired – like when I've tried to do things to address my health and help me work – then I've been penalised for that.… I think very, very few people would put themselves through this because it's horrible and it makes you feel worthless."

Steve

Steve is 32 years old. At the time of interview, he was living with his parents following a relationship breakdown. He had worked most of his life until two years ago, when he sustained an injury requiring multiple surgeries that left him unable to work. He described being on "constant medication", experiencing extreme weight loss due to infections and being in constant pain, with limited function in his hand due to nerve damage.

Steve's story encapsulates a number of issues that are common features for many who apply for ESA and undergo the Work Capability Assessment (WCA). He describes his frustration at applying for ESA and being rejected, even as someone who was still undergoing hospital treatment at the time of our interview:

> "When I came out of work due to this injury, I had no option but to go to the local jobcentre to try and claim a benefit. They put me on JSA to start off with. Then they said 'no, we need to make a claim for ESA', which it just took on from there. I was on that for a while and then they sent me for some medicals … and it was fine to start off with. Then, six months later, I had another medical there and they rejected it. They said I was fit for work… They could not understand that I was in hospital, and how am I supposed to work when I'm in hospital? I had to go up to a certain hospital every day for four-and-a-half months, but they still expected that some employer is going to employ me while I'm doing that."

Steve's benefits were initially stopped when one of his hospital stays had prevented him from attending an appointment:

> "They actually stopped my benefit when they sent me a letter to go for a medical questionnaire and I've not replied to this by a certain date because I'm in hospital. I've just had surgery … and I was ringing them daily to say 'Look, I'm in here but also I need my benefit reinstated' and it took a decision-maker seven-and-a-half weeks to reinstate that."

Steve struggled financially when his benefit was stopped, but he did not unfortunately qualify for additional financial help through a local authority discretionary hardship scheme, which made him angry and depressed. Reflecting on his experience, he recognised that the decision-makers have a job to do; however, he felt that there was currently a lack of sympathy in relation to people's individual situations:

> "When they took it away, they gave me this telephone number and said that 'your local council might be able to help you with a short-term loan-type thing', but then you ring the council and you don't qualify for it … when your benefit has been taken from you and it's the money that you solely rely on to pay your bills' it makes you very angry.… They've got a job to do, but they've also got to show a bit of – I don't know what the word is for it – sympathise with people. They don't show any of that."

Steve had successfully appealed the negative decision on his ESA claim and, at the time of interview, had been placed in the WRAG. Like Brenda, he was therefore still required to attend work preparation activity as a condition of his benefit receipt, and like Brenda, he described feeling the continual threat of being sanctioned:

> "I'm on ESA now and I've won the case, so I've got a 12-month period, but I have to come into this place here which, to be fair, I find pointless. It's just they never leave you alone. They'll try everything. If they don't get a letter on time, if they don't get a phone call, they'll stop your benefit, and it's wrong."

Reflecting on his overall experience, Steve felt that he was unfairly treated and that there is a lack of appropriate support and empathy within the current benefit system:

> "That's what I felt with the DWP. I'm not a person, I'm a number, and that's all.… It was a very hard time. I'm not only coping with an illness that affects your daily life, but I'm also affected [by] somebody [who] has just clicked a button and just stopped my benefits, stopped the bit of income that's coming in.… It does start to affect, mentally as well."

At the close of the interview, Steve indicated that he was interested in starting his own business in the future and felt confident that he would find work again.

Notes

[1.] Pseudonyms have been used to protect the identity of the participants.

[2.] The Work Programme is a payment-by-results welfare-to-work programme in the UK delivered by a range of private, public and voluntary sector organisations. The programme can be mandatory for JSA claimants who have been claiming for more than three months, as well as ESA claimants in the WRAG. It was launched in the UK in 2011, and will be replaced by the new Work and Health Programme in 2017.

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SPECIAL ISSUE • Disability and Conditional Social Security Benefits

policy and practice

The bedroom tax in the Supreme Court: implications of the judgment

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In common with most decisions of the Supreme Court, the judgment in *R. (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 tells two stories: a short version and a long version. This article outlines both. The short story is the immediate impact of the decision: the application of the high-bar 'manifestly without reasonable foundation test', a distinction drawn on 'transparent medical need', and the lack of regard given to international obligations under the UNCRPD and the UNCRC. The long story is how this decision fits into the 'cut-and-devolve' approach to welfare reform in the UK, where local authorities are left to mitigate the effects of centrally determined benefit reductions without adequate support. After outlining the basis of the decision and its likely effects, this article argues that the decision does little to square this key structural circle at the heart of the UK government's welfare reform agenda.

key words localism • Bedroom Tax • discretionary housing payments • disability discrimination • austerity • proportionality • transparent medical need

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Introduction

It is testament to the impact of its reforms that the Welfare Reform Act 2012 is still finding itself before the Courts. Perhaps its most controversial offering, the government's 'Removal of the Spare Room Subsidy' (RSRS) – known to almost everybody else as the 'bedroom tax' – was the focus of the United Kingdom Supreme Court's decision in in *R. (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58. As will be familiar to many readers, under the amended Reg.B13 Housing Benefit Regulations 2006, the policy imposes a housing benefit reduction for working age households living in the social rented sector deemed to be under-occupying their homes: 14 per cent of the eligible rent for one bedroom too many, 25 per cent for two or more. In common with other flagship reforms, such as the benefit cap and reductions to local housing allowance, the supporting regulations contain little in the way of statutory exemptions, with the majority of

those affected reliant on the availability of the local authority delivered discretionary housing payment scheme (DHPs).

Decisions of the Supreme Court generally have two stories to tell: a short version and a long version. This article starts with the former. The first two sections provide a mercifully concise overview of the judgment of the Court in *Carmichael*, before turning to its practical implications and key problems. The third section addresses the long version. The implications of this decision are not limited to the confines of the RSRS scheme; the same structural design – a 'cut and devolve' approach, where central budgets are reduced and the responsibility for mitigation passed down to lower levels – dominates other high profile policies, particularly the (now further reduced) benefit cap and reductions to local housing allowance (LHA). Indeed, when defending the RSRS before the Court on behalf of the government, James Eadie QC argued that it was intended to 'shift the place of social security' from the 'central government to local government;'[1] perhaps a surprising aim for a policy which *prima facie* seeks to address under-occupation in the social rented sector. It is the lawfulness of a regulatory scheme constructed to achieve this shift, in particular its reliance on the mitigating effects of DHPs as opposed to statutory exemptions, which is the long story of this judgment. Consequently, the third section situates the decision in a broader criticism of tying benefit reductions to localism and the concomitant assumptions made by the Courts. I argue that the judgment, despite some modest successes, does little to square the structural circle at the heart of much of the UK government's welfare reform agenda, where local authorities are given the near-impossible task of mitigating centrally imposed benefit reductions.

An overview of the judgment: disability discrimination and 'transparent medical need'

The case was formed of three joined appeals – *A, Rutherford/Carmichael*, and *MA* – and consequently, the circumstances of the claimants put before the Court were wide-ranging. All require either an additional bedroom to that permitted under Reg.B13 Housing Benefit Regulations 2006, or to remain in their current property despite apparent under-occupation. Appendix 1 of the judgment provides a detailed summary, but for our purposes, the claimants can be treated as falling into three groupings: (i) a single parent, who is a victim of domestic violence, living in a home adapted under a sanctuary scheme (*A*), (ii) a couple who are unable to share a bedroom by reason of a disability (*Carmichael*), and a child who requires overnight care (*Rutherford*), and (iii) a broader class of tenant (*MA*), where an additional bedroom or continued occupation of the property is required for medical reasons, such as the storage of medical equipment (*Mr Rouke*) or due to significant mental health problems leading to the hoarding of newspapers (*Mr Drage*).

The claimants' main line of attack followed the familiar formula for judicial review challenges to welfare reforms: a Human Rights Act 1998-based challenge, arguing unlawful discrimination under Article 14 (Prohibition of Discrimination), leveraged through the First Part of the First Protocol (Right to Property) and/or Article 8 (Right to Respect for Private and Family Life). In other words, they submitted that the Secretary of State had unlawfully discriminated against the claimants in these cases by failing to treat them differently – in this case by making a statutory exemption from the RSRS – where such differential treatment is warranted. The Court unanimously

allowed the appeals for the *Rutherford* and *Carmichael* claimants, dismissed *A's* appeal by 5–2, with Lady Hale (with whom Lord Carnworth agreed) dissenting from the majority, and unanimously dismissed the appeal in *MA*. Each will be outlined in turn.

The evolution of the room standard imposed under Housing Benefit Regulations 2006 had led to an odd dichotomy in the RSRS policy: a statutory exemption is provided for children who cannot share a bedroom by reason of disability, but not adults (as per the *Carmichaels*), and for adults requiring overnight care, but not children (as per the *Rutherfords*). This anomalous position stems from the antecedent *Burnip v Birmingham City Council, Gorry v Wiltshire CC* [2012] EWCA Civ 629 decisions, where the same room standard imposed under the RSRS was successfully challenged in the context of Local Housing Allowance by: (i) a child unable to share a room by reason of a disability (*Gorry*), and (ii) an adult requiring overnight care (*Burnip*). The subsequent amendments made under reg.2 Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013/2828, provided statutory exemptions for those classes of claimant, but not those in 'counterpart' (para.43) circumstances, such as *Rutherford* and *Carmichael*.

The government had sought to justify the difference in treatment in the *Carmichael* case by arguing that the 'best interests of the child' were a primary consideration (para.46). Consequently, they had sought to provide a statutory exemption for children who could not share a bedroom by reason of disability, but not adults. The Court derided the 'ironic and inexplicable inconsistency' (para.47) in this approach, where the exact opposite effect is achieved – in the same regulations – for the *Rutherfords,* where adults are exempted but children are not. Instead, the Court determined that there was 'no reasonable justification' for the differences in treatment (para.46). Consequently, the policy was held to be unlawfully discriminatory under Article 14 ECHR, taken with Article 8 (para.49).

The position of the other five claimants is not as straightforward. Lord Toulson's lead judgment relies on a point of distinction between the *Rutherford/Carmichael* claimants, who he determines have a 'transparent medical need' (para.58) for an additional bedroom, and the others, who may have 'very strong reasons' (para.56) to continue to live where they are, but do not have such an 'objective need for that number of bedrooms' (para.53). In applying the 'manifestly without reasonable foundation' test,[2] the Court determined that it is reasonable for the latter to instead 'be considered on an individual basis under the DHP scheme' (para.53). Lady Hale and Lord Carnworth dissented in *A,* finding that requiring a woman in a sanctuary scheme to 'endure all of those difficulties and uncertainties' associated with the DHP application process, 'cannot be justified' (para.77).

Problems and implications

There were three key issues within the judgment which warrant attention here. First, the Court's point of distinction on a 'transparent medical need for an additional bedroom' (para.42) is not as clear as it first appears. This dividing line distinguishes the *Rutherford* position, where the additional bedroom provides sleeping space for an overnight carer, against *Mr Rourke's* position, where it is used to store medical equipment. Both are transparent requirements for additional space which arise from a medical need; in both instances, the additional bedroom is that space. The scope of a *medical* need in this context is also unclear. One would imagine that needs arising

from mental health problems would be included. However, *Mr Drage's* case – where obsessive-compulsive disorder and other severe mental health problems have led to hoarding – is distinguished as not having such a 'transparent medical need' for those rooms (para.52). This problem is set into sharp relief given the particular importance of bedroom space by those suffering from some forms of medical health difficulties (Padgett, 2007). This is of real practical significance. Under s.3 Human Rights Act 1998, First-Tier Tribunals must read B.13 Housing Benefit Regulations 2006 in a convention compliant manner. This key point of distinction between the claimants in *Carmichael* is therefore likely to keep welfare rights practitioners occupied in future appeals.

Second, the Court's misapplies the 'manifestly without reasonable foundation' test.[2] The effect of this familiar formulation, a near omnipresent feature of the judicial review challenges following the Welfare Reform Act 2012, can be concisely summarised: when considering 'policy decisions on economic and social matters' (para.32), and in particular 'state benefits' (para.29), the government should be accorded sizable deference in their decision-making. Though a high bar for the claimants, it is far from insurmountable.

The Court's assessment, however, is unapologetically structural, focusing on the government's decision to design a regulatory scheme offering little in the way of statutory exemptions, but bearing parallel DHP support sitting alongside it. The Court determined that for the *MA/A* claimants, the 'Secretary of State's decision to structure the scheme as he did was reasonable' (para. 41). Here, the Court is looking to justify the wrong thing. The test is not the extent to which the structural design of the scheme is 'manifestly without reasonable foundation', but whether the discriminatory impact on the claimants can be justified. For the Court to contain its focus on the design of the scheme rather than its discriminatory impact is to draw its consideration away from the capacity of the DHP scheme to provide an adequate means of mitigation. Indeed, the only explicit reference to the limitations of DHP provision is provided within Lady Hale's dissenting judgment (para.77). The numerous problems inherent in their operation and the, often very difficult, financial environment in which local authorities have to operate the scheme has been dealt with in more detail elsewhere (Meers, 2015), but were not addressed at all in the Court's application of the 'manifestly without reasonable foundation' test.

Third, despite arguments being put to it on the issue, and – in my view – its clear relevance, the Court did not assess the role of international obligations under the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) or the United Nations Convention on the Rights of the Child (UNCRC). Both of these conventions have a pedigree as interpretative guides to Article 14 discrimination, which has been underscored in both the Supreme Court's consideration of the 'benefit cap' in *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 and in the challenge to the room allowance for Local Housing Allowance in *Burnip*.

The determinative issue is the extent to which a conduit can be drawn between the grounds of the discrimination and the ambit of the relevant convention *(SG*, para.119). In *SG*, the 'benefit cap' was argued to be discriminatory against women, given its disproportionate effect on (predominantly female) lone parents, with the claimants arguing that the UNCRC could serve as an interpretive guide to the justification of this discrimination. The Supreme Court determined that 'no such connection' (*SG*,

para.131) existed between the convention's ambit (the interests of children) and the discrimination at issue (gender).

No such problem, however, exists here for the *MA/Rutherford* claimants; the UNCRPD is clearly relevant. Indeed, when considering the justification for changes to Local Housing Allowance under the same room standard in *Burnip*, although the case turned on other grounds, Maurice J indicated that he would have been willing to utilise the UNCRPD in his interpretation of Article 14 and find in favour of the claimants on that basis (*Burnip*, para.22). Its use has already led to a 'heightened standard of scrutiny' elsewhere in ECHR case law (Broderick, 2015, 115), and Article 19 of UNCRPD in particular offers the potential to 'illuminate our approach to both discrimination and justification' (*Burnip*, para.22) in cases involving housing benefit, given its focus on the right of those with disabilities to live independently and choose their place of residence on an equal basis to others.

Interrogating the 'localised approach'

As outlined above, the RSRS policy – and the welfare reform agenda in the UK more generally – can be characterised as exhibiting a 'cut and devolve' approach; namely, reducing centrally determined welfare payments, and then pushing the responsibility to manage their impact down to local authorities or other decentralised bodies. In *Carmichel,* the Court explicitly refers to the importance ascribed by the government to their 'localised approach' to the RSRS (para. 23). The principle is a simple one: if reforms to welfare programmes have to be made, those closest to the impact are better placed to implement, mitigate or target them than a central government department. This approach, however, warrants examination, particularly when 'localism' becomes tied to the perceived imperative of saving money – described elsewhere as 'sink or swim localism' (Lowndes and Pratchett, 2012) or 'austerity-localism' (Featherstone et al, 2012). In the context of the Supreme Court *Carmichael* decision, this 'fetishisation' (Featherstone et al, 2012, 177) of a locally orientated approach to the management of these policies leads to three key problems.

There is an assumption that because the most immediate impacts of reducing social security expenditure are discernible at the local level, solutions to them are best served at that level too. This fails to recognise the problematic political asymmetry between the two: by reducing central expenditure and pushing decisions downwards, governments can 'externalise responsibility' (Lowndes and Pratchett, 2012, 38) for the impacts of spending reductions, while local authorities find themselves in a 'political cul-de-sac' (Gaffikin, 2015) unable to change their fundamental basis. This problem manifests itself in the RSRS, as local authorities remain responsible for the award of DHPs while the Department for Work and Pensions imposes the initial DHP funding allocation (HB Circular S1/2015). The balance of responsibility for decisions is consequently unclear.

Second, in shifting this responsibility to the local level, it may be that that such a 'localised approach' (para. 23) is not 'politically innocent' (Featherstone et al, 2012, 178) – rather, it is seeking to avoid explicitly delineating the boundaries of those affected by the RSRS. Pushing the responsibility for mitigation down to the local authority level can serve as a form of political sleight of hand, moving the legislative focus away from arguments over who should bear the burden of reductions in social security expenditure, and towards the discussion of local authority provision for these

decisions. In other words, conflicts about the impact of a policy can be 'deliberately fudged' (Prosser, 1981, 150).

Third, these issues pose particular problems for the Courts when assessing proportionality in human rights based challenges, as in *Carmichael*. The proportionality exercise demands that the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. Under a localised approach, however, this balancing exercise cannot operate on a common scale; it shifts the focus away from the justification of the policy and towards a justification of the local involvement. This leads to the deferential tests applied by the Courts – principally the 'manifestly without reasonable foundation' bar outlined above – being applied not to the *potential discrimination* by the policy itself, but instead the *structural mechanism* of pushing the decision downwards, as reflected in the Court's conclusion that 'the Secretary of State's decision to structure the scheme as he did was reasonable' (para.41). The structural design is the focus of their assessment, not the discriminatory impact at issue.

These three problems do not mean that such a localised approach to welfare reform is inherently problematic or misguided. Rather, cases like *Carmichael* illustrate the problems that arise when such an approach is not an *end* in its own right, but is instead relegated to a *means* of delivering or alleviating the hardship caused by policies determined at the central level. What results is a judgment which is 'deliberately fudged' (Prosser, 1981, 150), where a floating area of discretion ascribed to the DHP scheme can largely act as a panacea to otherwise unlawful discrimination.

Overall, although this judgment is welcome news for the *Rutherford* and *Carmichael* claimants, its reasoning is not without problems. In particular, the way in which the 'manifestly without reasonable foundation' test was applied, the distinguishing line between those with a 'transparent medical need for an additional bedroom' and those without, and the lack of consideration of international obligations under the UNCRC and UNCRPD, are – in my view – problematic, and may serve to abate further challenges to other policies adopting the 'cut and devolve' approach to welfare reform. The decision itself does little to address the key structural tension at the heart of much of the welfare reform agenda, where local authorities are left to pick up the pieces of centrally imposed benefit reductions while the latter evade responsibility for their effects.

Notes

[1] See the recording of the hearing available at UK Supreme Court, '01 Mar 2016 – Morning – Part 4 of 6' at www.supremecourt.uk/cases/uksc-2014-0125.html, 1:47:11

[2] In an effort to keep legal technicalities to a minimum, the details of this test are not discussed. For more information, see Cousins (2016).

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