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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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