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Case Comment:

RR v Secretary of State for Work and Pensions: Empowering Tribunals to Enforce the Human Rights Act 1998

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A. INTRODUCTION

The Human Rights Act 1998 is a controversial piece of legislation. Whether it is properly considered to be a 'constitutional statute' worthy of greater legal status or a candidate for repeal, it is law and has been for two decades now.[1] This being so, it is important, as with all laws, that it is realistically enforceable by individuals.[2] Given the general and arguably fundamental nature of its protections, it might be thought to be especially important to ensure that the rights it protects are easily enforceable. In this case note, we analyse the recent Supreme Court judgment in RR v Secretary of State for Work and Pensions—follow-on litigation from the high-profile bedroom tax cases.[3] As we demonstrate, this judgment has significant implications for social security law, the interpretation of the Human Rights Act, the tribunals

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1 F. Cowell (ed.), Critically Examining the Case Against the Human Rights Act (London: Routledge, 2019).

2 R (UNISON) v Lord Chancellor [2017] UKSC 51; [2017] 3 WLR 409 [71] (Lord Reed); T. Bingham, The Rule of Law (London: Penguin, 2010).

3 RR v Secretary of State for Work and Pensions [2019] UKSC 52. Our focus in this article is on the point vis-à-vis tribunals.

system, the judicial control of delegated legislation, and access to justice. At its core, however, is the issue of the enforceability of human rights laws.

Our approach to the case is not to provide a conventional public law analysis—i.e. one concerned with process and principle—but rather to analyse the Supreme Court's approach pragmatically.[4] That is to say, while we engage with the reasoning of the Supreme Court, we also engage with the effects of the Court's ruling for individuals, as well as court and tribunal processes. In this instance, the individuals concerned are primarily social security claimants affected by a discriminatory element of the bedroom tax and users of tribunals in future, similar human rights claims. This is a perspective less often adopted in UK public law analysis but one which yields important insights as to the judgment's meaning in terms of the practical enforceability of human rights law. We argue that the Supreme Court was not only justified in its interpretation of the Human Rights Act but that it makes the protections of the Act more easily enforceable.

A. THE CARMICHAEL LITIGATION

The UK Supreme Court's ruling in Carmichael was a headline-grabbing case.[5] It centred on a dispute about the effect of what became widely known as the bedroom tax (otherwise referred to in the widely-derided government language of 'the removal of the spare room subsidy').[6]

4 R.A. Posner, Overcoming Law (Cambridge: Harvard University Press, 1996).

5 R. (on the application of Carmichael) v Secretary of State for Work and Pensions [2016] UKSC 58; [2016] 1 WLR 4550. For commentary, see: J. Meers, 'The bedroom tax in the Supreme Court: implications of the judgment' (2017) 25(2) Journal of Poverty and Social Justice 181; J. Meers, 'Discrimination and the "spare room subsidy": an analysis of Carmichael' (2017) 20(2) Journal of Housing Law 24; M. Cousins, 'The bedroom tax and the Supreme Court: pragmatism over principle' (2017) 24(3) Journal of Social Security Law 135.

6 The policy itself has been the subject of extensive academic criticism, see e.g. A. Greenstein, E. Burman, A. Kalambouka, and K. Sapin, 'Construction and deconstruction of 'family' by the 'bedroom tax'' (2016)

The general principle of the tax, found in Regulation B13 of the Housing Benefit Regulations 2006, provides that those with a 'spare room' could have their benefits reduced.[7] Regulation B13(2) provided that 'where the number of bedrooms in the dwelling exceeds the number of bedrooms to which the claimant is entitled' then the claimant must pay a penalty which was calculated as an 'appropriate percentage.'[8]The 'appropriate percentage' was 14% where the number of bedrooms was one too many or 25% where the number of bedrooms in the dwelling was two or more too many. It was found by the Supreme Court in Carmichael that this provision unlawfully discriminated against two claimants who required an additional bedroom by reason of a disability. The rule discriminated against the first claimant because she could not share a bedroom with her husband due to her disabilities, and it discriminated against the second claimants as they needed a regular overnight carer for their disabled grandson. The basis for this ruling was Article 14 in conjunction with Article 8 of the European Convention on Human Rights, made part of UK law under the Human Rights Act 1998.

In response to the Supreme Court's ruling in Carmichael, the Secretary of State laid before Parliament the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017.[9] These new regulations introduced two exceptions into

11(4) British Politics 508; K. Gibb, 'The multiple policy failures of the UK bedroom tax' (2015) 15(2) International Journal of Housing Policy 148; S. Moffatt, S. Lawson, R. Patterson, E. Holding, A. Dennison, S. Sowden, and J. Brown, 'A qualitative study of the impact of the UK 'bedroom tax'' (2016) 38(2) Journal of Public Health 197.

7 The cap was imposed by Regulation B13 of the Housing Benefit Regulations 2006 (SI 2006/213). Regulation B13 was introduced with effect from 1 April 2013, by way of amendment of the 2006 Regulations by the Housing Benefit (Amendment) Regulations 2012 (SI 2012/3040), as further amended by the Housing Benefit (Amendment) Regulations 2013 (SI 2013/665). See also the The Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013 (SI 2013/2828).

8 The bedroom tax imposes a penalty by deducting an appropriate percentage from the eligible rent of the property i.e if a claimant's rent is £100 a week, and they work part-time and receive a £50 per week housing benefit, their bedroom tax penalty for under-occupying by one room will be £14 per week, not £7. This is the case even if they only receive a housing benefit for half of the weekly rent of the property. This policy therefore negatively impacts working claimants.

9 The Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017 (SI 2017/213).

Regulation B13 for 'a member of a couple who cannot share a bedroom' and for 'a member of a couple who can share a bedroom.' This was a response that the Upper Tribunal has observed was 'in the best traditions of the dense drafting of social security secondary legislation.'[10] However, by the time new regulations were introduced, multiple cases—around 130 or so—had piled-up under the old provisions. One such case was that of RR, who lives with his severely disabled partner in social sector rented accommodation and is in receipt of Housing Benefit. In 2013, Sefton Borough Council decided that RR was under-occupying his accommodation and, in line with the bedroom tax principle, imposed a 14% reduction on his entitlement. RR appealed to the First-Tier Tribunal in 2013. The Tribunal granted a remedy to RR by way of a (very) imaginative reading under Section 3 of the Human Rights Act. The Secretary of State then sought to appeal this decision but it was stayed pending the Supreme Court decision in Carmichael. It remained stayed after the Supreme Court's ruling as Mr. Carmichael himself had to go back to the Upper Tribunal in 2017, this time to decide what the practical legal solution to the Supreme Court's ruling in his own case would be.[11]

Mr. Carmichael's obvious need for a legal solution raised 'an important constitutional question:' the extent of a social security tribunal's jurisdiction to disapply incompatible secondary legislation.[12] This is a point of particular importance in the context of social security where, like many other areas of mass bureaucracy, complex webs of delegated legislation are the basis of the system.[13] At the same time, this issue also goes to defining the province of the Human Rights Act itself, the power of tribunals, and how delegated legislation is controlled by

10 Secretary of State for Work and Pensions v Carmichael & Another [2017] UKUT 174 (AAC) [39]

11 Ibid.

12 N 3 above [3].

13 N. Harris, Law in a Complex State: Complexity in the Law and Structure of Welfare (Oxford: Hart Publishing, 2013).

the judiciary—all issues at the heart of administrative justice in the modern state about which much ink has been spilt.[14]

Unsurprisingly, the Upper Tribunal found that there was not a possible reading of the Regulations compatible with Convention Rights as per Section 3. Furthermore, it also found that the 14% deduction could be disapplied as to impose it would be to rule contrary to Section 6 of the Human Rights Act. In other words, the tribunal was required, as a public authority itself, to act in line with the Convention. The Secretary of State was not satisfied with this position and did not relent in her opposition. The case went on, once more, to the Court of Appeal. By a majority, it was found by the Court of Appeal in Carmichael (No. 2) that the Upper Tribunal overreached its jurisdiction and read the Human Rights Act incorrectly.[15] It was held to be for Parliament, not a court or tribunal, to decide what form legislation to give effect to the Convention should take, particularly where political issues arose as to the deployment of scarce public resources. The Court of Appeal deemed that the appropriate avenue for redress for claimants would be issuing a claim for damages under Section 8(2) of the Human Rights Act, which provides that 'damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.' The upshot was that Mr. Carmichael and RR, and others in similar situations, would have to initiate entirely new civil proceedings for damages. The reason the Court of Appeal offered for

14 See e.g. E.C. Page, Governing by Numbers: Delegated Legislation and Everyday Policy-Making (Oxford: Hart Publishing, 2001); T. Hickman, Public Law After the Human Rights Act (Oxford: Hart Publishing, 2010); N. Wikeley, 'Burying Bell: Managing the Judicialisation of Social Security Tribunals' (2000) 63 M.L.R. 475.

15 Secretary of State for Work and Pensions v Carmichael [2018] EWCA Civ 548; [2018] 1 W.L.R. 3429. For commentary, see: J. Meers, 'Legislation in breach of ECHR rights: the impotence of tribunals' (2018) 40(3) Journal of Social Welfare & Family Law 366; B. Fullbrook, 'Judicial remedies for Human Rights Act breaches: Secretary of State for Work and Pensions v Carmichael' (2018) 23(2)Judicial Review 119.

this position was that 'the existing powers of courts and tribunals do not include the rewriting of primary or secondary legislation in order to render it compatible with Convention rights.'[16]

The argument that Section 6 of the Act compelled the tribunal—as a public authority itself—to not act in breach of Convention rights was rejected on the basis section 6(6) 'makes it clear that a failure to pass remedial legislation is not an "act" of a public authority for the purposes of the section and, by parity of reasoning, it seems to me that a tribunal cannot be required pursuant to the section to go beyond its existing powers and fashion a remedy which involves rewriting the relevant legislation.'[17] Previous case law which took a different approach—notably Mathieson—was read as not providing a general principle and, instead, seen as a case where the Supreme Court sought 'to fashion a remedy to meet the particular facts of that case.'[18] The Court of Appeal reached this view of Mathieson on the basis that the Supreme Court 'do not appear to have considered any constitutional implications of the remedy they adopted' and there was no wider consistent line of authority.[19] As a result, the Court of Appeal found that there was no 'sure authority' for the Upper Tribunal's approach.

Leggatt LJ produced a powerful dissent. His view was that the approach of the majority, and the Government's position, appeared to suggest that 'in cases where giving effect to subordinate legislation… has been found to be incompatible with a Convention right, a court or tribunal is nevertheless bound as a matter of constitutional principle to apply the legislation as it stands until it is amended by Parliament to remove the incompatibility.'[20] For Leggatt LJ,

16 Ibid [45] (Flaux LJ).
17 Ibid [48] (Flaux LJ).
18 Ibid [49] (Flaux LJ).
19 Ibid [50] and [51] (Flaux LJ); Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47; [2015] 1 WLR 3250.
20 Ibid [77] (Leggatt LJ).

this was an unsustainable interpretation of the Human Rights Act framework as it ignored the distinction in treatment between primary and subordinate legislation—a distinction he considered to be 'carefully drawn… precisely in order to respect the sovereignty of Parliament.'[21] In contrast to the majority, Leggatt interpreted Section 6(1) as obliging a court or tribunal not to act in a way which is incompatible with a Convention right, unless it is required to do so by a provision in primary legislation. The correct principle therefore, according to Leggatt LJ, was that the obligation to give effect to subordinate legislation was overridden by the Human Rights Act. On this view, there is no meaningful distinction to be found between the facts of the Mathieson case and the circumstances in Carmichael.

A. THE RR CASE

After the Court of Appeal's ruling in Carmichael (No. 2), RR took up the baton and went back to the Upper Tribunal to contest the Court of Appeal's ruling. The Upper Tribunal—recognising the issues of public importance involved, the fact that the Court of Appeal had spoken on the point already, and the urgent need to resolve the back-logged cases—leap-frogged the case to the Supreme Court. This was the first time the Upper Tribunal has ever done so.[22]

The Supreme Court vindicated Leggatt LJ's dissent and the Upper Tribunal's approach in a short, unanimous judgment built on the premise that 'there is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this

21 Ibid [78] (Leggatt LJ).

22 Tribunals, Courts and Enforcement Act 2007, s 14A.

is necessary in order to comply with the HRA.'[23] For the Supreme Court, subordinate legislation is clearly subject to the Human Rights Act framework, which—reflecting the dissent of Leggatt LJ—they concluded 'draws a clear and careful distinction between primary and subordinate legislation.'[24] Mathieson was also deemed not to be a 'one off' but part of a consistent line of authorities where the courts have held that, where possible, a provision of subordinate legislation which results in a breach of a Convention right must be disregarded.[25]

Not only did the Supreme Court reach a justifiable decision on the question of legal interpretation, they provided a legal solution which has positive practical effects for the individuals concerned. In RR and Carmichael, the relevant individuals are social security applicants affected by the discriminatory aspects of the bedroom tax but the same analysis applies to future users of tribunals in similar circumstances. The central question about effects is: what position will a claimant find themselves in when seeking to vindicate their right under the Human Rights Act? The appropriate comparators, in terms of assessing impact on claimants, can be split into two potential outcomes, which can helpfully be defined by reference to the Supreme Court's approach in RR and the Court of Appeal's approach in Carmichael (No. 2).

On the ruling of the Court of Appeal majority in Carmichael (No. 2), a claimant would have to bring a 'follow on' damages claim under section 8(2) of the Human Rights Act. The

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23 N 3 above [27]. This echoes the position of Lord Bingham in *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68; [2004] 2 AC 72, 92: 'I cannot accept that it can ever be proper for a court, whose purpose is to uphold, vindicate and apply the law, to act in a manner which a statute declares to be unlawful.'

24 The Court pointed to multiple provisions of the Human Rights Act to demonstrate this, including section 6(1), section 6(2), and section 3(2).

25 N 3 above [30]. Francis v Secretary of State for Work and Pensions [2005] EWCA Civ 1303; [2006] 1 WLR 3202, Burnip v Birmingham City Council [2012] EWCA Civ 629; [2013] PTSR 117, JT v First-tier Tribunal [2018] EWCA Civ 1735; [2019] 1 WLR 1313, In re G (Adoption: Unmarried Couple) [2008] UKHL 38; [2009] AC 173 [116].

routes available for this are a judicial review (in the High Court or the Upper Tribunal) or a civil claim (in the Country Court or the High Court).[26] Since Anufrijeva, human rights damages claims have routinely been determined in the county court, and via ordinary procedure in the Queen's bench division of the High Court.[27] On the contrary position—that is, the Supreme Court's approach in RR—it would be the First-tier Tribunal that would be able to provide a remedy through the straightforward disapplication of the regulations, by virtue of Section 6 of the Human Rights Act. Overall, the Supreme Court's judgment in RR has the effect of positively enhancing the position of claimants, and thus the enforceability of human rights law, because the latter approach is far more likely to provide an accessible and effective remedy. Put simply, this is so because the need for multiple proceedings shifts a significant burden onto individual claimants as they would need to lodge a civil claim for damages, effectively doubling-up barriers to justice for individuals.

There are numerous advantageous effects of the Supreme Court's approach in RR. Tribunal judges are legally qualified and are often specialists in the complex statutory regimes that govern appeals. Tribunals have the ability to call on specialist non-legal members of the panel such as doctors (or in other spheres, chartered surveyors, ex-service personnel, or accountants), to assess the claims of appellants. Combined with tribunal procedures, which are designed to be informal and inquisitorial, access to justice in the tribunal is designed to be readily available. Civil claims do not generally provide equivalent access and county court judges do not tend to have a lot of experience with these types of claims. In light of the informal

26 On accessibility problems with judicial review, see: J. Tomlinson and R. Low-Beer, Financial Barriers to Judicial Review: An Initial Assessment (London: Public Law Project, 2018); V. Bondy, L. Platt and M. Sunkin, The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences (London: Public Law Project, 2015); Sir Rupert Jackson, Review of Civil Litigation Costs: Final Report (London: The Stationery Office, 2009).

27 Anufrijeva v Southwark LBC [2003] EWCA Civ 1406; [2004] QB 1124.

procedures before specialist judges in the tribunals, it is broadly expected that many appellants will represent themselves or appoint a non-legal representative.[28] Indeed, in a 2010 Consultation Paper, the Government stated that legal aid for advocacy before most tribunals is not justified 'given the ease of accessing a tribunal and the user-friendly nature of the procedure.'[29] By contrast, empirical research on the experience of litigants in person in civil claims demonstrates that such litigants are at significant disadvantage.[30] Beyond this, the necessity for dual proceedings would delay the ultimate disposal of the dispute and the fees implications can be a significant barrier to access to justice.[31] This is particularly the case for social security claimants, who are likely to have limited resources. An appeal of a benefits decision to the FTT is free of charge,[32] and there is no hearing fee.[33] By contrast, in a civil damages claim, there are both issuing and hearing fees.[34] While it may often be the case that claimants are eligible for fee remission, the need to apply for remission may itself act as a significant disincentive to progressing claims. In the FTT in a social security context, an appellant is not liable to pay costs if he or she loses their appeal, and the tribunal has no power to award costs.[35] Appellants may be able to claim reasonable expenses for attending a social

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28 The Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules, 2008 S.I. 2008 No. 2685 (L. 13), 21 August 2015, Rule 11.

29 Proposals for the Reform of Legal Aid in England and Wales, Consultation Paper CP12/10, November 2010, §4.153. This is one of the reasons that legal aid for proceedings in the First-tier Tribunal (Social Entitlement Chamber) is not available.

30 G. McKeever, L. Royal-Dawson, E. Kirk, and J. McCord, Litigants in person in Northern Ireland: barriers to legal participation (Belfast: Ulster University, 2018).

31 This was famously recognised by the Supreme Court in R (UNISON) v Lord Chancellor [2017] UKSC 51; [2017] 3 W.L.R. 409. See further: A. Adams and J. Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' (2017) 80(3) Modern Law Review 412.

32 Court and tribunal fees <https://www.gov.uk/court-fees-what-they-are>

33 This is not true of all tribunals, but fees in other tribunals are generally significantly lower than in the courts. For example, in the immigration chamber the appeal fee is £80 for a paper determination or £140 for a hearing.

34 HMCTS Civil and Family Court Fees EX50 (March 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789201/ex50-eng.pdf For money claims, fees will be from £35 for a court issued claim up to £455.

35 The Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules, 2008 S.I. 2008 No. 2685 (L. 13), 21 August 2015, Rule 10.

security FTT hearing.[36] In civil claims, however, the general rule that costs follow the event applies, subject to the discretion of the court.[37] This exposure, even if limited, may be a disincentive, particularly for those with limited resources and whose claims may in any event not be large.[38] Experience of social security redress systems also demonstrates that the more stages a claimant has to pass through to achieve a benefit then the more likely it is that they will withdraw from the system entirely.[39] A requirement of a separate follow-on damages action is likely to have a similar effect. Overall, the difference for individuals is significant: the Supreme Court's approach saves individuals from being put in a situation where vindication of their human rights claims lies on the other side of a legalistic gauntlet.

On top of all these undesirable procedural implications, the substantive law governing issues under the Court of Appeal's approach also becomes more complex. While social security law is notoriously complex,[40] there is wide-ranging commentary which observes the substantively complex nature of human rights damages.[41] This debate has focused in particular

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36 The Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules, 2008 S.I. 2008 No. 2685 (L. 13), 21 August 2015, Rule 21. This includes travel time and compensation for time out of paid work to attend the hearing.

37 Senior Courts Act 1981, s 51; Civil Procedure Rules, Rule 44.2.

38 Small claims under £5,000 fall under fixed costs arrangements, whereas claims over £5,000 will fall under the fast track and costs are not fixed save for the trial itself. Those with legal aid have more limited exposure in any event. Disclosure and oral evidence are likely to be required in such a claim which could prolong the hearing and increase costs. NB: Lord Neuberger who has said that costs are the main barrier to accessing legal services.

39 A recent example of this pattern can be seen in the context of the DWP's mandatory reconsideration system, see: J. Tomlinson and R. Thomas, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' (2019) Public Law 537. Other scholarship on administrative justice systems has identified this issue, see e.g. S. Halliday and D. Cowan, The Appeal of Internal Review: Law, administrative justice, and the (non-)emergence of disputes (Oxford: Hart Publishing, 2003), 138-140.

40 For example, see: N. Harris, 'Complexity in the law and administration of social security: is it really a problem?' (2015) 37(2) Journal of Social Welfare & Family Law 209.

41 J.N.E. Varuhas, Damages and Human Rights (Oxford: Hart Publishing, 2016); R. Clayton, 'Damage limitation: the courts and the Human Rights Act damages' (2005) Public Law 429; J. Varuhas, 'A Tort-Based Approach to Damages under the Human Rights Act 1998' (2009) 72(5) Modern Law Review 750; J. Steele, 'Damages in tort and under the Human Rights Act: remedial or functional separation' (2008)

on the 'balancing' element in human rights claims, as well as potentially complex issues in quantification. As well as calculating the benefit to which a person would have been entitled (a task well suited to the tribunals but less familiar to the courts), the court will have to assess the award of damages necessary to afford just satisfaction to the claimant, and whether it is just and appropriate to make such an award. As Jason Varuhas has put it:

> If one takes account of all possible hurdles, legal and non-legal, that a human rights damages claimant must overcome, to add the further hurdle of an interest-balancing approach at the remedies stage would begin to strike overall balance away from protection of fundamental interests, which is the very aim of human rights law, and in favour of other interests, public and governmental.[42]

Ultimately, much of this analysis ought to be plain to those with an understanding of the position of the claimants in the bedroom tax litigation. Indeed, the Upper Tribunal judgment in Carmichael (No. 2) records that the Treasury Devil himself accepted that the interpretation put forward by the Government might not appear to be attractive given 'the funding complications.'[43] The Supreme Court's judgment in RR ought to be welcomed as a clear, justifiable approach to the interpretation of the Human Rights Act which carries the benefit of producing positive systemic effects that claimants will be able to meaningfully access a remedy for the Government's breach. It is only a shame, particularly for the claimants like RR who were caught between the harshness of the bedroom tax policy and the complexity of law, that such a solution could not be reached much sooner.

67(3) Cambridge Law Journal 606; D. Fairgrieve, 'The Human Rights Act 1998, damages and tort law' (2001) Public Law 695.

42 J.N.E. Varuhas, Damages and Human Rights (Oxford: Hart Publishing, 2016) 361.

43 Secretary of State for Work and Pensions v Carmichael and Sefton MBC [2017] UKUT 174 (AAC) [55].