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Case Report

Legislation in breach of ECHR Rights: The impotence of tribunals

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The appeal in *Secretary of State for Work and Pensions v Carmichael* [2018] EWCA Civ 548, gets to the heart of a long-standing tension between the 'distinctive philosophy' of tribunals in granting 'ordinary people' access to justice in social security provision, and the tendency of those that sit on them to 'lament their impotence to assist the needy' (Baldwin et al, 1991, pp.96-102). The question before the court was a wide-reaching one: when a tribunal is faced with secondary legislation that is an unlawful breach of a claimant's human rights, can it disapply the offending provision in the assessment of their benefit entitlement? In deciding that this would have 'exceeded what is permissible' (para.67) the Court of Appeal sided with lamentable impotence.

After an outline of the case, this comment reflects on two key elements of the court's reasoning: (i) the distinction in treatment between primary and secondary legislation, and (ii) the Court's assessment of the 'discretionary housing payment' scheme (DHPs). I argue that the implication of this decision is to render the claimant's right under s.7(1)(b) Human Rights Act 1998 to 'rely on the Convention right or rights concerned in any legal proceedings' entirely illusory.

The claimants in this case were affected by the Coalition Government's 'Removal of the Spare Room Subsidy' – known commonly as the 'bedroom tax' – which imposes a housing benefit penalty to those deemed to be under-occupying their properties in the social rented sector. The underlying regulations assumed that couples share a room, but this was not possible due to Mrs Carmichael's disabilities. Consequently, a penalty was imposed on their housing benefit – 14% of the eligible rent for the property – leaving them reliant on applying to the local authority administered DHP scheme for support. The facts may well be familiar to readers; this is the same Carmichael family as in the series of high profile 'bedroom tax' judicial review challenges, culminating in their successful appeal in *R. (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58. Having been

unsuccessful in the earlier instance decision of *R. (on the application of MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, the Carmichaels ran a parallel appeal on the application of Reg.B13(5)(a) Housing Benefit Regulations 2006 to their housing benefit award at the First-Tier Tribunal under s.6 Sch.7 Child Support, Pensions and Social Security Act 2000. It is this route which is our focus here.

Their argument mirrored that of the judicial review challenges – the housing authority's application of Reg.B13(5)(a) was unlawfully discriminatory under Article 14, taken with A1P1. The nuance of their position was, however, that the exercise of justification under a statutory appeal is different from that under a judicial review challenge in the administrative courts. The First-Tier Tribunal agreed, finding that the decision to apply Reg.B13 should be set aside and – controversially – under s.3 Human Rights Act 1998, the offending regulation should be read with the additional words 'one member of a couple who is unable to share a bedroom because of his or her disability'.

On appeal, the Upper-Tier Tribunal held that the First-Tier had clearly overreached their interpretive duty under s.3 Human Rights Act 1998; the offending provision could not be read in a convention compliant manner and the insertion of additional words was to rewrite it. However, following *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47*,* in the context of secondary legislation a First-Tier Tribunal should not 'give effect' to regulations which they determine are incompatible with convention rights. To apply the penalty would result in a clear breach of the Carmichael's convention rights contrary to s.6(1) Human Rights Act 1998 and leave them no recourse but a free-standing claim for damages for the breach under s.8(2). As the tribunal observed, Mr Eadie QC, acting for the Secretary of State, 'had the good grace to accept that this might not appear to be a particularly attractive argument, given the funding complications' (para.55).

Given the broad-ranging implications of the decision, an appeal was inevitable. The Secretary of State argued that the Upper-Tier Tribunal (i) was wrong to find that it could disapply the regulation, and (ii) had failed to have regard to the provision of DHPs. In the present case, the majority of the Court of Appeal upheld the appeal on both grounds. Lord Justice Flaux determined that there was not 'any material difference' (para.46) between the approaches in the first and upper tiers; both were re-writing legislation when they should instead have 'limited itself to determining that [Reg.B13] as it stood was incompatible' (para.67). *Mathieson* could be distinguished as the Carmichaels had been in receipt of DHPs and their

remedy therefore lies solely 'in bringing a claim for damages' under s.8(2) Human Rights Act 1998 (para. 67). Sir Brian Leveson P agreed, with Lord Justice Leggatt dissenting on the first ground, determining that the tribunals had the power to disapply the regulations, but in exercising their discretion to do so under s.8(1) Human Rights Act 1998 Act, had failed to have regard to the provision made by way of DHPs (para. 102).

There are two key issues that are worth underscoring here. First, the majority of the court were not persuaded that the position of secondary legislation which is not convention compliant, where its incompatibility does not arise from its enabling Act, is significantly different to where its provisions are the inevitable consequence of primary legislation. Put another way, where secondary legislation conferring welfare benefits is noncompliant, the tribunal is bound to apply it regardless, notwithstanding its subordinate status. It is on this issue that Lord Justice Leggatt dissents, underscoring that s.6(2) Human Rights Act 1998 provides such a distinction (para.79) and to regard the tribunal as 'exceed[ing] what was permissible' (para.67) is to 'disregard the distinction between primary and subordinate legislation' (para. 78). Akin to circumstances where secondary legislation is *ultra vires*, it is not necessary to 'identify words which can be deleted with an imaginary blue pencil' (para. 87), it is enough to recognise that for the tribunal to enforce the offending provision in the assessment of benefit entitlement would be contrary to s.6(1) Human Rights Act 1998.

This issue gets to the root of the First-Tier Tribunal's role in holding the administration of social security regulations to account. For the majority of the court to pull the 'notoriously labyrinthine' (Harris, 2013, p.14) patchwork of secondary legislation that governs the payment of benefits to sit alongside the overarching, principle-setting primary legislation – here the Welfare Reform Act 2012 – is to absolve s.6 Human Rights Act 1998 of any meaningful effect on social security legislation. If the 'distinctive philosophy' of the tribunals is to bring the assertion of rights closer to claimants in need (Baldwin et al, 1991, p. 96), it is difficult to see how the residual right to seek damages under s.8(2), with the funding challenges this inevitably carries with it, is a satisfactory answer.

Second, the Court's faith on the provision of DHPs as a distinguishing factor is characteristic of judgments relating to housing benefit reform. Indeed, on behalf of the Secretary of State, Mr Eadie argued that to concentrate on the regulations themselves would be a 'misplaced focus on entitlement' (para.38). I would suggest that the deficiencies of the scheme identified in *Burnip v Birmingham City Council* [2012] EWCA Civ 629 (para. 46) and underscored by

the UKUT in the earlier instance – namely, that these payments are often time-limited, paid from a capped fund, and cannot be relied upon – demonstrate the importance of such a focus on entitlement as opposed to one on this floating layer of discretionary support (Meers, 2018). When the Court determines that the violation has been accounted for by these payments, as 'no loss has been suffered' (para. 67), the inability of the scheme to be relied upon to service a deduction indefinitely is neglected.

In deciding that the tribunal should have properly limited itself to 'determining that [Reg.B13] as it stood was incompatible' (para.67), leaving the Carmichaels with a remedy rooted solely in 'bringing a claim for damages' under s.8(2) of the Human Rights Act 1998, it is difficult to see how the promise to rely on convention rights in 'any legal proceedings' (s.7(1)(b)) is satisfied, nor the requirement of the tribunal to act pursuant to s.6(1)(b). Notwithstanding a clear breach of their convention rights, the tribunal must still apply the offending secondary regulation, even when it is not the inevitable consequence of primary legislation. The judgment speaks to longstanding concerns about the ambit of the tribunal system and whether the social entitlement chamber has sufficient teeth to uphold the rights of the ordinary people it seeks to serve. In the context of broader debates on impediments to human rights enforcement, perhaps best reflected in the Joint Committee on Human Rights ongoing inquiry into the matter (2018), this judgment will be unwelcome by those tribunal judges who 'lament their impotence to assist the needy' (Baldwin et al, 1991, pp.96-102).

References

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