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**Discrimination, weighty reasons and the “bedroom tax”: J.D. and A v. The United Kingdom**

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**Legislation:**

Housing Benefit Regulations 2006.

Equality Act 2010.

**Cases:**

*J.D. and A* v. *The United Kingdom* *Applications nos. 32949/17 and 34614/17* (ECtHR, 24 October 2019).

*Burnip v. Birmingham City Council and others* [2012] EWCA Civ 629

*R. (on the application of DA) v Secretary of State for Work and Pensions* [2019] UKSC 21

The decision of the European Court of Human Rights in *J.D. and A* v. *The United Kingdom[[1]](#footnote-1)* marks the end of the road for two appeals to the well-known “bedroom tax” policy that stretch back to 2013. Both claimants in this case have long argued that they suffer indirect discrimination from the policy’s imposition of a penalty for the under-occupation of social rented housing. The offending regulations, amended in the wake of the Coalition Government’s Welfare Reform Act 2012, are found in Reg.B13 Housing Benefit Regulations 2006. They impose a 14% penalty based on the eligible rent for under-occupying by one room, 25% for two or more.[[2]](#footnote-2)

The controversial policy is designed to put people at risk of losing their homes in order to incentivise them to downsize; as the ECtHR describes it, “this precarity was the intention of the scheme”.[[3]](#footnote-3) In the present case, both claimants argued that being subject to this policy was unlawfully discriminatory contrary to Article 14 European Convention on Human Rights, for *J.D.* on the grounds of disability and for *A* on the grounds of gender. Both fell within the broader classes of claimant who failed to convince a majority of the UKSC of their arguments in *R v Carmichael* [2016] UKSC 58. They subsequently appealed to the ECtHR. Here, *A* was successful in her appeal and *J.D.* was unsuccessful. This note details the circumstances of the two claimants before turning to the decision of the court.

**The two claimants**

The facts in front of the court cut across two forms of indirect discrimination: disability and gender. The first claimant (*J.D*), lives with and cares full-time for her (adult) disabled daughter, who suffers from severe physical and learning disabilities and is registered blind. The three-bedroom property has been significantly adapted to meet her daughter’s needs, including the fitting of an internal lift and ceiling hoists, among many other accessibility adaptations.

Under the amended Reg.B13 Housing Benefit (Amendment) Regulations 2006, they are deemed to be under-occupying the property by one-bedroom, and therefore are subject to penalty of 14% of the eligible rent. The shortfall between housing benefit and their rent had been met by Discretionary Housing Payments (DHPs) on a “temporary basis” – at the time of the appeal, the claimant was awaiting the outcome of their most recent DHP application (para. 9).

The second claimant (*A*) lives in a three-bedroomed property with her son – they have been resident there for 25 years. *A* was subject to sustained domestic violence by an ex-partner, including an incident in 2002 where he violently attacked and raped her in her home. The claimant and her property is part of a “Sanctuary Scheme” designed to protect those most at risk of domestic violence. As a result, it has been adapted to include a panic room.

There is no statutory exemption from the penalty outlined in Reg.B13 for those in sanctuary schemes. As a result, she has been subject to a 14% penalty for under-occupation and reliant on applying for support under DHP scheme. She has received support on a “temporary basis” until 2015, when her application was refused. Following an intervention by the Secretary of State, the award of DHP was reinstated on the basis that the refusal had resulted from an “error in processing”.[[4]](#footnote-4)

**The arguments**

The claimant’s submissions revisit familiar ground from the hearing in the UKSC decision in *Carmichael* and the suite of other challenges to reforms stemming from the Welfare Reform Act 2012: the failure to treat those in the claimants’ positions differently from those captured by Reg.B13, is unlawfully discriminatory under Article 14, taken with either the first part of the first protocol (Right to Property (A1P1)) and/or Article 8 (Right to Respect for the Home). For the first claimant (*J.D*), this discrimination is in the sense of a failure to make a reasonable accommodation in the case of a disability (as in *Çam v. Turkey*, no. 51500/08). For the second (*A*), it is the failure to treat her differently under Reg.B13 that forms the basis of the indirect discrimination (as in *Thlimmenos v. Greece* ([GC], no. 34369/97)*.*

The claimants argued that the aim behind the “bedroom tax” policy – attempting to incentivise households to downsize – did not have a rational connection the application of the policy on their respective facts. Both had a need to remain in their accommodation. Even if such a rational connection was to the be found, the claimants argued that the test to apply to the justification of this discrimination is not the widely employed “manifestly without reasonable foundation” benchmark. Instead, for discrimination concerning disability and gender, the Government should demonstrate “weighty reasons”. Both claimants contended that the DHP scheme was not a sufficient alternative to receipt of housing benefit and did not obviate the discrimination at issue or justify its impact. For reasons best summarised in *Burnip v. Birmingham City Council and others* [2012] EWCA Civ 629 [46[ (Kay LJ), the payments are unreliable, administered from a capped fund, and (by very definition) discretionary.

The Government’s arguments revisited their broad-ranging justification of the welfare reform agenda. They argued that the policy had two legitimate aims: the “saving of public funds in the context of a major state benefit” and “shifting the place of social security support in society”.[[5]](#footnote-5) The latter, despite its unclear meaning, will be a familiar formulation to those accustomed to legal challenges to welfare reform measures. In oral arguments to the UKSC, the Government has characterised this shift as being from “central government” to “local government”;[[6]](#footnote-6) particularly, in the context of the “bedroom tax”, the use of the locally administered DHP scheme to identify and mitigate problematic claimants on a case-by-case basis.

They argued that these two aims are both rationally connected to the policy and that the failure to make specific exemptions to deal with claimants in analogous positions to each case can be justified. Both claimants have recourse to DHPs and in each instance had been in receipt of these payments for a significant period of time.

**The decision**

The judgment of the court turned on two key issues: the standard to apply to the Government’s justification of discrimination and the rational connection, or lack thereof, between the (legitimate) aim behind the measure and its application to the claimants.

First, the court determined that the correct standard to apply to the justification of the discrimination at issue for both claimants was “very weighty reasons”, and not the “manifestly without reasonable foundation” test. Indeed, the court limited the application of the latter benchmark to transitional measures, concluding that:

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…[[7]](#footnote-7)

Having established the discrimination at issue and the test to apply, the court then turned to the first two stages of a proportionality assessment: (i) whether the measure has a legitimate aim, and (ii) whether the means are rationally connected to the aim. The court determined that the aims of the “bedroom tax” did not “appear” to be achieved by applying the policy to the applicants and – as a result – that the legitimate aim was not rationally connected to the applicants in this instance. As noted by the court, the expectation that the claimants would be in receipt of DHPs is in tension with the application of the penalty:

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 [homes] … Accordingly, it does not appear that the aims envisaged by the legislative changes could have been achieved by applying them to the applicants.[[8]](#footnote-8)

However, having established the extent of the rational connection between the aim and the policy, the court went on to consider the “compatibility of the system as a whole”[[9]](#footnote-9) with Article 14, rather than just to the claimants themselves.

It is at this point of the assessment that the court applied the “weighty reasons” benchmark. For the first claimant, *J.D.*, it is not in “fundamental opposition” to the needs of disabled persons in adapted accommodation to move into “smaller, appropriately adapted accommodation”.[[10]](#footnote-10) In such cases, given the demands of the Human Rights Act 1998 and the Public Sector Equality Duty[[11]](#footnote-11), decisions as to the award of DHPs at the local authority level would be likely to meet their needs. Consequently, the availability of DHPs 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”.[[12]](#footnote-12)

For *A*, the relationship between the legitimate aim and the “bedroom tax” means is more problematic. The court determined that the aim to incentivise downsizing could not align with the aim of a sanctuary scheme to enable victims of domestic violence to *remain* in their property. The Government had provided no weighty reasons as to why the aim was rationally connected to the means; DHPs were not sufficient to justify the discrimination for such a “small and easily identifiable group”.[[13]](#footnote-13)

As a result, the appeal of the first claimant (*J.D*) in respect of disability discrimination was dismissed and that of the second claimant (*A*) in respect of gender discrimination was allowed.

**Analysis**

These two cases were part of those left behind in the UKSC decision in *Carmichael.* In my view, there are three key differences in the reasoning by the Supreme Court and that by the ECtHR that led the court to both a different conclusion for *A,* and their differing reasoning behind their dismissal of *J.D’s* appeal*.*

First, the ECtHR accepted that higher standard of review for justification applies in the context of disability and gender discrimination where the offending policy is not transitional, even if the issue at play is one of a socio-economic nature. Discrimination-based appeals against socio-economic measures in the UK have been dogged by a rigid application to the application of the “manifestly without reasonable foundation” benchmark. This is a difficult bar to pass. Indeed, in Lord Wilson’s lead judgment in *R. (on the application of DA) v Secretary of State for Work and Pensions*[[14]](#footnote-14)*,* in deciding that the benefit cap policy did not unlawfully discriminate against lone parents and their children contrary to Article 14 ECHR (taken with Article 8), the majority of the Supreme Court concluded that ECtHR derived authority “mandates inquiry into the justification of the adverse effects of rules for entitlement to welfare benefits by reference to whether they are *manifestly without reasonable foundation*”[[15]](#footnote-15). Lord Wilson declared, “let there be no future doubt about it”.[[16]](#footnote-16) The ECtHR’s acceptance of the higher standard of review for both claimants here questions the extent to which the domestic court’s assessment of justification of Article 14 discrimination is an accurate assessment of proportionality under the convention.

Second, the ECtHR undertook a staged analysis of the proportionality of the measure, separating out explicitly their analysis of the legitimacy of the aim and its rational connection to the circumstances faced by both the claimants and those in analogous positions. Within the UKSC decision in *Carmichael*, and in other challenges to policies made in the wake of the Welfare Reform Act 2012, the staged assessment of proportionality is often supplanted with a simple application of the question: is the policy “manifestly without reasonable foundation”? Here, the court’s focus on the extent to which the aim is capable of being rationally connected to the claimants narrows their inquiry substantially.

Third, although the court relays the Government’s aim of “shifting the place of social security” within the policy, they do not return to this in their analysis of the justification of the discrimination. Instead, they focus on the aim of the “bedroom tax” to incentivise downsizing. This may be a recognition that the more porous motivation of “shifting the place of social security” is less amenable to a rigorous proportionality assessment that the clear stated aims of a policy *prima facie* addressing under-occupation in the social rented sector. This is important, as this aim – as opposed to simply the intent to encourage downsizing and save money – speaks directly to the introduction of the DHP scheme.

The decision of the court for *A* is a welcome one, and is testament to her and her lawyers’ tenacity. For such a small and easily identifiable group to be subject to the insecurity of the DHP scheme is clearly at odds with any effort to encourage downsizing. However, the decision for *J.D.* highlights the continued capacity of cash-limited discretionary payments to justify otherwise unlawful discrimination, even in the face of the application of a “weighty reasons” benchmark as opposed to the widely employed “manifestly without reasonable foundation” bar.

1. *Applications nos. 32949/17 and 34614/17* (ECtHR, 24 October 2019). [↑](#footnote-ref-1)
2. See Reg.B13 of the amended Housing Benefit Regulations 2006. [↑](#footnote-ref-2)
3. *A v UK* (n 1) [93]. [↑](#footnote-ref-3)
4. *A v UK* (n 1) [14]. [↑](#footnote-ref-4)
5. Ibid [73]. [↑](#footnote-ref-5)
6. Jed Meers, ‘The bedroom tax in the Supreme Court: implications of the judgment’ (2017) 25(2) *Journal of Poverty and Social Justice* 181. [↑](#footnote-ref-6)
7. *A v UK* (n 1) [97]. [↑](#footnote-ref-7)
8. Ibid [99]. [↑](#footnote-ref-8)
9. Ibid [100]. [↑](#footnote-ref-9)
10. Ibid [101]. [↑](#footnote-ref-10)
11. Under s.149 Equality Act 2010. [↑](#footnote-ref-11)
12. *A v UK* (n 1) [102]. [↑](#footnote-ref-12)
13. Ibid [105]. [↑](#footnote-ref-13)
14. [2019] UKSC 21. [↑](#footnote-ref-14)
15. Ibid [59] (Lord Wilson). [↑](#footnote-ref-15)
16. Ibid [65]. [↑](#footnote-ref-16)