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Fighting for Rights

The bedroom tax - protecting the rights of people with disabilities

The Bar Council

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This is an account of how the law was used, successfully, to challenge the effect of provisions of the Housing Benefit regulations that had a particularly adverse effect of the disabled. The provisions limited the amount of housing benefit that could be paid in respect of rented accommodation. The provisions were introduced first into the private rented sector; and then into the social rented sector – housing association and local authority accommodation. The provisions are known colloquially as the bedroom tax; although government refers to the underlying policy as the "Removal of the Spare Room Subsidy".

Whatever it was called, the thinking behind the policy had a logic. It was that much rented accommodation was under-occupied – three bedroomed houses or flats being occupied by a single couple, for example. The payment of housing benefit in respect of the full rent was, so the argument goes, a disincentive to move to more appropriately sized accommodation. Sharp criticisms are made of the overall policy; this account is not concerned with them. It is concerned with the fact that at the heart of the policy are "size criteria", used to judge how large a house or flat a particular family needed. For example, a married couple could be expected to share a bedroom, so the size criteria indicated one bedroom. Two children under ten, of either sex, could be expected to share a bedroom. So the rent payable for a family consisting of a couple and two children under ten would meet a reasonable rent for two bedrooms; with deductions being made from the rent if in fact it was a reasonable rent for three or more bedrooms.

The litigation arose from the fact that the size criteria created very particular practical and distressing problems for the disabled. The first cases to reach the higher courts concerned the private sector – a group of cases before the Court of Appeal reported as *Burnip v Birmingham City Council* [2013] PTSR 117. There were three individual appellants – Ian Burnip; Lucy Trengrove (who had sadly died before the appeal) and Richard Gorry. Ian and Lucy's problem was that they needed a second bedroom for an overnight carer; and the way the regulations defined the potential occupiers of a bedroom did not cover the need for a carer to sleep in the accommodation. Application of the size criteria accordingly required a deduction to reflect the apparent need for one bedroom rather than two. The need for an overnight carer arose from their disability. The Gorrys' problem was different. The family consisted of Richard and his wife; and three daughters. Two of the three daughters were expected by the size criteria to share a bedroom; and accordingly, once again, the size criteria required a reduced rent. But the two youngest daughters were disabled – one by spina bifida and one by Downs syndrome. The behavioural consequences of the disability meant that

sharing bedroom was in fact inappropriate.

In all three cases there was a powerful argument that the size criteria were producing an objectively indefensible answer. In order to make this matter legally, the appellants turned to the Human Rights Act 1998 and, in particular, article 14 of the European Convention on Human Rights. This is the anti-discrimination provision. It prohibits discrimination in relation to the rights and freedoms guaranteed by the Convention on *"any ground such as sex, race, colour, language ….or other status."* Article 8 of the Convention requires the State to respect the home, so this is a right or freedom guaranteed by the Convention. Accordingly, so the argument went, the size criteria breached article 8 read together with article 14. Although the width of the reference to *"other status"* has been controversial, everyone agreed that it included disability.

Apparent discrimination contrary to article 14 will be lawful if the government can defend it on an appropriate basis (or, in legal language, if it is "justified"). And in a welfare benefits case all the government needs to show is that the effect is not *"manifestly without reasonable foundation."* Nonetheless, the Court held that the size criteria did discriminate unlawfully against the groups of the disabled who were affected in the same way as the three appellants. Maurice Kay LJ observed *"Disability can be expensive. It can give rise to needs which do not attach to the able-bodied." The central reasoning of Henderson J was "The exception is sought only for a very limited category of claimants, namely those whose disability is so severe that an extra bedroom is needed for a carer to sleep in (or, in case like that of Mr Gorry, where separate bedrooms are needed for children who, in the absence of disability could reasonably be expected to share a single room. Thirdly, such cases are by their very nature likely to relatively few in number, easy to recognise, not open to abuse, and unlikely to undergo change or need regular monitoring."* So, in the end, the appellants received their full housing benefit unaffected by the deduction.

However, that is by no means the end of this account. The size criteria were later imported into the social housing sector. And when this was done, provision was made for *children* who could not share a bedroom (reflecting the circumstances of the Gorry family); and for *adults* who needed overnight carers (reflecting those of Ian Burnip). No provision was made for adults who could not share a bedroom; or for children who needed an overnight carer. Somewhat predictably, it became apparent that this response was inadequate. There are adults who cannot share a bedroom because of disability. The Carmichaels are such a couple. Mrs Carmichael has spina bifida and consequent severe disabilities. She needs a special bed with an electronic mattress, her husband cannot share her bed; and there is no room in the bedroom for another bed. Her disabilities are physical, but there will be couples who cannot share because of disabilities such as dementia. There are also children who need overnight

carers, although they may be less common. The Rutherford's grandson was one. He was himself disabled; he lived with his grandparents who had their own health problems and it was recognised that an overnight carer was needed on a respite basis. So the social housing size criteria were falsified for the Carmichaels and the Rutherfords in the same way that the private sector housing criteria had been for the Burnips and the Gorrys.

The two cases took their own separate routes, but both ended up in the Supreme Court ([2016] 1 WLR 4550). Both the Carmichaels and the Rutherfords won. Lord Toulson commented on the different treatment of adults and children. He said *"I cannot…see a sensible reason for distinguishing between adult partners who cannot share a bedroom because of disability and children who cannot do so because of disability. And the same applies also to distinguishing between adults and children in need of an overnight carer."*

Even this victory was not quite the last word. There is a final footnote. The cases brought by the Carmichaels and the Rutherfords were brought by judicial review rather than by appeal to the First Tier Tribunal. The latter is designed for disputes in the benefits system; and is intended to provide a relatively informal remedy. It took another trip to the Supreme Court (*RR v Secretary of State for Work and Pensions* [2019] 1 WLR 6430) to establish that these tribunals could provide a remedy where a breach of Convention rights would be caused by the application of discriminatory provisions contained solely in regulations rather than in the principal statute itself.

The whole history of this litigation, from *Burnip* in the Court of Appeal to *RR* in the Supreme Court, demonstrates the sort of practical, focused assistance that the Human Rights Act can provide. It also demonstrates the realistic way in which the courts can apply it. The full range of cases that were before the Supreme Court in the *Carmichael* and *Rutherford* judicial reviews included other disabled claimants with problems which were not specifically concerned with the size criteria, but arose because, for example, their accommodation had been expensively adapted and they could not move. The Court held *their* problems had been appropriately addressed by the separate system of discretionary housing payments ("DHPs"); and that the government's position in relation to them was justified. So the HRA is sensitive both to the needs of individuals and government.