

BENEFITS – LOCAL AUTHORITIES AND AUSTERITY

IMPACTS OF A LOCALISM AGENDA

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AGENDA



- Current position on some main challenges - benefits cap; spare room subsidy (aka bedroom tax); Zambrano carer exclusion
- Role of discretionary housing payments (DHPs)
- Role of local authorities in avoiding breach of ECHR or EU law
- Traps in designing local schemes – residence conditions; approach to resources such as DLA; consultation; EQiA
- Other strains on local authority budgets - LWAS

R (SG and others) v SoS for Work and Pensions (CPAG and Shelter intervening) [2015] 1 WLR 1449



- Challenge failed 3/2 in Supreme Court
- Challenge was on basis that there was a disproportionate effect on women/lone parents within ambit of A1 P1 in breach of Article 14
- Minority held that the three main justifications flawed; that despite the fact that justification test tough – *manifestly without reasonable foundation* – it was not met because of breach of “best interests duty” under UNCRC
- A third member of the court (Lord Carnwath) agreed that there was a breach of best interests duty but that this was irrelevant to the justification of disparate impact on *adult* women

ROLE OF DHPS IN BENEFITS CAP



- Government pointed to availability of DHPs
- But in benefit cap context these were expressly regarded as transitional
- Baroness Hale approved Henderson J's approach in Burnip

Relevance for the future?

- Accordingly, end result is 3/2 holding that no breach of ECHR; 3/2 holding that breach of UNCRC; the major legal split between majority and minority being relevance of the latter to the former
- Present administration committed to lowering level of cap; so further argument appears inevitable
- Terms in which the justifications analysed may be important
- Primary justification fairness; but evidence showed that those affected always substantially worse off than those working and earning median wages because of in work benefits. Effect especially marked in London because of rent levels

R (MA and others) v SoS for Work and Pensions

2014 EWCA Civ 13



- Again, a challenge under Art 14 on the basis that discrimination was against the disabled
- Role of DHPs different
- “From August 2011 onwards, there was a consistent view within Government that the most workable solution to the difficulties for the disabled that would result from the introduction of the bedroom criteria was to increase what could be made available through DHPs.”

LOCAL DECISION MAKING AT THE HEART OF THE JUSTIFICATION



- “ *Burnip* was concerned with a different scheme although it was similar in many ways... The DHP scheme has changed to some extent. Further guidance has been issued to the local authorities that administer it. The DHP fund is now better resourced. ...There is the further point that the Regulations that were being considered in *Burnip* were not made under the shadow of the financial crisis and the need to reduce public spending which the Coalition Government was elected in 2010 to bring about.”

“ it was not practicable to add an imprecise class of persons (those who need extra bedroom space by reason of disability) ... I accept that the class could have been identified ... but that would necessarily have introduced more complexity... The issue raised by houses which have been significantly adapted provides a good illustration... applying a tighter definition would have resulted in an administratively intensive and costly process involving outside agencies as well as local authority staff. This is because of the difficulties in identifying the minority of HB claimants who are unable to share a bedroom due to the nature of their disabilities.”

“ DHPs are administered by local authorities who are accountable locally for the money they spend. Under the existing regime, eligibility for HB is assessed at the local level by local authority decision-makers, but in almost every case 100% of the HB paid by local authorities is reimbursed by the Secretary of State. Thus local authorities are not subject to the same financial discipline in relation to HBs as they are in relation to DHPs.”

Zambrano carers – Sanneh v SoS for Work and Pensions 2015 Civ 49



- CoA rejected a challenge to regulations removing Zambrano rights from the category of rights to reside which found a right to mainstream benefits
- Practical effect is to place burden on social services departments under Children Act s17

R(Rutherford) v SoS for Work and Pensions [2014] EWHC 1631 (Admin)



Case was that bedroom needed for carer for disabled child when grandparents could not cope

“ the role of DHPs in the Scheme is critical.

“DHPs are, by definition, discretionary. The evidence in *Burnip* led to the conclusion that they could not be relied upon to plug the identified discriminatory gap. That is not the evidence in the present case:

“First, it is abundantly clear that the intention of the scheme as a whole is that DHPs *should* be used to plug the gap where, [otherwise] a person with an ascertained need for an additional bedroom would otherwise be the subject of discrimination on the grounds of disability.”

- Second, in the event, it has not yet proved necessary to increase the monies available for the DHP fund. To the contrary, Pembrokeshire underspent in 2013-2014 and returned part of its allocated fund for that year; and it received an increased fund for 2014-2015;
- Third, although the awarding of DHPs remained discretionary, the position of disabled people living in specially adapted accommodation (a category which includes Warren and his grandparents) was specifically identified in the Good Practice Guide as being a category for whose support additional funds had been allocated to the DHP fund: see [8] above;

- Fourth, the Good Practice Guide also identified households having a health problem which meant that the choice of housing is restricted and claimants requiring an extra room because of a health problem that affects them or a member of their household (both of which include Warren and his grandparents) as groups meriting consideration
- Fifth, the award of DHPs by Pembrokeshire to the Claimants has plugged the gap and continues to do so. They have suffered and suffer no financial detriment as a consequence of being funded in part by the DHP conduit rather than entirely pursuant to the 2012 Regulations.

The Claimants submit that.....they do not have adequate assurance of future payment. In support of this submission they rely upon the undoubted fact that the power.... to award a DHP is not mandatory but discretionary. This appears to me entirely to ignore the practicalities of the situation. Pembrokeshire is obliged to exercise its discretion in accordance with public law principles and Human Rights legislation.

R (Winder) v Sandwell MBC 2015 PTSR 34



- Council tax reduction scheme made subject to a two year residence requirement
- Quashed on primary basis that the wording of s13A(2)(b) did not allow it.

“the class must be defined by reference to financial need, albeit by reference to criteria which the authority considers identify those who are, in general, in financial need. There is therefore considerable discretion in the authority as to the criteria adopted to identify financial need. However, criteria which do not identify those who are at least more likely to be in financial need fall outside the powers granted to an authority by Parliament.”

Other reasons for quashing included

- Improper purpose
- Failure to take into account material considerations – “if other authorities adopted a similar requirement, this would compound the difficulties for individuals, and could lead to some with financial need not being entitled to a council tax reduction anywhere in the country. This... links in with the central government’s policy that there should be some consistency...: this requirement could not be adopted by all authorities.”

- Lack of consultation
- Barrier to freedom of movement and discrimination
- PSED
- For a challenge based on lack of consultation which failed see *R (L & P) v Warwickshire County Council and Warwickshire Safeguarding Children Board* [2015] EWHC 203 (Admin)

R(Hardy) vSandwell MBC [2015] EWHC 890 (Admin)



- Issue was whether Sandwell’s approach to the treatment of the care component of DLA for the purposes of DHPs was lawful. Answer no.

“Given that the discriminatory effect of the HB size criteria... is only justified by the availability of DHPs to “plug the gap”, and given that.. the Good Practice Guide refers to additional funding having been allocated for this purposes, it is difficult to see any reasonable justification..... *Rutherford* took the view that a decision to withhold DHPs in that case “would appear to be unjustifiable” and, more generally, that councils were acting “wrongly” by including DLA(c) in household income: I fully agree..”

R (Jump) v SoS for Communities and Local Government; and Work and Pensions



- This was a challenge to the decision announced in December 2013 to cease identified central government funding for Local Welfare Assistance Schemes (“LWAS”) the replacement for the social fund
- Government agreed to a consent order committing to consulting on a fresh decision about how the schemes should be funded
- Pre-Christmas spending review found no new money, though did identify £129.6m within existing grants which could be used
- Further £74m announced in February 2015 but not ring fenced
- Lack of ring fencing very problematical