Landmark CHAMBERS

Housing Benefit and Council Tax Reduction

Legal issues for the near future

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- Genesis of the talk the thought that in relation to both housing benefit and council tax reduction the recent reforms have left a different role for local authorities
- Most obvious example is the increased role for discretionary housing payments (“DHPs”). Much of the talk concerned with current case-law developments affecting central government amendments of welfare provision and their implications for the use of DHPs as a “safety valve”.
- Talk could be described as “thoughts on a means test”

Burnip 2013 PTSR 117; 2012 EWCA Civ 629

Building blocks:-

•Disability is a “status” for the purposes of article 14

•The problem is how to characterise the need the claimants had – which was an objective need for an extra bedroom, either because of the need to provide for care by night or for two children who could not share because of disability.

Maurice Kay LJ:-

That Article 14 embraces a form of discrimination akin to indirect discrimination in domestic law is well-known. Thus, in *DH v Czech Republic* (2008) 47 EHRR 3, the Strasbourg Court stated (at paragraph 175):

"… a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group."

The submission here is that, whilst the statutory criteria provided for an able-bodied person to be given HB which would be an adequate contribution towards his accommodation needs, they failed to make equivalent provision in relation to the severely disabled, whose needs are more costly.

- The skeleton argument on behalf of the appellants puts this aspect of their case as follows:
- “The difference between a disabled person such as the [appellant] and a non-disabled person is that the disabled person has a level of need which is greater to enable him to live in a dignified manner in the community. The State’s failure to recognise this difference by making adequate provision represents a breach of the *Thlimmenos* obligation to treat different cases in a different way.”

Conclusion:-

Whilst it is true that there has been a conspicuous lack of cases post- *Thlimmenos* in which a positive obligation to allocate resources has been established, I am not persuaded that it is because of a legal no-go area. I accept that it is incumbent upon a court to approach such an issue with caution and to consider with care any explanation which is proffered by the public authority for the discrimination. However, this arises more at the stage of justification than at the earlier stage of considering whether discrimination has been established. I can see no warrant for imposing a prior limitation on the *Thlimmenos* principle.

Henderson J dealt with justification. His judgment has potential implications for means tests and/or the allocation of discretionary payments.

- “it is necessary to draw a clear distinction between the benefits .... for his subsistence, and those which he was entitled to claim in respect of his housing needs. His incapacity benefit and DLA were intended to meet (or help to meet) his ordinary living expenses as a severely disabled person. They were not intended to help with his housing needs. This is demonstrated ..not only by the availability of HB and DHPs as separate benefits but also by the way in which HB is structured. .... the amount of HB is fixed by reference to an applicable amount which represents what the claimant is taken to need to live on....

- Discretionary housing payments were in principle available as a possible way of bridging this gap, but they cannot ..be regarded as an... answer to the problem. This follows from the cumulative effect of a number of separate factors. The payments were purely discretionary in nature; their duration was unpredictable; they were payable from a capped fund; and their amount, if they were paid at all, could not be relied upon to cover even the difference between the one and two bedroom rates of LHA, and still less the full amount of the shortfall. To recognise these shortcomings is not in any way to belittle the valuable assistance that discretionary housing payments are able to provide, but is merely to make the point that, taken by themselves, they cannot come anywhere near providing an adequate justification for the discrimination in cases of the present type.

"A further aspect of the problem is that housing, by its very nature, is likely to be a long term commitment. This is particularly so in the case of a severely disabled person, because of the difficulty in finding suitable accommodation and the probable need for substantial physical alterations to be made to the property in order to adapt it to the person's needs. Before undertaking such a commitment, therefore, a disabled person needs to have a reasonable degree of assurance that he will be able to pay the rent for the foreseeable future, and that he will not be left at the mercy of short term fluctuations in the amount of his housing-related benefits."

- Two points emerge from this approach to justification.
- First, and even in a non HRA context, it is necessary to think hard about whether benefits given for one purpose can be regarded as available for another purpose. This is in fact already clear from next case
- Second, there will be cases where the objective needs of a claimant mean that there is an obligation on the state, as a whole, to provide the appropriate accommodation. This is likely to produce acute tensions as the effects of the benefits cap and the bedroom tax/spare room subsidy become clear – subject to the results of current legal challenges

R (Carton) v Coventry City Council 2001 4 CCLR 41

- “The claimants challenge the introduction by the defendants on 3 January of this year of what the claimants contend is a substantially altered structure for charging for day care provision. The applications are made on two grounds. First, that it was unfair in the circumstances for the defendants to make substantial changes to their charging policy, to the claimants' detriment, without consultation; second, that it was irrational, unlawful and unfair for the defendants to apply a new charging policy, which treated as “income” available for care in the day, sums of Disability Living Allowance (DLA) paid in respect of watching over, or attention needed, at night, in connection with bodily functions.”

- “18 These were indeed fundamental changes to the charging structure. In my view, fairness required that there should be proper consultation before they were introduced, and there was none. The changes adopted are more than a mere uprating: they constitute changes to the policy,……. To people in the claimants' position, they represent not only significant, but also substantial, changes. To them, these were not mere adjustments to the charges. They were fundamental changes. They were introduced unfairly,…..
- 19 Moreover, it was irrational, unlawful and unfair for the defendants to apply a new charging policy which treated as income available for day care sums of DLA paid in respect of night care.”

- It is sensible to describe next the state of play in the challenges to the bedroom tax/spare room subsidy cases and the benefits cap
- The first is R (MA and others) v Secretary of State and Birmingham CC 2013 EWHC 2213 (QB). This is listed for hearing on 20th January
- The second is R(JS) and others v Secretary of State. Judgment is awaited from the Divisional Court.
- The terms in which Laws LJ accepted the justification in MA is important, and highlights the way in which LA's have been thrust into the firing line

- For reasons I have given, the absence of a precise class of persons (those who need extra bedroom space by reason of disability), which can be identified in practical and objective terms and sufficiently differentiated from other groups equally in need of extra space but for other reasons, does not take the case out of Article 14. But it is a very powerful factor upon the question of justification. In *Burnip* (or rather *Gorry*) the Court of Appeal was faced with a discrete group, exemplified by Mr Gorry's daughters: families with children who could not share a bedroom by reason of their disabilities. The court concluded that such persons suffered unlawful discrimination by the application of the private sector provisions equivalent to B13.

But I do not accept that that approach can be applied here, where there is no such discrete group. The Secretary of State had, of course, nevertheless to consider carefully what steps to take in relation to disabled persons, and others, who would or might face real difficulties arising out of the cap – even though they could not practically be defined as a class. His provision of extra funding for DHPs and advice and guidance on its use cannot be said to be a disproportionate approach to the difficulties which those persons faced.

- This approach will lead to arguments that the provision of DHPs is necessary, on particular facts, to avoid a breach of the ECHR. The disabled are a relevant group; but in the benefits cap cases Secretary of State accepted a disparate impact on women, especially single parents.
- It is likely that there will be challenges by claimants who claim to be part of a discrete group – eg adult couples who cannot share a bedroom because of the disability of one or both of them.

- All this has implications for budget setting. An argument has been formulated that discretionary decisions could be challenged if made by an authority who had budgetted less than the amount granted.
- Doubted by Commissioner Fellner in CH1175/2002
- But see now the integral roll played by DHPs in the Article 14 justification.