Landmark CHAMBERS

The Bedroom Tax Litigati0n
Local Authorities, Human Rights And Discretionary Housing Payments

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The starting place: Burnip and others in the Court of Appeal [2013] PTSR 117

- Concerned the application of size criteria in the private sector

- Case ultimately proceed on the basis that the claimants could demonstrate an objective need for an extra bedroom

- Basic discrimination argument proceeded on the basis that housing benefit was within the ambit of Article 1 Protocol 1; that disability was a status for the purposes of article 14; and that the failure to meet the objectively verifiable need was discrimination in breach of Article 14

Position of the Burnip claimants

1 Disability can be expensive. It can give rise to needs which do not attach to the able-bodied. Ian Burnip and the late Lucy Trengove provide stark examples. Because of their severe disabilities they were assessed as needing the presence of carers throughout the night in rented flats in which they lived. For this reason they needed two-bedroom flats. In each case they were entitled to and received housing benefit (HB) but Birmingham City Council (in Mr Burnip's case) and Walsall Metropolitan Borough Council (in Ms Trengove's case) quantified it by reference to the one-bedroom rate which would apply to able-bodied tenants.

(Maurice Kay LJ)

Richard Gorry's case is somewhat different. He, his wife and their three children live in a four-bedroom rented house. Two of the children are girls who, at the material time, were aged 10 and 8. Both are disabled – one by Down's Syndrome, the other by Spina Bifida. For this reason it is inappropriate for them to share a bedroom in the way in which able-bodied sisters of those ages would be expected to do.

Accordingly, there were two adults who needed an extra bedroom because of disability – to accommodate carer

And two children who could not share because of disability

Steps in Henderson J's reasoning included:-

… it is necessary to draw a clear distinction between the benefits which Mr Burnip was entitled to claim for his subsistence, and those which he was entitled to claim in respect of his housing needs. His incapacity benefit and disability living allowance were intended to meet….his ordinary living expenses….They were not intended to help with his housing needs. This is demonstrated, in my view, not only by the availability of HB and discretionary housing payments as separate benefits with separate rules ….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….

Mr Burnip's objectively verifiable need was for a flat with two bedrooms, and that the maximum LHA available to him on the one bedroom basis left a substantial shortfall from the rent which he had to pay to his landlord. Discretionary housing payments were in principle available as a possible way of bridging this gap, but they cannot in my judgment be regarded as a complete or satisfactory 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 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.

.. we are.. concerned with a benefit (HB) the purpose of which is to help people to meet their basic human need for accommodation of an acceptable standard. Secondly, there is no question of a general exception from the normal bedroom test for disabled people of all kinds. The exception is sought for only a very limited category of claimants…..Thirdly, such cases are by their very nature likely to be relatively few in number, easy to recognise, not open to abuse, and unlikely to undergo change or need regular monitoring.

The cost and human resource implications of accommodating them should therefore be modest, quite apart from the point that in some cases the effect of refusing the claim could well be to force the claimant into full-time residential care at much greater expense to the public purse. Fourth, for the reasons which I have already given, the extra assistance which can be provided by discretionary housing payments, valuable though it can be, falls far short of being an adequate solution to the problem.

The social sector litigation

Included the following steps:-

- Divisional Court [2013] PTSR 1521
- Court of Appeal [2014] PTSR 584
- Supreme Court [2016] 1 WLR 4550

In addition:-

Rutherford v SSWP and Pembrokeshire County Council

[2014] EWHC 1631 (Admin) Stuart Smith J

R(Rutherford) v SSWP 2016 HLR 8 Court of Appeal. Includes the "Sanctuary" case "A".

So possible to discern three groups of claimants:-

- Daly, Drage, JD and Rourke. These claimants lost at the Divisional Court, Court of Appeal and Supreme Court levels
- Mrs Carmichael and the Rutherfords. Mrs Carmichael could not share a bedroom with her husband because of disability; Warren Todd, grandson of the Rutherfords, was a child who needed an overnight carer from outside the family in a way not catered for by the size criteria
- A, who lived in Sanctuary accommodation

Mrs Carmichael and the Rutherfords won in the Supreme Court. There was an obvious irony about the relationship with the children who could not share in the Gorry litigation; and the adults who needed a carer from outside the family in Burnip.

As Lord Thomas CJ said in the CofA:-

- “He [the Secretary of State] justified the distinction between making provision for a bedroom for disabled children but not for disabled adults by reference to the best interests of the child and explained the different treatment on that basis. On that basis, it seems to us very difficult to justify the treatment within the same regulation of carers for disabled children and disabled adults, where precisely the opposite result is achieved; provision for the carers of disabled adults but not for the carers of disabled children.”

The other claimants all lost, although A had won in the Court of Appeal. The Court split 3/2 in A.

The dividing line was whether the claimants could show an objective need for an extra bedroom; as opposed to showing that it was unreasonable to expect them to move.

Part of the majority reasoning included:-

Such examples could be multiplied, but the point remains the same. It was recognised from the time that [the regulation were] mooted that there will be some people who have a very powerful case for remaining where they are, on grounds of need unrelated to the size of the property. For reasons explained in the evidence….it was decided not to try to deal with cases of personal need unrelated to the size of the property by general exemptions for particular categories but to take account of them through DHPs. (Lord Toulson, paragraph 62)

An issue that accordingly remains is the extent to which DHPs claimed in circumstances where the claimant cannot practically move are truly discretionary. Can the LHA refuse them? Does it matter that the claimant has a status for the purposes of Article 14? (As A did).

Stuart Smith in Rutherford proceeded on the basis that Pembrokeshire was effectively obliged to pay as it " is obliged to exercise its discretion in accordance with public law principles and Human Rights legislation. It is also as a matter of public law obliged to have regard to the guidance… That being so, no basis has been advanced on which Pembrokeshire could properly have exercised its discretion to deny the full DHPs…."