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Alice Diver - *Putting dignity to bed? The taxing question of the UK's housing rights relapse*

As Grant has argued,

‘one of the most basic human needs which millions of the poorest people around the world lack, is housing. Implementation of the right to housing is therefore a fundamental requirement of a human rights approach to poverty eradication.’¹

Despite being ‘wrapped up in ...ideological discourse,’² the UK’s recent statutory cap on Housing Benefit (a form of welfare payment aimed at helping unemployed or low-paid tenants pay their rent³) has significantly affected the lives of ‘some of the most vulnerable members’ of society.⁴ Recent case law from England and Wales has examined a range of rights-relevant issues, such as the legal definition of justifiable discrimination, equality, the nature of the overlap between fundamental rights, judicial over-deference and the margin of appreciation. They confirm that human rights issues, especially those which are tied to socio-economic decision-

¹ E Grant ‘Enforcing Social and Economic Rights: The Right to Adequate Housing in South Africa’ 15 *Afr. J. Int’l & Comp. L.* (2007) 1-28 p 2. See also J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) Hart: London, on the ‘primary importance’ of a right to housing, and the ‘vexed questions’ that accompany its realization.

² K Gibb ‘The Multiple Policy Failures of the UK Bedroom Tax’ *International Journal of Housing Policy* (2015) 1 -19 p 2

³ See s.134 of the Social Security Administration Act 1992. In the private rented sector, Housing Benefit is paid by way of a rent allowance. In Northern Ireland, at the time of writing, the cap on Housing Benefit applies only to the private rented sector, pending welfare reforms. See further <http://www.niassembly.gov.uk/assembly-business/legislation/primary-legislation-current-bills/welfare-reform-bill/> (accessed 10.03.15)

⁴ See R Rolnik’s statement 2013 (A/HRC/25/54/Add.2) available <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13707&LangID=E> (accessed 01.02.15); See also Rolnik ‘Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development: Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context’ (Distr. GENERAL A/HRC/10/7 4 February 2009)

making, should remain at the forefront of legislators' minds.⁵ Taken together the cases provide fairly detailed guidance, for anyone seeking to argue that the various impacts of harsh austerity measures might amount to unlawful human rights infringements. There is little sign however that a meaningful right to *adequate* housing is being embedded in domestic law, with judicial concerns over preserving finite, scarce resources generally hindering the various arguments being put forward by housing rights advocates.

The UN Special Rapporteur on adequate housing stressed in 2012 that there was an urgent need for a general 'paradigm shift from housing policies based on the financialization of housing to a human rights-based approach to housing policies.'⁶ A year later, she warned specifically of a clear 'regression' in respect of the right to adequate housing within the UK stressing how a clear 'deterioration in the enjoyment of the right' was becoming increasingly evident.⁷ The introduction of 'bedroom tax' was largely to blame for this, with its underpinning policy aims strongly suggesting government commitment to prioritising and privileging home-ownership over other modes of tenure, namely the leasehold interest.⁸ Arguably, a wider political agenda exists, which seeks to limit the role of the state generally in acting as a provider of social housing.⁹ This is so despite the UK having had a 'long history of providing affordable and good quality housing..[and] having placed this human right at the centre of its policy priorities.'¹⁰

The question of whether some form of positive obligation now exists, to underpin meaningful, rights-led safeguards (against poverty, ill-health, eviction and homelessness) is not fully answered by recent, domestic judicial discourses. Courtroom arguments citing inequality or discrimination are prone to swift rebuttal, on the grounds that both of these are essentially lawful (under statute or policy) or alternatively, that they are justified on the basis of scarce or finite resources. Judicial deference is also a key factor, with domestic courts clearly not keen to take on the mantle of chief law-maker in such contexts. The concept of human dignity, not least as it relates to an adequate standard of living, and the 'right' to health, is therefore perhaps particularly relevant to advocates seeking to highlight the harsh inequities of such systems. As Gomez and Thiele have observed,

'access to adequate housing directly affects other human rights. Without it, employment is difficult to secure and maintain, health is threatened, education is impeded, violence is more easily perpetrated, privacy is impaired, and social relationships are frequently strained.'¹¹

⁵ See J P Costa, 'The Relationship between the European Court of Human Rights and the National Courts' (2013) *E.H.R.L.R* (3) 264-274

⁶ R Rolnik A 67 /286 (August 2012) on how the 'ruling paradigm of housing policies... focus(es) on housing finance as the main means of promoting homeownership..' She argues that 'full realization of the right to adequate housing, without discrimination, cannot be promoted solely by financial mechanisms and requires broader and more holistic housing policies and State interventions.' Available <http://www.ohchr.org/Documents/Issues/Housing/A-67-286.pdf> (accessed 12.02.15)

⁷ *Op cit* n 4. She also cited the cumulative effect of various socio-economic policies, which have served to gradually 'erode one of the world's finest systems of affordable housing.'

⁸ *Ibid*

⁹ See also the domestic case law on homelessness and eviction proceedings, for example *Kay v. Lambeth Borough Council*; *Price v. Leeds County Council*, 8 March 2006, [2006] UKHL 10, where the House of Lords revisited *Qazi v. London Borough of Harrow* [2003] UKHL 43; *Sheffield City Council v. Smart* [2002] EWCA Civ 4 in the wake of the decision in *Connors v. the United Kingdom*, no. 66746/01, 81–84, (27 May 2004). The Court held that the decision in *Connors* was not incompatible with the majority view in *Qazi* i.e. that there was no need for a County Court review of Article 8 (2) (of the European Convention) issues in tenancy possession cases where legislation had clearly addressed the issue. A tenant might however still be able to rely upon Article 8 in exceptional cases where, as in *Connors*, domestic law was incompatible with Article 8 rights, or where it was possible to challenge a social landlord on public law grounds e.g. as an abuse of state power.

¹⁰ 'For generations, being poor in the UK didn't necessarily equate to being homeless, or to living badly housed and in permanent threat of eviction.' Rolnik *op cit* n 4.

¹¹ Gomez M and Thiele B 'Housing Rights are Human Rights' (2005) 32 *Hum. Rts.* 2 p 2

The research analyses the small but significant body of domestic case law which continues to emerge over issues of housing and welfare within the UK. It will argue that the rights-language of such judicial discourses is relevant to gauging whether a meaningfully safeguarded entitlement to ‘adequate housing’ might ever be brought into existence. Arguably, where recession-led, discretion-based decision-making can so easily hinder the impact and scope of human rights law, then this perhaps sends a message relevant to other rights areas: if public funds are needed for the realisation of such basic entitlements as decent housing or health, then these rights might be more accurately described as a social privileges. Put bluntly, if human dignity can be easily tied to purse strings, and a ‘duty’ to preserve finite state resources is an acceptable ‘get out clause’ for jurists and legislators (to infringe basic rights), then there is no guarantee that similar reasoning might not apply to cases involving civil or political rights issues. Economic austerities should not bring to mind political atrocities: where benefit caps lead directly to food-banks, evictions, and squalor, it can be argued that the concept of human dignity has been ill-served by those tasked with ring-fencing meaningful protections for human rights.

The work of housing lawyers and anti-poverty activists should not be framed as a minor domestic law matter. In terms of property rights being infringed, a tenant facing a forced ‘eviction’ (via lease surrender on the grounds of ‘under-occupation’ or through an inability to pay their rent) may not be in an entirely dissimilar rights-position to others finding themselves dispossessed of their home life or ‘displaced’ from their community in other contexts. Given the frequent overlap between housing and health, the case law in this area does at least at times look to the provisions of international human rights law and the higher principles of non-discrimination and equality for some degree of guidance (even if the margin of appreciation almost always then proves to be impenetrable.)

For example the High Court (England and Wales) recently dealt with a challenge to a council decision on calculating a Discretionary Housing Payment (‘DHP’). In *R (Hardy) v Sandwell* (2015)¹² a retired, disabled claimant sought a judicial review of his local council’s decision to include the care component of his Disability Living Allowance (DLA) in their calculations of his DHP-eligibility, arguing that this contravened the government’s own 2013 Guidance, and also placed an ‘unlawful fetter’ on the exercise of their discretion, amounting to unlawful discrimination, contrary to Article 14 of the European Convention. It was further argued that the Public Sector Equality Duty had not been discharged and that no reasonable adjustments had been made as required under s. 29(7) of the 2010 Equality Act. Such behaviour therefore constituted discrimination in the exercise of a public function (contrary to sections 15, 19 and 29(6) of the 2010 Act) with the inclusion of DLA in the calculations amounting to ‘an irrational act.’ The background to the case was that the claimant’s wife was also disabled, and they together often provided overnight care for her elderly mother, who suffered from dementia. They were ineligible for a one bedroom council property, so were destined to ‘over-occupy’ in any event, even if some suitable alternative to their three-bedroom, substantially disability-adapted house were to be found. The court considered the recent judicial challenges to the scheme and looked to the 2013 Guidance on DHPs, which stated that local authorities might ‘decide how to treat any income or expenditure, taking into consideration the purpose of the income where appropriate.’¹³ Income from disability related benefits could be disregarded, given that these were designed to help pay for the extra costs of living generally associated with having a disability (e.g. adaptations to one’s dwelling, as was the case here). Similarly, ‘in all cases [they] should consider what is reasonable and not create a process that is too onerous for the claimant.’¹⁴

Where, as here, a rented home had been subject to significant disabled adaptations, local authorities were urged to consider making awards of DHP sufficient to allow people to remain in their adapted houses. Sandwell’s own Policy (2013-14) allowed them to ‘give consideration’ to the DHP Guidance, but to also look at the ‘individual

¹² [2015] EWHC 890 (Admin)

¹³ See s 3.8 of The 2013 Guidance

¹⁴ Para 30

merits' of each case. The council's blanket policy took into account *all* of an applicant's income, apart from the mobility component of DLA (the benefit also has a care component and is graded according to the level of care an individual needs.)¹⁵ By including the care component of DLA in its calculations, the council had not grasped the meaning of the DHP Guidance and thus had failed to give it 'proper consideration.' It had not exercised its discretion 'properly or at all.'¹⁶ They had also erred by basing their policy on the judgment in *R (Turner) v London Borough of Barnet Housing Benefit Review Board* [2001]¹⁷ which had dealt with a decision pre-dating the of the Human Rights Act 1998.¹⁸ The failure to take the 2013 Guidance into account also meant that both their policy and their decision in respect of Mr Hardy's case were both clearly unlawful.

Through such cases, domestic decision-makers are also at least being reminded of such important rights concepts as the child's best interests and of the relevance of such instruments as the UN Convention on the Rights of Persons with Disabilities ('CRPD'). Those tasked with amending or crafting social welfare policies, and indeed with monitoring their adverse effects upon vulnerable persons, could do worse than look to Article 4 of the CRPD which obliges signatory states to:

"take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs or practices that constitute discrimination against persons with disabilities."

Article 5(3) also usefully provides that:

"in order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided."

Article 19 similarly calls for recognition of 'the equal right of all persons with disabilities to live in the community, with choices equal to others.' This in turn is likely to be grounded upon 'the opportunity to choose their place of residence and where and with whom they live on an equal basis with others' so that they are not simply 'obliged to live in a particular living arrangement.' Other relevant provisions include Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR') which highlights the need for 'adequate food, clothing and housing and ..the continuous improvement of living conditions.'

Article 2 (1) provides however a sort of 'get out clause' via its proviso on 'maximum available resources' which goes some way towards enabling a government 'defence' of justification in cases involving discretionary, economic decision-making. Despite this, the ICESCR General Comment 3 (5th session, 1990) (on the Nature of States Parties Obligations) remains particularly relevant, highlighting the need for 'a minimum core obligation to ensure the satisfaction of, at the very least, basic, essential levels of each of the rights' contained therein.' Thus where

'any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing.....[the state] is, prima facie, failing to discharge its obligations under the Covenant.'¹⁹

¹⁵ See s 71(1) of the Social Security Contributions and Benefits Act 1992; See further The Discretionary Financial Assistance Regulations 2001

¹⁶ Para 41

¹⁷ EWHC 204 (Admin)

¹⁸ Para 42

¹⁹ Available http://www.bayefsky.com/themes/adequate_general_general-comments.pdf accessed 21.03.15. See also General Comment 4: The Right to Adequate Housing (1991)

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The recent Rutherford appeal is also highly significant, given its relevance for both disabled children and victims of domestic violence.²⁰ Here, the Court of Appeal held that the failure of the Secretary of State to make provision in the regulations for the overnight carers of disabled children did amount to unlawful discrimination. This was clearly contrary to Article 14 of the European Convention on Human Rights. It was therefore

“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 Secretary of State had also failed to have regard to the best interests of disabled children when devising the regulations, which was contrary to Article 3 of the UN Convention on the Rights of the Child. Whether the Supreme Court will overturn the Court of Appeal, remains to be seen.

²⁰ *Susan Rutherford and others -v- Secretary of State for Work & Pensions and A -v- Secretary of State for Work & Pensions* [2016] EWCA CIV 29

