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

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In brief: '*Bedroom tax*'? ('Reg 13B')

- Housing Benefit Regulations (2012)
- HB and Universal Credit (*Size Criteria*) Regulations (2013) ('Reg 13B')
- Aimed at reducing welfare payments
- '*austerity measures*' – part of wider welfare cuts
- Affects persons claiming Housing Benefit



'under-occupation'?

- *'Too many bedrooms'* ..e.g.
- Single person in a 2 bedroom flat..?
- Family with 2 young children in a 3 bedroom house..?



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Overlapping issues..

- Health
- Children's rights
- Discrimination
- Equality
- Human dignity



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Because the reduced Housing Benefit will not cover the extra room...

- Tenants can apply for state support -
- Discretionary Housing Payment ('DHP')-
- must 'make up the shortfall' by e.g.
- 'paying extra towards their rent'
- (i.e. from their savings/income/benefits)?
- Taking in a lodger to live in the 'spare room'?
- Moving to premises with fewer bedrooms?



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What if....

- A disabled person requires overnight care or live-in helper for some of the time?
- A divorced/separated parent has their child/children to stay over at weekends?
- A disabled child needs a separate bedroom?



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Recent case law from England/Wales..

- Looks to the European Convention on Human Rights...
- Art 8 – home, family, private life ‘rights’
- Art 14 – non-discrimination/equality
- Art 6 – fair hearing – (right to appeal?)
- Art 1 of Protocol 1 – deprivation of property? (welfare benefits..?)
- UNCRC – Art 3 – (Best Interests of the Child)



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R (MA) v Sec State for Work and Pensions [2014] EWCA Civ 13

- Correct test to gauge whether unlawful discrimination is justified?
- If justification of the discrimination is “*manifestly without reasonable foundation?*”
- i.e. did it lack an *objective and reasonable justification?*



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MA [2014] cont'd..

- 'Disability needs vary greatly' ...some will be addressed via the Regs, other claimants can apply for support from the DHP fund
- ('Discretionary Housing Payments')
- Held: **Justified** discrimination
- Currently on appeal to the Supreme Court



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Rutherford [2014] EWHC 1613

- *Category not covered under the Regs – disabled child, needing overnight care*
- 14 year old son = *Potoki-Shaffer* syndrome
- Severe mental & physical disabilities – 24 hour care of 2 people needed
- Both carers were also disabled



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- Rutherford cont'd
- 3rd bedroom used for respite carer twice a week and to store medical equipment
- Had to apply for DHP rather than being covered by the new legislation
- *Q - is there any real difference between adults and children who require overnight care?*



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Discrimination? Justified?

- If *discretionary* fund refuses a support application...
- No automatic right of appeal ...
- Applicants must seek leave to bring a Judicial Review in the High Court rather than have automatic, basic entitlement of appeal to tribunal



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In sum..

- ‘*Wide margin of appreciation*’ where economic & social rights are at issue (‘wobble room’)
- Not enough for the law simply to be ‘flawed’
- Applicants must show that the law is ‘*seriously flawed*’ **with**
- an ‘*unreasonable discriminatory effect*’



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Key issue..

- Appellants had failed to demonstrate that Reg B13 was ‘*manifestly without reasonable foundation*’ because..
- A. more funding had been made available since the *Burnip case*
- B. further guidance had been issued to local authorities
- C. ***Extreme financial austerity existed....***



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Equally...

- The Govt. had not acted irrationally, despite some aspects of the scheme beinga little odd ...
- E.g. assuming that non-resident carers might not need a room overnight..



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On appeal: Rutherford v SS for Work and Pensions [2016] EWCA Civ 29

2 appeals heard together:

- [A] a female victim of serious violence living in housing protected under the Sanctuary Schemes +
- the Appellants (Rutherfords)
- Claiming: The loss of part of their means-tested Housing Benefit in respect of their public sector home was ***unlawful***.
- ***Burnip decision endorsed ..***



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Reg B 13 – ‘unlawful..’?

It did not include these vulnerable people within the defined classes of persons whose position must ‘be taken into account for the purposes of the reduction in Housing Benefit.’

This omission was **unlawful discrimination under Article 14 of the European Convention on Human Rights**

Why? It was unlawful by reason of a breach by the Secretary of State of his **public sector equality duty (PSED)** under s.149 of the Equality Act 2010



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PSED?

s.149 Equality Act 2010 (in brief)

Public authorities must have due regard to the need to **eliminate discrimination, harassment, victimisation** and any other conduct prohibited by the Act

Advance **equality of opportunity** between persons sharing a **relevant characteristic** and those who do not share it

Remove or minimise disadvantages suffered

Take steps to meet need



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Key questions/concepts for policy-makers:

Is there **objective and reasonable justification** for the discrimination?

Is the discrimination **manifestly without reasonable foundation**?



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Rutherford [2016]

The courts will scrutinise carefully the **reasons** advanced by the Secretary of State in justifying 'differences in treatment'

(Dyson MR para 35)



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Rutherford cont'd

- It is insufficient for decision-maker to have a vague awareness of his legal duties
- 'Focussed awareness' of each of the duties under the relevant section
- **Potential impact** e.g. A's case (domestic violence) -
- uncertainty re discretionary payment - fund not ring-fenced

Gender-based violence...



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Update..

Rutherford and *MA* – on appeal to the Supreme Court

Currently awaiting decision, which should also consider..

- International law
- Definition of 'justification' in general.....
- Submissions of The Equality and Human Rights Commission ..



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D, R (On the Application Of) v Worcestershire County Council [2013] EWHC 2490 (Admin) (09)

- Community care – funding cuts..
- *‘These are times of considerable financial stringency..’*



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D, R (cont'd)

- Choice between remaining in own home with reduced care package or moving into residential care
- **Consultation process was key**
- Court referred to various Policy documents 2003-2009, citing value of choice, individual plans, control..
- Art 19 UN Convention on the Rights of Persons with Disabilities – access to a range of support services



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Returned to issue of resources..

Cited 5 cases (1997-2012)

'The public purse is not bottomless..'



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International law on housing welfare benefits?

ICESCR art 11(1)

'...Adequate food, clothing and housing..'

UNCRC art 27 (1) *'..standard of living..'*

27(3) *'..State Parties...provide material assistance and supportparticularly with regard to nutrition, clothing and housing.'*



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General Comments

ICESCR General Comment 3 (5th session, 1990) para 10 (nature of obligations):

Failing in obligations where .. *'any significant number of individuals is deprived of...basic shelter and housing..'*

Resource constraints..



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Recent Strasbourg cases of interest..

Gerasimov and Ors v. Russia [2014] – failure to provide housing & utilities breached ECHR (Arts 6, 13 ECHR)

Fazia Ali v. The United Kingdom [2015] = system as a whole = compliance with the ECHR (housing = 'civil right')

Tchokontio Happi v. France [2015] – failure to enforce re-housing – finance? Also, the right to a “social tenancy” = right to use property but not to acquire it = Not a “possession” within the meaning of Article 1 of Protocol No. 1



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