

HOUSING SYSTEMS: BRIEFING

No.3 / 2019:

Human Rights, Discrimination and Benefit Challenges Recent Supreme Court Decision

Key facts:

- This decision does not mean that the Bedroom Tax as a whole breaches Human Rights and is therefore unlawful – but makes it easier for those claimants who are affected by the Bedroom Tax to challenge it if they believe that in their situation the application of it breaches their Human Rights.
- Before this decision, if a claimant wished to challenge benefit regulations because they felt they breached their Human Rights, then they would have had to make that challenge through the Judicial Review process.
- Judicial Review is almost impossible to do without legal representation, and can be a lengthy process. A lawyer will almost certainly be required to take the claim. Legal Aid is almost never available for a benefit decision so it can be very expensive for the claimant unless a charity or other body is willing to fund the claim.
- This Supreme Court ruling now means that where a benefit claimant is suggesting that secondary legislation – which includes the Housing Benefit and Universal Credit Regulations – breaches their Human Rights, then they are able to make this challenge directly to the benefit authority (and can go on to appeal any decision to HM Courts and Appeals Service). They no longer have Judicial Review as the only option.
- This makes it easier for claimants to challenge secondary legislation benefit decisions that they believe breach their Human Rights.

Introduction

A recent Supreme Court ruling - *RR v SSWP* (2019) UKSC 52 - means that decision makers, Tribunals and Courts no longer have to apply the HB Regulations if doing so would breach the claimant's (or a member of their family's) Human Rights.

The judgement makes it clear that where *secondary** legislation breaches the claimant's Human Rights, a decision maker has the right to disapply a provision of that secondary legislation: indeed it appears to impose a duty on public bodies to act in such a manner.

So this is no longer an issue solely for Judicial Review.

*Secondary legislation includes the UC Regulations as well as the HB Regulations (as opposed to primary legislation such as the Welfare Reform Act ie an Act of Parliament).

Please see Appendix A for more information about the case.

See Appendix B for more information on what is primary and secondary benefit legislation.

What does this mean for claimants?

This Judgement means that benefit claimants will no longer have to take all cases for breach of Human Rights through the Judicial Review process – which can be both costly and protracted. But they can request that the relevant benefit authority consider the breach.

However, they should be aware that some claimants have already taken cases regarding the Bedroom Tax and Benefit Cap through the Judicial Review process – so a decision may have already been made in a case similar to theirs.

And it is only rules made by secondary legislation that they can challenge in this way.

Benefit rules that have already been found to breach a claimant's Human Rights

Since the onset of the Welfare Reforms back in 2013 claimants have been challenging their discriminatory impact. The majority of these challenges have been to the Bedroom Tax and Benefit Cap.

In some of these challenges – which went through the Judicial Review process - the Judge agreed that the legislation did breach the claimant's Human Rights, but that the availability of Discretionary Housing Payments provided a remedy.

However, Lady Hale, in the Supreme Court decision said:

"neither the initial decision-maker in the local authority, nor the FTT on appeal, nor the UT on appeal, was concerned with anything other than entitlement to housing benefit. They were not concerned with DHPs and had no power to take them into account."

So any decision that secondary legislation breaches the Human Rights Act but does not need to be disapplied because of the availability of DHPs, is clearly wrong – the breach is what matters.

Because a breach has already been confirmed in these cases – and the availability of a DHP is no longer a factor - any claimant in the same situation can now request a review / mandatory reconsideration of the decision.

They will need to explain that the HB Office / DWP should disapply the particular Regulation because it is in breach of their Human Rights; and quote the relevant case law that found the particular Regulation to be discriminatory (see below) giving details as to why their situation matches that case.

The HB Office / DWP should supersede the current benefit decision and re-calculate their benefit entitlement disapplying the rules. If they refuse, the claimant can appeal to a Tribunal: both are bound to follow the Supreme Court ruling.

We have made a list of which rules have already been found to be discriminatory (and which rules have been challenged and which have not) – please see below.

In the majority of cases the government have - due to the findings that the rules breach Human Rights - gone on to amend the Regulations.

So we are only left with a couple of cases: Sanctuary schemes (we are waiting to see if the government are going to change the rules), and adapted properties where it would be '*extremely disruptive and highly undesirable*' for the claimant to move, where claimants in very similar circumstances can request any Bedroom Tax reduction is removed as it has been found to breach their Human Rights.

Please see standard letters in Appendix C.

Other Benefit rules that have not yet been considered

There may well be other benefit rules governed by secondary legislation that claimants believe breach their Human Rights, where no such decision has yet been made.

In such cases the claimant can ask the HB Office / DWP to review / reconsider the decision: the claimant no longer has to go through the Judicial Review process. The claimant will need to explain why they believe the application of the rule in their case breaches Human Rights. And if you consider the cases below you will see that this is no easy task.

The decision maker will then have to make a decision on whether the Regulations breach the claimant's Human Rights or not.

We would suspect that whilst this Supreme Court decision has given decision makers at Local Authorities and DWP etc the right to make that decision, in most cases decision makers will feel unable to do so, so the claimant will need to challenge their decision not to disapply the rules by taking it to an appeal tribunal.

Please see Appendix D for more information about the Human Rights Act and Article 14, which looks at discrimination and is often the Article considered when considering whether benefit legislation has breached a benefit claimant's Human Rights.

Bedroom Tax Decisions

Where a Breach has been found

Sanctuary Scheme

Any female victim of domestic violence who has been accommodated in a “sanctuary scheme” and who is deemed to be under-occupying: particularly if they have a specially adapted “panic room”. A claimant, “A” was deemed to have been unlawfully and unjustifiably discriminated against due to her sex in a European Court of Human Rights judgment on 6th November 2019. We are waiting to see if the DWP will be amending the Regulations to take account of this recent Judgement.

COMMENT: In the meantime claimants in a similar situation can challenge the application of the Bedroom Tax as it breaches their Human Rights. They should quote this decision:

J.D. and A v the United Kingdom (nos. 32949/17 and 34614/17)

Adapted property

This case involved a claimant and her adult daughter. They live in a specially constructed three bedroom property. The daughter has cerebral palsy with quadriplegia, learning difficulties, double incontinence and she is registered blind. She requires 24 hour care and support. The claimant provides full time care for her.

In this case the Judge decided that, although a move to a smaller adapted property would be the answer in most cases of under-occupancy, any move in this case would be '*extremely disruptive and highly undesirable*' for the claimant and her daughter and there would be a breach of their Human Rights. But their case failed because the Judge decided that the fact that they'd been getting DHPs - and so were not having to move - remedied the breach.

COMMENT: Although the claimant lost their case this was because of the availability of DHPs. The Judge did find that the Bedroom Tax breached their Human Rights. So any claimant in a similar position – where they can demonstrate that it would be '*extremely disruptive and highly undesirable*' for them to move – should now challenge the Bedroom Tax decision on the grounds that it breaches their Human Rights. They should quote this decision:

J.D. and A v the United Kingdom (nos. 32949/17 and 34614/17)

Child / non-dependant requiring carer

Up until the rules changed from 1st April 2017 (due to the Rutherford case) where a child or a non-dependant requires a bedroom for a carer (who is unpaid and doesn't live in the household) to stay overnight on a regular basis.

R(on the application of Daly and others) (formerly known as MA and others) v SSWP (2016) UKSC 58

Couples needing separate bedrooms due to disability needs

Up until the rules changed from 1st April 2017 (due to the Carmichael's case) a couple who were affected by the Bedroom Tax but who can demonstrate to the HB Office / DWP that they needed to sleep in separate bedrooms due to disability needs.

R (on the application of Carmichael and Rourke) v SSWP (2016) UKSC 58

Where no breach of Human Rights was found

COMMENT: Any family affected by the Bedroom Tax for the reasons detailed below will probably find that, if they challenge the Bedroom Tax decision on the grounds that it breaches their Human Rights, their case is refused unless their situation is significantly different.

If their circumstances are different, then it may be worth appealing because a breach of Human Rights might be found.

Access to a child with disabilities

This case involved a father who had access to his severely disabled son, who is a wheelchair user and needs help with all aspects of daily living. Dad lived in a two bedroom house and was affected by the Bedroom Tax. The Supreme Court judgement in 2016 found that there was no “*proper basis for challenging the HB and DHP structure on equality grounds.*” Their decision was that the need for the extra bedroom was not directly connected to his son’s disability. So they decided there was no breach of Human Rights.

R (on the application of Daly and others) (formerly known as MA and others) (Appellants) v Secretary of State for Work and Pensions (Respondent)

Shared Care of Child

This case involved a couple with shared care of their children. The Judge decided that in their case if they had to move to smaller accommodation where all their children could no longer live with them, that would not, in itself, be a breach of their right to family life. The Judge decided that a failure to make provision for shared residence could involve or amount to a violation of Article 8 of the European Convention on Human Rights, but only in exceptional circumstances – and this case was not one of them.

R (Cotton & Ors) v Secretary of State for Work and Pensions & Ors

Use of bedroom to store disability equipment

This case involved a father and daughter who lived in a three bedroom property and who used the third bedroom to store disability related equipment. The Judge decided that their need for an additional *bedroom* was not connected, or not directly connected, to their/their family member’s disability.

R (on the application of Daly and others) (formerly known as MA and others) (Appellants) v Secretary of State for Work and Pensions (Respondent)

Use of bedroom by hoarder

This case involved a claimant with significant mental health problems including obsessive compulsive disorder who lived in a three bedroom property; he did not sleep in any of his bedrooms which were all full of papers that he had accumulated. The Judge decided that his need for additional *bedrooms* was not connected, or not directly connected, to his disability.

R (on the application of Daly and others) (formerly known as MA and others) (Appellants) v Secretary of State for Work and Pensions (Respondent)

Benefit Cap Decisions

Where a Breach of Human Rights has been found

Carers

Up until to the rules changed on 7th November 2016 (due to the case below) carers ie those entitled to Carers Allowance (or a Carer Element in their UC).

This High Court Judgment ruled that imposing the Benefit Cap on carers *“is not lawful because it amounts to indirect discrimination which is not objectively justifiable.”*

Hurley & Others v Secretary of State for Work And Pensions [2015] EWHC 3382

Where no breach of Human Rights was found

COMMENT: Any family affected by the Benefit Cap for the reasons detailed below will probably find that, if they challenge the Benefit Cap decision on the grounds that it breaches their Human Rights, their case will be refused unless their situation is significantly different.

If their circumstances are different, then it may be worth appealing because a breach of Human Rights might be found.

Lone parent with child aged under two years old

A Supreme Court decision ruled that *“the discrimination faced by lone parents of young children subject to the benefit cap is not 'manifestly without reasonable foundation' “* and that therefore the application of the Benefit Cap in such cases is not a breach of Human Rights.

R (on the application of DS and Others) v SSWP (2019) UKSC 21.

Victims of domestic violence

It was found that the differential impact on men and women of the Benefit Cap was not manifestly without reasonable foundation, so there was no breach.

R (on the application of SG and others (previously JS and others)) (Appellants) v Secretary of State for Work and Pensions (Respondent)

Appendix A: Background

It all started with the Carmichaels' appeal against the Housing Benefit Office's decision that they had a "spare" bedroom and so were subject to the Bedroom Tax. R (on the application of Carmichael and Rourke) (Respondents) v Secretary of State for Work and Pensions (Appellant).

That bedroom was used by Mrs Carmichael as her medical condition meant that she had to sleep in a hospital bed which could not be accommodated in the same bedroom that Mr Carmichael slept in. The Carmichaels won at First Tier Tribunal (FTT), then there followed a series of appeals including about 130 similar cases going to FTT (but which were stayed - ie put on hold - until this latest Supreme Court decision).

Eventually in March 2017 the DWP amended Regulation B13 of the Housing Benefit regulations 2006 to allow an additional bedroom for people who had a clear medical need to sleep in a separate room from their partner. However the Regulations were not applied retrospectively, meaning that Housing Benefit reduced by the Bedroom Tax prior to 1st April 2017, stayed reduced.

Meanwhile a separate but related issue was being taken through the appeals process, initially by the Carmichaels, then taken up at Supreme Court stage by an appellant in one of the other similar cases. This issue was to do with whether a Tribunal can over-ride or "disapply" what secondary legislation states, where to follow that wording would mean the claimant is being discriminated against. The regulation had already been found to discriminate against disabled people - hence the change in the law.

The reason this issue arose was because, when the secretary of State for Work and Pensions (SSWP) appealed against the FTT decision in favour of the Carmichaels, the Upper Tribunal stated that the FTT had made their decision by wrongly "reading words into" the Housing Benefit regulations. Confusingly the UT simultaneously replaced the FTT decision with a different positive decision for the Carmichaels- which was that their HB should be recalculated removing the Bedroom Tax because not to do so would be discriminatory under the Human Rights Act (HRA). The SSWP appealed against this to the Court of Appeal.

What was the outcome?

The case was taken to the Supreme Court and the five judges ruled unanimously that the UT had been right: a Tribunal does have the power to over-ride a part of secondary legislation when it is discriminatory under the HRA :

"There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the Human Rights Act. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The Human Rights Act is an Act of Parliament and its requirements are clear."

Note that there is a difference in this respect between primary legislation (eg Acts of Parliament such as the Welfare Reform Act 2012) and secondary legislation, in that there is provision in the Human Rights Act for exceptions to the rule for primary legislation , but not secondary.

The judgment also stated, confirming that the appellants in these cases could have their Housing Benefit decisions made before 1st April 2017 revised:

"A decision-maker must find that a claimant who is unjustifiably discriminated against is entitled to the housing benefit they would have received if the discrimination had not occurred and that to do otherwise would be acting in a manner which section 6 of the HRA declares to be unlawful. "

The judges also ruled that the existence of Discretionary Housing Payments was irrelevant to whether the Housing Benefit decision was correct or not, and:

" It is for the local authority to consider whether there are any steps which they can take to recover any DHPs and if there are whether they wish to take them. "

Appendix B: Primary and Secondary Benefit Legislation

Primary Legislation:

Acts of Parliament – in benefit terms this includes:

Social Security Administration Act 1992

Social Security Fraud Act 2001

Welfare Reform Act 2009

Welfare Reform Act 2012

Welfare Reform and Work Act 2016

Which governed:

- Reducing the benefit cap to £20,000, except for £23,000 in Greater London
- Freezing certain social security benefits and certain tax credit amounts for four tax years
- Limitation to the amount of support provided by the child tax credit for families who become responsible for a child born on or after 6 April 2017
- Limiting the child element of universal credit to a maximum of two children and removing the distinction between the first and subsequent children in the rate of the child element
- Removing the work-related activity component in employment and support allowance and the limited capability for work element in universal credit
- Changes to conditionality for responsible carers in universal credit
- Replacing current support for mortgage interest payments for benefit claimants with the offer of a recoverable interest-bearing loan secured as a second charge on claimants' properties

Secondary Legislation

Secondary legislation (also called delegated legislation) is the granting of additional law-making powers to another branch of government by an Act or statute. So will include:

Housing Benefit Regulations (General) 2006

The Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006

Universal Credit Regulations 2013

Universal Credit Regulations (Transitional Provision) 2014

The Social Security (Personal Independence Payment) Regulations 2013

The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013

Employment and Support Allowance Regulations (2013)

Note: These are not exhaustive lists

Appendix C: Standard Letters

BT21: REQUEST FOR APPEAL OF SIZE CRITERIA– APPLICATION OF SIZE CRITERIA RULES BREACHES CLAIMANT’S HUMAN RIGHTS

To DWP

Date:

Dear Sir /Madam

Re: Request for an Appeal of your decision to impose size criteria

Name:

Address:

HB Ref:

I am writing to you regarding your decision to reduce my Housing Benefit due to the social housing sector size criteria rules (“Bedroom Tax”). I understand that you believe I have one or more ‘spare’ bedrooms.

I would like you to reconsider this decision on the basis that it breaches my Human Rights.

Either:

The property I live in is a ‘sanctuary scheme’. This was arranged by xxxxxxxxxxxx for my and my family’s protection. (If there is a ‘panic room’ add: One of the bedrooms in the property is a ‘panic room’.)

I therefore believe I am in the same situation as the claimant in ***A v the United Kingdom (nos. 32949/17 and 34614/17)*** - a case in which the Judge decided that the application of the Bedroom Tax was a breach of the claimant’s Human Rights on the grounds of sex discrimination.

Or:

The property I live in **has been suitably adapted/is a purpose build property** due to xxxxxxxx’s disability needs. Whilst for some families it may be possible to move to smaller suitably adapted/purpose built property, this is not so in my case **because:**

I therefore believe I am in the same situation as the claimant in ***J.D.v the United Kingdom (nos. 32949/17 and 34614/17)*** - a case in which the Judge decided that the application of the Bedroom Tax was a breach of the claimant’s Human Rights because any move would be ***‘extremely disruptive and highly undesirable’***.

As confirmed in RR v SSWP (2019) UKSC 52, you are duty bound to disapply Regulations that breach my Human Rights, and the payment of a Discretionary Housing Payment does not remedy the breach as previously thought.

I would therefore be grateful if could you revise your decision or, if you feel unable to do so, to pass this appeal to HM Courts and Tribunals Service.

Yours faithfully

UC BT12: REQUEST FOR MANDATORY RECONSIDERATION OF SIZE CRITERIA– APPLICATION OF SIZE CRITERIA
RULES BREACHES CLAIMANT’S HUMAN RIGHTS

To DWP

Date:

Dear Sir /Madam

Re: Request for a Mandatory Reconsideration of your decision to impose size criteria

Name:

Address:

Claim Ref:

I am writing to you regarding your decision to reduce my Universal Credit Housing Costs Element due to the social housing sector size criteria rules (“Bedroom Tax”). I understand that you believe I have one or more ‘spare’ bedrooms.

I would like you to reconsider this decision on the basis that it breaches my Human Rights.

Either:

The property I live in is a ‘sanctuary scheme’. This was arranged by xxxxxxxxxxxx for my and my family’s protection. (If there is a ‘panic room’ add: One of the bedrooms in the property is a ‘panic room’.)

I therefore believe I am in the same situation as the claimant in ***A v the United Kingdom (nos. 32949/17 and 34614/17)*** - a case in which the Judge decided that the application of the Bedroom Tax was a breach of the claimant’s Human Rights on the grounds of sex discrimination.

Or:

The property I live in **has been suitably adapted/is a purpose build property** due to xxxxxxxx’s disability needs. Whilst for some families it may be possible to move to smaller suitably adapted/purpose built property, this is not so in my case **because:**

I therefore believe I am in the same situation as the claimant in ***J.D.v the United Kingdom (nos. 32949/17 and 34614/17)*** - a case in which the Judge decided that the application of the Bedroom Tax was a breach of the claimant’s Human Rights because any move would be ***‘extremely disruptive and highly undesirable’***.

As confirmed in RR v SSWP (2019) UKSC 52, you are duty bound to disapply Regulations that breach my Human Rights, and the payment of a Discretionary Housing Payment does not remedy the breach as previously thought.

I would therefore be grateful if could you revise your decision or, if you feel unable to do so, to pass this appeal to HM Courts and Tribunals Service.

Yours faithfully

Appendix D: Human Rights

Copied from Equality and Human Rights Commission webpages:

The Human Rights Act

The Human Rights Act 1998 sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. The Human Rights Act came into force in the UK in October 2000.

What human rights are covered by the Act?

The Act sets out your human rights in a series of 'Articles'. Each Article deals with a different right. These are all taken from the ECHR and are commonly known as 'the Convention Rights':

- Article 2: Right to life
- Article 3: Freedom from torture and inhuman or degrading treatment
- Article 4: Freedom from slavery and forced labour
- Article 5: Right to liberty and security
- Article 6: Right to a fair trial
- Article 7: No punishment without law
- Article 8: Respect for your private and family life, home and correspondence
- Article 9: Freedom of thought, belief and religion
- Article 10: Freedom of expression
- Article 11: Freedom of assembly and association
- Article 12: Right to marry and start a family
- Article 14: Protection from discrimination in respect of these rights and freedoms
- Protocol 1, Article 1: Right to peaceful enjoyment of your property
- Protocol 1, Article 2: Right to education
- Protocol 1, Article 3: Right to participate in free elections
- Protocol 13, Article 1: Abolition of the death penalty

Articles 1 and 13

Articles 1 and 13 of the ECHR do not feature in the Act. This is because, by creating the Human Rights Act, the UK has fulfilled these rights.

For example, Article 1 says that states must secure the rights of the Convention in their own jurisdiction. The Human Rights Act is the main way of doing this for the UK.

Article 13 makes sure that if people's rights are violated they are able to access effective remedy. This means they can take their case to court to seek a judgment. The Human Rights Act is designed to make sure this happens.

What does the Act do?

The Act has three main effects:

1. You can seek justice in a British court

It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. This means that if your human rights have been breached, you can take your case to a

British court rather than having to seek justice from the European Court of Human Rights in Strasbourg, France.

2. Public bodies must respect your rights

It requires all public bodies (like courts, police, local authorities, hospitals and publicly funded schools) and other bodies carrying out public functions to respect and protect your human rights.

3. New laws are compatible with Convention rights

In practice it means that Parliament will nearly always make sure that new laws are compatible with the rights set out in the European Convention on Human Rights (although ultimately Parliament is sovereign and can pass laws which are incompatible). The courts will also, where possible, interpret laws in a way which is compatible with Convention rights.

Article 14 requires that all of the rights and freedoms set out in the Act must be protected and applied without discrimination

Discrimination occurs when you are treated less favourably than another person in a similar situation and this treatment cannot be objectively and reasonably justified. Discrimination can also occur if you are disadvantaged by being treated the same as another person when your circumstances are different (for example if you are disabled or pregnant).

It is important to understand that the Human Rights Act does not protect you from discrimination in all areas of your life – there are other laws that offer more general protection, such as the Equality Act 2010.

What the Act does do is protect you from discrimination in the enjoyment of those human rights set out in the European Convention of Human Rights. Article 14 is based on the core principle that all of us, no matter who we are, enjoy the same human rights and should have equal access to them.

The protection against discrimination in the Human Rights Act is not ‘free-standing’. To rely on this right, you must show that discrimination has affected your enjoyment of one or more of the other rights in the Act. However, you do not need to prove that this other human right has actually been breached.

What type of discrimination does the Act protect you from?

The Human Rights Act makes it illegal to discriminate on a wide range of grounds including ‘sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.

The case law relating to this right has shown that the term ‘other status’ includes sexual orientation, illegitimacy, marital status, trade union membership, transsexual status and imprisonment. It can also be used to challenge discrimination on the basis of age or disability.

Does the right cover indirect discrimination?

The courts have also ruled that the human rights protection from discrimination includes indirect discrimination. This occurs when a rule or policy, supposedly applying to everyone equally, actually works to the disadvantage of one or more groups. For example, a requirement that all employees be

over six feet tall may be indirect discrimination. Women and some disabled people will be disadvantaged and to be justified this would need to be a strict requirement for the job.

Using this right - example

A gay couple successfully used the anti-discrimination protection in the Act to receive the same treatment as a heterosexual couple in relation to the rules on the inheritance of the tenancy of a property.

What the law says

Article 14: Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.