All England Reporter/2019/November/*RR v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening) - [2019] All ER (D) 83 (Nov)

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*RR v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)

[2019] UKSC 52

Supreme Court

Lady Hale P, Lord Reed DP, Lady Black, Lord Briggs and Lady Arden SCJJ

13 November 2019

Social security – Housing benefit – Bedroom tax

Abstract

There was 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 right under the European Convention on Human Rights, where necessary to comply with the Human Rights Act 1998. The Supreme Court, in allowing the appellant's appeal, held that his housing benefit entitlement was to be recalculated without making the deduction under reg B13 of the Housing Benefit Regulations 2006, SI 2006/213, as its application would be a clear breach of the appellant's Convention rights, contrary to s 6(1) of the Act.

Digest

The judgment is available at: [2019] UKSC 52

Background

The appellant lived with his severely disabled partner in a two-bedroomed rented social housing property for which he claimed housing benefit. The local authority applied reg B13 of the Housing Benefit Regulations 2006, SI 2006/213, and decided that, because they were a couple, they were only entitled to one bedroom and so applied the 14% discount required by reg B13(3)(a).

The First-tier Tribunal (the FTT) held that that the appellant and his partner required separate bedrooms because of her disabilities, and her need to accommodate medical equipment and supplies. It further held

that the appellant had suffered discrimination as between a member of a couple with a disability and a member of a couple without disability, which could not be objectively and reasonably justified. To avoid that discrimination, the FTT held, applying the interpretative obligation in s 3(1) of the Human Rights Act 1998 (the HRA 1998), that reg B13(5)(a) should be read so as to apply either to a couple or to one member of a couple who could not share a bedroom because of the disability of one of them. The Upper Tribunal (Administrative Appeals Chamber) (the UT) allowed the Secretary of State's appeal. The appellant appealed.

Issues and decisions

(1) Whether the decision-makers in the housing benefit system had to carry on applying reg B13 in its original form or whether they had to calculate housing benefit without making the percentage deduction in cases where to do so would breach the claimants' rights under the European Convention on Human Rights.

There was 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 that was necessary in order to comply with the HRA 1998. Subordinate legislation was subordinate to the requirements of an Act of Parliament. The HRA 1998 was an Act of Parliament and its requirements were clear. It drew a clear and careful distinction between primary and subordinate legislation (see [27], [28] of the judgment).

The obligation in the HRA 1998 s 6(1), not to act in a way which was incompatible with a Convention right, was subject to the exception in s 6(2). However, that only applied to acts which were required by primary legislation. If it had been intended to disapply the obligation in s 6(1) to acts which were required by subordinate legislation, the HRA 1998 would have said so. Under the HRA 1998 s 3(2), primary legislation which could not be read or given effect compatibly with the Convention rights had to still be given effect, as had subordinate legislation if primary legislation prevented removal of the incompatibility. If it had been intended that the section would not affect the validity, continuing operation or enforcement of incurably incompatible subordinate legislation, where there had been no primary legislation preventing removal of the incompatibility, the HRA 1998 would have said so (see [29] of the judgment).

The appeal against the local authority's decision would be allowed and the appellant's housing benefit entitlement was to be recalculated without making the under-occupancy deduction of 14%. The reason for doing so was that, if the deduction were applied, there would be a clear breach of the appellant's Convention rights, contrary to the HRA 1998 s 6(1) (see [35] of the judgment).

Secretary of State for Work and Pensions v Carmichael and another [2018] All ER (D) 11 (Apr) overruled; *A-G's Reference (No 2 of 2001)* [2004] 1 All ER 1049 applied; *Mathieson v Secretary of State for Work and Pensions* [2016] 1 All ER 779 applied; *Rutherford and others v Secretary of State for Work and Pensions; R (on the application of A) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2016] All ER (D) 208 (Jan) applied; *R (on the application of Carmichael and Rourke) (formerly known as MA) v Secretary of State for Work and Pensions; R (on the application of Daly) v Secretary of State for Work and Pensions; R (on the application of A) v Secretary of State for Work and Pensions* [2017] 1 All ER 869 applied; *Francis v Secretary of State for Work and Pensions* [2006] 1 All ER 748 considered; *P (adoption: unmarried couple), Re* [2008] 2 FLR 1084 considered; *Burnip v Birmingham City Council; Trengove v Walsall Metropolitan Council; Gorry v Wiltshire Council* [2012] All ER (D) 170 (May) considered.

(2) Whether, if the housing benefit was to be calculated without the percentage deduction, account should be taken of any discretionary housing payments (DHPs) received by the claimant.

In deciding a housing benefit appeal, the FTT was not permitted to take into account any circumstances not obtaining at the time when the decision appealed against had been made. The task of the UT was the same. In remaking the decision, having set aside the decision of the FTT, it had power to make any decision which the FTT could make if the FTT were remaking the decision (see [33] of the judgment).

The initial decision had been made by the local authority, applying the size criteria. At that stage no question of DHPs could have arisen. Neither the initial decision-maker in the local authority, nor the FTT on appeal, nor the UT on appeal, had been concerned with anything other than entitlement to housing benefit. They had not been concerned with DHPs and had had no power to take them into account. Accordingly, the initial decision had not been correct. It was for the local authority to consider whether there were any steps which it could take to recover any DHPs and, if there were, whether it wished to take them (see [33], [34] of the judgment).

Decision of Upper Tribunal (Administrative Appeals Chamber) [2018] UKUT 355 (AAC) Reversed.

Richard Drabble QC and Matthew Fraser (instructed by Leigh Day) for the appellant.

James Eadie QC and Edward Brown (instructed by the Government Legal Department) for the Secretary of State.

Dan Squires QC and Chris Buttler (instructed by Equality and Human Rights Commission, Manchester) for the Equality and Human Rights Commission, as intervener.

Martin Chamberlain QC, Tom Royston and Jennifer MacLeod (instructed by Herbert Smith Freehills LLP) for Liberty, the Child Poverty Action Group and the Public Law Project, as interveners.

Karina Weller - Solicitor (NSW) (non-practising).