Building dignity into the social security system[1]

Mark Simpson (School of Law, Ulster University)

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m.simpson@ulster.ac.uk ¦ http://ulster.academia.edu/marksimpson

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It is a said that an elephant is easy to recognise when you see one, but difficult to describe. I do not know the origin of this cliché, or why an elephant should be any harder to describe than any other animal. However, the description is apt to the concept of human dignity. We all know what a life in dignity looks like, or feels like. Or, perhaps more accurately, we know what it looks like when someone's dignity is being violated, what it feels like when our own dignity is violated. But the concept is less easy to define. From a legal perspective, this lack of certainty is a problem.

Chris McCrudden has done more than most to develop a clear, legally grounded definition of human dignity.[2] By basing his definition on the European Convention on Human Rights (principally articles 3

[1] This paper draws extensively on M Simpson, '"Designed to reduce people… to complete destitution": human dignity in the active welfare state' (2015) (1) European Human Rights Law Review 66

and 8), he also gives it the advantage of a measure of judicial weight. McCrudden proposes that protection of dignity requires that four conditions be met. The state must prohibit inhuman and degrading treatment, ensure its citizens' ability to satisfy their essential needs, protect individual autonomy and protect group identity and culture. It is arguable that meeting all four of these conditions is to some extent dependent on the citizen having a minimum level of economic resources. However, in the short time available I intend to focus on the second, the ability to satisfy essential needs. This seems to me to be the element most dependent on a certain level of income and therefore most closely linked to social security entitlements.

What, then, are essential needs? Human rights law is clear that when we talk about essential needs, we are not merely talking about survival needs – those things that are absolutely required to stay alive and in reasonable health. Rather it extends to those goods and services necessary to enjoy something recognisable as a normal lifestyle in the society concerned. For example, article 11 of the International Covenant on Economic, Social and Cultural Rights includes a right to food. This is not just a right to the number of calories necessary to stay upright all week, but to a *culturally appropriate* diet.[3] Now, whether in 2016 a culturally appropriate diet in the UK still includes a roast dinner on a Sunday I am not sure, but I am sure we will all have our own idea of what sort of diet is necessary for a reasonably normal lifestyle. Of course, this vision may be more prescriptive for members of some religious or cultural groups than for others.

When we turn from international to UK law, a relatively clear legal statement of what things constitute essential needs is available. This is thanks to a judicial review of the level of support provided by the Home Office to asylum seekers, which was brought by Refugee Action in 2014. Refugee Action argued that [4] the cash or voucher allowance supplied was insufficient to enable the asylum claimant to live with dignity in accordance with European law, and this was accepted by the court.[5] Four broad categories of essential needs can be identified in the judgment. The first takes in housing-related costs including furniture, council tax and utility bills. These are covered for asylum seekers by the Home Office. The next category – food, clothing, toiletries, essential travel, means of communication with the emergency services and the education and socialisation of children – consists of those things the Home Office takes into account when calculating the cash or voucher allowance awarded. The third category consists of things the Home Office *does not* take into account, but which the court held are in fact essential needs. These are cleaning products, formula milk, nappies, some non-prescription drugs and a minimum of social participation. A final category contains a small number of things the court thought *might* also be essential needs, but on which it did not take a firm position, so that the Home Office retains discretion whether to take these into account or not.

This judgment is also important to those of us with an interest in social security law. In the judicial review of the household benefit cap it was observed that the immigration and asylum legislation

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[2] C McCrudden, 'Human dignity and judicial interpretation of human rights' (2008) 19(4) European Journal of International Law 665

[3] Committee on Economic, Social and Cultural Rights, 'General comment 12: the right to adequate food (article 11)' (E/C.12/1999/5, Geneva: United Nations, 1999)

[4] *R (on the application of Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin)

[5] Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers

serves as a legal destitution threshold.[6] The *Refugee Action* case does not tell us exactly where this threshold is, but it does tell us that the amounts the Home Office was paying to asylum seekers in 2014 are below it. For a lone parent with two children, this was £149.86 per week. I focus on a household with children not only because this is a *Child* Poverty Action Group conference, but because the European Convention on Human Rights is not a very useful tool for establishing a right to a cash benefit for adults-only households. It has more potential to be used when children are affected.

We can compare the income a lone parent on benefits would receive with the destitution threshold established in *Refugee Action*. In 2014, the combined income from jobseeker's allowance, child tax credits and child benefit would have been £220.50 – below the poverty line, but comfortably above the destitution threshold, below which essential needs could not be met. Things become more problematic when sanctions are brought into the equation. David Webster argues that the UK sanctions regime is "deliberately designed to reduce people… to complete destitution."[7] This assessment is supported by the figures. Subject to a sanction, our example lone parent would have an income of just £148.80 – *below* the figure that the *Refugee Action* judgment tells us is not enough to meet the family's essential needs and protect them from destitution. A strong case can therefore be made that a claimant subject to a sanction would not have sufficient income to protect the dignity of the household. We need not rely solely on McCrudden's definition of dignity to reach the conclusion that this represents an unacceptable level of income. Returning to the judicial review of the benefit cap, the Supreme Court judgment states that reduction of benefit to a level that makes it impossible to satisfy the essential needs of children would be a "manifestly unreasonable" and therefore unlawful interference with the claimant's rights under the European Convention.

Our concern here, of course, is not only with whether the social security system protects dignity, but with how dignity might be "built in" to the system. If we look to the devolved regions, we can see that both Scotland and Northern Ireland are doing what they can to mitigate the impact of some of the UK government's recent reforms on claimants, including around sanctions. Here in Scotland, the Scottish Welfare Fund can provide crisis grants to people subject to JSA sanctions, whereas the old social fund could not. However, this is about all the Scottish government can do at present. Conditionality, including the sanctions regime, is and will remain a reserved matter. One area to watch may be what use might be made of Scotland's new power to top up reserved benefits – we have heard a lot of optimism today about the potential of this new competence and it will be interesting to see if Holyrood is able and willing to use it to help sanctioned claimants. In Northern Ireland, meanwhile, the maximum duration of a sanction is 18 months, compared to three years in Great Britain, and a dedicated helpline is being set up to help sanctioned claimants prepare an appeal or request a hardship payment. Perhaps more significantly, the region's Social Security Agency imposes far fewer sanctions than does DWP in Great Britain.

Ultimately, these measures are just tinkering at the edges. If we really want a social security system that protects dignity, we need to protect people from such dramatic drops in income. Returning one last time to our lone parent example, if a hardship payment is awarded following the sanction, household income increases from £148.80 to £191.82. Still a low income, but now above the

[6] *R (on the application of SG) v Secretary of State for Work and Pensions* [2014] EWCA Civ156

[7] D Webster, 'Independent review of jobseeker's allowance (JSA) sanctions for claimants failing to take part in back to work schemes: evidence submitted by Dr David Webster' (London: CPAG, 2014)

£149.86 found to be inadequate. For a social security system that truly protects of dignity, and if we are going to persist with something like the current system of conditionality, I would argue that sanctions for all claimants should be changed from withdrawal of benefit to a percentage reduction. But as a minimum, to ensure human rights compliance, the rules must be changed so that a claimant with children *automatically* receives a hardship payment on the imposition of a sanction. That is not to dismiss the criticisms made by Peter Dwyer about the merits of conditionality:[8] I share many of his concerns. But if we look at sanctions as the missing judicial review following the 2012 welfare reforms,[9] I believe this is the best line of attack.

[8] Dwyer's address to the conference drew on findings reported in S Wright and ABR Stewart, 'First wave findings: jobseekers' (York: Welfare Conditionality, 2016)

[9] Since the Welfare Reform Act 2012, there have been judicial reviews of unpaid 'workfare' placements, the household benefit cap and the 'bedroom tax' – *R (on the application of Reilly) v Secretary of State for Work and Pensions; R (on the application of Wilson) v Secretary of State for Work and Pensions* [2013] UKSC 68; *R (on the application of SG and others) (previously JS and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; *Rutherford and others v Secretary of State for Work & Pensions and A v Secretary of State for Work & Pensions* [2016] EWCA Civ 29