Article 14 discrimination in state benefit cases: trends and forecasts

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'The duty of States parties to protect the vulnerable members of their societies assumes greater rather than less importance in times of severe resource constraints.'[1]

UN Committee on Economic, Social and Cultural Rights, General Comment No 3

Introduction

1. There are no enforceable economic, social or cultural rights in the UK. Although the UK has ratified ICESCR it has not been incorporated into domestic law and the ECHR is of course primarily concerned with civil and political rights.

2. Therefore it is generally uncontroversial that there are no rights to state benefits or social security in the UK. The attempts that have been made to infer such rights under ECHR have largely failed.

3. Nonetheless, there have still been a large number of challenges brought to various aspects of the benefits system. Mostly these have been on grounds derived from the common law, EU law, the public sector equality duty or Article 14 ECHR discrimination. As is clear from the summer 2015 budget and the Welfare Reform and Work Bill 2015/16, the program of reform to the UK social security system is likely to remain a political reality for some time to come and doubtless the legal challenges will also continue.

4. In the event that the HRA is repealed or substantially modified the common law standards of ultra vires and the principle of legality are likely to develop apace but as their application tends to be very case specific they are not discussed further here. EU law is also outside the scope of this short paper but is another area where major changes can be anticipated in the coming years, particularly in relation to benefits for EEA nationals. On the other hand the law regarding the public sector equality duty, contained in s.149 Equality Act 2010, seems to have

[1] *General Comment No 3*

become fairly settled, at least in terms of the relevant principles.[2] It is also probably fair to say that in the field of state benefits at least the relevant public authorities now routinely carry out equality impact assessments, although, somewhat controversially, not in relation to the cumulative impact of contemporaneous changes to the system.

5. It is perhaps in the area of Article 14 ECHR discrimination where judicial disharmony is most sharply edged. Below is a short account of where the law may soon be travelling in that context.

6. Article 14 ECHR states:

"The enjoyment of the rights and freedoms set forth in this Convention 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".

7. In *Clift v United Kingdom* the Grand Chamber applied Art 14 and stated that (at para [60]):[3]

"It should be recalled in this regards that the general purpose of Article 14 is to ensure that where a State provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified".

8. It is well established that Article 14 does not require a substantive breach of one of the other Articles. However:

- The facts must be within the ambit of one of the other Articles.
- The discrimination alleged must be on the ground of a status recognised by the Article.
- If discrimination is shown then the burden shifts to the Defendant to show that the rule is justified as pursuing a legitimate aim and that it is proportionate.

[2] See R(Bracking) v. SSWP [2013] EWHC 897
[3] No. 7205/07

Ambit of one of the Articles

9. It is generally accepted that most state benefit challenges engage Article 1 Protocol 1, the right to peaceful enjoyment of one's possessions. Note however that Lord Reed considers this less settled than most, commenting in *SG* [2015] UKSC 16 (the benefits cap case) that at least in relation to the decision to cap a benefit the applicability of A1P1 is not straightforward. It may be that the Secretary of State does not concede this point quite so readily next time, should there be one.

10. There may also be arguments available that the alleged discrimination falls within other Articles, most notable Article 8 or in relation to the 2 child rule for example, Article 9 ECHR (religious freedom). In light of the decision in *SG* there may now be some utility in alleging discrimination within the scope of Article 8 as it may permit the Court to have regard to the UN Convention on the Rights of the Child (CRC) when analysing whether the measure is justified.

Categories of discrimination

11. There are three categories of discrimination under Article 14:

1. Direct discrimination
2. Indirect discrimination[4]
3. *Thlimmenos* discrimination[5] - i.e failing to treat differently persons whose situations are significantly different

12. Collectively these fall under a single principle: as Elias LJ at said *in AM (Somalia)*:

"[l]ike cases should be treated alike, and different cases treated differently. This is perhaps the most fundamental principle of justice."[6]

[4] E.g *DH v Czech Republic* (2008) 47 EHRR 3)
[5] *Thlimmenos v Greece (2001) 31 EHRR 15*
[6] AM (Somalia) [2009] EWCA Civ 634 at [34]

13. However, for the purposes of state benefit cases it may not matter how the alleged discrimination is characterised as the approach to justification is likely to the same, at least in the vast majority of cases (see Dyson in *R(MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13 at 46).

'Status' under Article 14

14. The courts have taken a fairly broad approach to the meaning of "other status".

15. In *(AL) Serbia*, Lady Hale commented that "[i]n general, the list [in Article 14] concentrates on personal characteristics which the complainant did not choose and either cannot or should not be expected to change".[7] Lord Neuberger broadened this to include a person's status as homeless person.[8] Other examples include a person who has chosen a particular country to live in[9] and a former employee of the KGB.[10]

16. Lord Wilson recently observed that it "is clear that, if the alleged discrimination falls within the scope of a Convention right, the ECtHR is reluctant to conclude that nevertheless the applicant has no relevant status, with the result that the inquiry into discrimination cannot proceed."[11]

17. In that case he confirmed that Cameron Mathieson's status under Article 14 was "that of a severely disabled child who was in need of lengthy in-patient hospital treatment and that, in comparison with a severely disabled child who was not in need of lengthy in-patient hospital treatment, application to Cameron of the 84-day rule discriminated against him contrary to article 14."[12]

Justification

18. The Supreme Court has spent quite a lot of time in the last couple of years discussing the law regarding proportionality. The definitive statements as to what is required of the domestic

[7] *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434
[8] *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] AC 311
[9] *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173
[10] *Sidabras and Dziautas v Lithuania* (2004) 42 EHRR 104).
[11] *Mathieson v. So DWP* [2015] UKSC 47 at [22]
[12] Ibid at [19]

courts when considering proportionality are set out in *Bank Mellat v. HM Treasury* (*No 2*) [2013] UKSC 38. Lord Reed set it out as follows [at 74]:

"it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter ....In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

19. However, in A1P1 matters which concern social policy specific standards have been developed.

20. In *Stec v United Kingdom* (2006) 43 EHRR 47 the Strasbourg Court said in the (oft quoted) paragraphs:

"51. A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

52. The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in

the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".'

21. This has been taken to mean that the "manifestly without reasonable foundation" test applies to all social security cases irrespective of the ground upon which the alleged discrimination is said to be based:

"It seems clear from Stec, however, that the normally strict test for justification of sex discrimination in the enjoyment of the Convention rights gives way to the 'manifestly without reasonable foundation' test in the context of state benefits."[13]

22. The same test was applied by Lord Neuberger (with whom Lord Hope, Lord Walker and Lord Rodger agreed) in *RJM*[14], which concerned the denial of income support disability premium to rough sleepers. Lord Neuberger said at paragraph 54:

"policy concerned with social welfare payments must inevitably be something of a blunt instrument, and social policy is an area where a wide measure of appreciation is accorded by the ECtHR to the state (see para 52 of the judgment in Stec 43 EHRR 1017). As Lord Bingham said about a rather different statute, "[a] general rule means that a line must be drawn, and it is for Parliament to decide where", and this "inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial" - *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] 2 WLR 781* , para 33.

23. Lord Neuberger went on to say that it was not possible to characterise the views taken by the executive as 'unreasonable', and concluded [57]:

'The fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an

[13] Baroness Hale in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18 at [19]
[14] *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311

arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable.'

24. Notably, in *MA* the Master of the Rolls, Lord Dyson, observed that Lord Neuberger's comments in *RJM* "came quite close" to saying that all that the Secretary of State has to show is that his policy is not irrational."[15]

25. That said, it should be remembered that "the fact that the test is less stringent than the "weighty reasons" normally applied ... does not mean that the justifications put forward for the rule should escape careful scrutiny. On analysis, it may indeed lack a reasonable basis",[16] or be based on a "fallacy" which "defied everyday experience."[17]

The beginning of the end for the 'manifestly without reasonable foundation' test

26. From the passages cited above it can be seen that thee distinct but related issues account for the test and its application in state benefit cases:

    1. The wide margin of appreciation that Strasbourg affords the UK and other states in relation to its social security provisions;

    2. The intrinsic value of having general rules or "bright lines";

    3. The respect the courts are required to display towards the democratic legitimacy and institutional competence of the legislature.

27. It is arguable that the force behind each of these as explanations or justifications for the rule is waning, at least in respect of the first two.

Margin of appreciation

[15] Ibid at [80]
[16] Baroness Hale in Humphreys paragraph 22
[17] Lord Hoffman in *G (A Child) (Adoption*) [2008] UKHL 38 at [18].

28. First, as noted by Lord Wilson in *Mathieson* at [25], "the very concept of a "margin of appreciation" is inapt to describe the measure of respect which, albeit of differing width, will always be due from the UK judiciary to the UK legislature."

29. Related to this, it now seems fairly clear that the 'manifestly without reasonable foundation' test the test is only applicable to the first stage of the four stages of the proportionality exercise, namely the broader policy choice of "whether the objective of the measure is sufficiently important to justify the limitation of a protected right", and the all important final stage ,will be determined by "asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved", the test which is otherwise of general application in Convention jurisprudence (see Lord Mance in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill,* Re Supreme Court, 09 February 2015 at [44-52]).[18]

30. Although "that does not mean that significant weight may not or should not be given to the particular legislative choice even at the fourth stage", it is potentially of profound importance as the high threshold test will not apply to the precursor questions, namely:

(2) whether the measure is rationally connected to the objective;

(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and

(4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

31. In particular, and in light of recent decisions, it seems the Court may be more receptive to evidence that the measure in question is unlikely to contribute to the achievement of the objective, at least to the extent with which the Secretary of State maintains it will.

[18] Notably, these points were not argued in SG but Baroness Hale nonetheless observed that the 'manifestly without reasonable foundation' test was considered to be of more limited application that had been conceded by the parties in that case (at [209 & 210]).

32. In cases which concern measures that are in large part justified by the anticipated financial savings this loosening of the test may result in the court paying closer attention to the externalities which result from their implementation – for example see Baroness Hale when evaluating the savings made by the benefit cap (*SG* at [194]). Plainly this will be a feature of any future challenge to the new cap.

33. The restriction in the application of the test may also affect how the courts approach the consideration of alternative sources of support or assistance the availability of which is said to contribute towards the justification of the cut, reduction or cap in question.

34. In *Morris* it was decided that a discriminatory measure is no less discriminatory simply because there are other means by which the adverse treatment might be ameliorated: "[a]n incompatibility remains an incompatibility whatever other forms of recourse are or become available".[19]

35. However, in *MA* the Court of Appeal were persuaded that the fact that Discretionary Housing Payments were ostensibly available for some of those affected by the removal of the subsidy meant the removal was justified. Notably, the opposite conclusion was reached in *Burnip*.

36. In *Mathieson* the availability of NHS services in lieu of parental services was considered by all the Supreme Court judges to be "irrelevant". Indeed the issue, which was at the heart of the Secretary of State's case on justification, was dealt with in a single line [47 & 55].

Deference

37. Lord Neuberger said this in *Rotherham MBC v. SoS BIS* [2015] UKSC 6:

"61 The courts have no more constitutionally important duty than to hold the executive to account by ensuring that it makes decisions and takes actions in accordance with the law. And that duty applies to decisions as to allocation of resources just as it applies to any other decision. However, whether in the context of a domestic judicial review, the Human Rights Act 1998 , or EU law, the duty has to be exercised bearing in mind that the executive is the primary decision-maker, and that it normally has the information, the contextual

[19] *Morris v. Westminster CC* [2006] HLR 8 at 30-32

appreciation, the expertise and the experience which the court lacks. The weight to be given to such factors will inevitably depend on all the circumstances.

62 The importance of according proper respect to the primary decision-making function of the executive is particularly significant in relation to a high level financial decision such as that under consideration in the present case. That is because it is a decision which the executive is much better equipped to assess than the judiciary, as (i) it involves an allocation of money, a vital and relatively scarce resource, (ii) it could engage a number of different and competing political, economic and social factors, and (iii) it could result in a large number of possible outcomes, none of which would be safe from some telling criticisms or complaints.

65 Nonetheless, a court should be very slow about interfering with a high level decision as to how to distribute a large sum of money between regions of the UK. But the degree of restraint which a court should show must depend on the purpose of the allocation, the legal framework pursuant to which the resources are allocated, and the grounds put forward to justify the allocation. The line between judicial over-activism and judicial timidity is sometimes a little hard to tread with confidence, but it is worth remembering that, while judicial bravery and independence are essential, the rule of law is not served by judges failing to accord appropriate respect to the primary policy-making and decision-making powers of the executive.

93 That consideration is relevant to these appeals, since the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. It is therefore necessary for the court to give due weight to the considered assessment made by those institutions. Unless manifestly without reasonable foundation, their assessment should be respected."

38. In *SG* Lord Reed stressed that Parliament had explicitly considered and approved of the cap by affirmative resolution and cited Lord Sumption in *Bank Mellat* at 44 that the court's "constitutional function call for considerable caution" before holding unlawful something which is within the "ambit of Parliament's review." Lord Reed then cited the words of Lord Bingham in *R (Countryside Alliance) v Attorney General [2007] UKHL 52; [2008] AC 719* , para 45:

"The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament."

39. On the other hand Baroness Hale's view in *SG* was that they were not concerned with moral or political judgements but legal ones [160]:

"Therefore, even in the area of welfare benefits, where the court would normally defer to the considered decision of the legislature, if that decision results in unjustified discrimination, then it is the duty of the courts to say so. In many cases, the result will be to leave it to the legislature to decide how the matter is to be put right."

40. Having considered the evidence Baroness Hale's conclusions on justification disclosed no obvious judicial deference to the views of Parliament but the considerable analytical skills of a judge [229]:

"Viewed in the light of the primary consideration of the best interests of the children affected, therefore, the indirect discrimination against women inherent in the way in which the benefit cap has been implemented cannot be seen as a proportionate means of achieving a legitimate aim. Families in work are already better off than those on benefits and so the cap is not necessary in order to achieve fairness between them; saving money cannot be achieved by unjustified discrimination; but the major aim, of incentivising work and changing the benefits culture, has little force in the context of lone parents, whatever the age of their children. Depriving them of the basic means of subsistence cannot be a proportionate means of achieving it."

41. It is of course in the essence of discrimination law to resist the excesses of a majoritarian system, no matter how much consideration it has given to the measure in question. Indeed, as observed by Lord Hope in *G (A Child),* the more controversial a measure proves to be in the legislative process the greater the risk that it might be discriminatory and it "is for the courts to see that does not happen."[20]

[20] *G (A Child) (Adoption)* [2008] UKHL at 48

42. There might also be limits however to the extent that *every* decision made in connection with a particular policy measure must be approached with the degree of caution espoused by Lord Neuberger in *Rotherham*. For example in *MA* it was argued that whilst the court should be relatively deferential in respect of the "general policy" choice that tenants in social housing should not have more space than they need, the detailed decisions taken in the implementation of that choice should be subjected to the ordinary "fair balance" proportionality test. It is well within the competence and constitutional role of the court to test and examine the finer detail of legislative scheme in a way that parliamentarians may not be so readily able to do. The argument was unsuccessful in the Court of Appeal but it remains to be seen what the Supreme Court make of it when *MA* is heard in spring 2016.

43. In any event it seems the courts are becoming more willing to hear evidence and make findings about the facts in cases that concern policy decisions and state benefits. In *SG* the Supreme Court requested certain statistical evidence to be provided to it and in the final analysis the facts about the numbers of capped single parents of children under 5 who were able to secure employment in order to escape the cap was of some significance in the judicial deliberations [56-8], [74].

44. *Mathieson* is another good example. In addition to the evidence regarding Cameron Mathieson's circumstances, the Supreme Court was also influenced markedly by evidence in the form of a survey conducted by a charity which was said to be "spearheading a campaign" against the measure [31]. The results of the survey suggested that disabled children in hospitals continued to need considerable care from their families and concluded that the justification for stopping their Disability Living Allowance after 84 days was unproven [47]. The contrast with the decision of the Court of Appeal, which considered the same evidence, is stark ([see paragraph 34 at [2014] EWCA Civ 286]).

Bright line rules

45. Another tension in the case of *Mathieson* is reflected in the relief granted. The Court declined to grant any relief beyond that which was required to meet the violation of Cameron Mathieson's rights. Although it was recognised that "the court's decision will no doubt enable many other disabled children to establish an equal entitlement", it was accepted that it will not always follow that every termination of support after 84 days would breach the

child's rights and therefore the Secretary of State ought to be afforded an opportunity to take steps other than the abrogation of the rule in order to avoid violating the rights of other disabled children [49].

46. This conclusion was not dissimilar to a result that Laws LJ had said in the Court of Appeal would "abolish the brightline rule in favour of ad hominem approach".[21]

47. Obviously there are likely to be significant limits to how far this approach will be allowed to develop in light of the costs and uncertainty involved but it might allow for the worst of the "hard cases" referred to by Lord Bingham in *Animal Defenders* to escape the consequences of being on the wrong side of the line. Notably, whilst agreeing with Lord Wilson's conclusions, Lord Mance, with whom Lord Clarke and Lord Reed agreed, felt it necessary to distance himself somewhat from Lord Wilson's approach that bright lines were only lawful "within reason" [at 51].

48. Of particular note in this respect, the Supreme Court is now likely to be hearing several cases in which different Claimants will maintain that they represent a "precise class of person"[22] that ought to have been exempted from the bedroom tax, including women in sanctuary regimes and grandparent carers of disabled children.[23] This may require the Court to consider the merits of a number of different classes being exempted as regards a more general rule which is ameliorated by the availability of DHPs.

Relevance of unincorporated treaties

49. In *JS* it was not in dispute that:

"the Convention rights protected in our domestic law by the Human Rights Act can also be interpreted in the light of international treaties, such as the UNCRC , that are applicable in the particular sphere."[24]

[21] Ibid at [38].
[22] as per Laws LJ at 53 in Divisional Court
[23] *R(A) v.SSDWP and R(SR) v. SSDWP* granted permission to appeal to the CA [2015] EWCA Civ 772 on an expedited basis so that they may be heard by SC at the same time as MA (insofar as necessary).
[24] Lord Reed at [83]

50. By way of example Maurice Kay said in *Burnip* that:

"If the correct legal analysis of the meaning of art.14 discrimination in the circumstances of these appeals had been elusive or uncertain (and I have held that it is not), I would have resorted to the CRDP and it would have resolved the uncertainty in favour of the appellants. It seems to me that it has the potential to illuminate our approach to both discrimination and justification."[25]

51. It is also fairly clear that the CRC, for example, will be relevant in the "illumination" of children's rights and questions about interference with their parents' right to respect for their family life.[26] In particular Article 3 of the Convention has been relied on in a number of different cases. Article 3 states:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

52. It is clear that the requirement to treat the best interests of the child as a primary consideration is more than traditional public law obligation to have regard to a material consideration. Instead it required a more structured decision making process as set out in *FZ (Congo) v SSHD* [2013] 1 W.L.R. 3690 at 10:

(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR ;

(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order

[25] *Burnip v Birmingham City Counci*l [2012] EWCA Civ 629; [2013] PTSR 117 at [22]
[26] Lord Reed at [86]. Lord Hughes at

to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

53. Important aspects of this obligation remain unresolved, including:

(i) whether it is legitimate to treat as a primary consideration the best interests of children generally or only the ones directly affected by the measure in question.[27]

(ii) the extent to which the Court will consider authoritative the General Comments of the Treaty Monitoring Bodies like the UN Committee on the CRC.[28]

54. In JS it was argued that the CRC was relevant to the consideration of justification under Article 14 and under Article 8. That aspect of the claim was lost on the facts before the Court of Appeal – there "was ample evidence that the Secretary of State did have regard to the interests of children as a primary consideration".[29]

55. In the Supreme Court that finding was reversed. Lords Kerr, Canworth and Baroness Hale all agreed that Article 3(1) of the CRC had not been complied with as the best interests of the children had not been treated as a primary consideration.

56. In the *SC* the Secretary of State argued that international treaties are only relevant to the content of the substantive right and are irrelevant to the question of Article 14 discrimination and/or the question of proportionality.

[27] See Lord Hughes at [153] c/f Baroness Hale at [226]

[28] Lord Carnwath considered them to be "authoritative guidance" in SG [at 106].

[29] [2014] EWCA Civ 156 at [74]

57. On both those points the Secretary of State lost. The argument therefore focussed on whether Article 3 of the CRC in particular was relevant to the question whether the benefit cap unlawfully discriminated against women in the their enjoyment of their A1P1 property rights.

58. Baroness Hale and Lord Kerr both found the CRC was directly relevant in that the best interests of the Appellants' children was obviously relevant to the question whether the benefit cap as it applied to sole parents was justified. As stated by Baroness Hale [at 218]:

> "Whatever the width of the margin of appreciation in relation to the subject matter of a measure, the Strasbourg court would look with particular care at the justification put forward for any measure which places the United Kingdom in breach of its international obligations under another human rights treaty to which we are party."

59. The majority concluded that it did not. Lord Reed said at 89:

> "In cases where the cap results in a reduction in the resources available to parents to provide for children in their care, the impact of that reduction upon a child living with a single father is the same as the impact on a child living with a single mother in similar circumstances, or for that matter a child living with both parents. The fact that children are statistically more likely to be living with a single mother than with a single father is unrelated to the question whether the children's rights under article 3(1) of the UNCRC have been violated. There is no factual or legal relationship between the fact that the cap affects more women than men, on the one hand, and the (assumed) failure of the legislation to give primacy to the best interests of children, on the other."
>
> The conclusion that the cap is incompatible with the UNCRC rights of the children affected therefore tells one nothing about whether the fact that it affects more women than men is unjustifiable under article 14 of the ECHR read with A1P1.
>
> The contrary view focuses on the question whether the impact of the legislation on children can be justified under article 3(1) of the UNCRC, rather than on the question whether the differential impact of the legislation on men and women can be justified

under article 14 read with A1P1, and having concluded that the legislation violates article 3(1) of the UNCRC, mistakenly infers that the difference in the impact on men and women cannot therefore be justified.

60. Lord Hughes, who agreed with Lord Reed, put it more starkly, and stated that that "interests of the children would be exactly the same in [the child of a male lone parent's] case, but he would have no article 14 claim to discrimination." [147]

61. Lord Canwarth also agreed with Lord Reed but "with considerable reluctance"

62. There are a number of problems with the majority's decision:

a. Lord Hughes statement that the "interests of the children would be exactly the same in [the child of a male lone parent's] case, but he would have no article 14 claim to discrimination" [147] may not be correct. If the Secretary of State were to remove the measure insofar as it applied to women then male single parents (and therefore their children, at least in the manner referred to by Lord Hughes) would have a straightforward claim for Article 14 discrimination. This is akin to the type of situation identified by Elias LJ in *AM (Somalia)* [2009] EWCA Civ 634 at [43}:

"Furthermore, in some cases, once the rule is found to operate in an indirectly discriminatory way, it may be impossible lawfully to apply the rule at all. To continue with the example of a requirement of full time work, if the rule is found disproportionately to impact on women without justification, then it is unlawful to apply it to women. However, it is difficult to see how it can thereafter be applied to that small minority of men with childcare responsibilities who are also prejudiced by the rule, since following the dis-application of the rule to women, they will now be able to claim direct discrimination on grounds of sex in circumstances where it has already been held that the rule was not justified. In such circumstances, the apparently neutral rule applying to all should not be applied at all."

b. The manner in which the majority characterised the decision was arguably the wrong way around. The majority saw no reason why the discrimination against their mother could be relevant to their children's best interest whereas Baroness Hale and Lord Kerr were surely

right to focus on the relevance of the children's best interest to the justification for the imposition of the benefit cap on single mothers. As Baroness Hale said [at 224]:

"What has to be considered is whether the measure itself, which in this case I take to be the benefit cap as it applies to lone parents, can be justified independently of its discriminatory effects. In considering whether that measure can be justified, I have no doubt at all that it is right, and indeed necessary, to ask whether proper account was taken of the best interests of the children affected by it.

c. In this regard the decision of Lord Carnwath is seemingly incomplete. Having accepted that "in considering the nature of the admittedly discriminatory effect of the scheme on lone parents, and its alleged justification, the effects on their children must also be taken into account" and that their best interests had not as a question of fact been treated as a primary consideration", he did not go on to give an opinion as to whether the cap was justified, seemingly on the basis that the CRC, and any violation of it, could play no part in the court's analysis. But absent the existence of the CRC the application of the normal ECHR principles would nonetheless have required a determination as to whether the cap was justified as it applied to sole parents, having regard to the effects on their children. One is left wondering whether Lord Carnwath's view in this regard might have made a difference to the result.

d. It is perhaps the case that the real difference between Lord Reed and Hughes on the one hand and Lords Carnwath and Kerr[30] on the other, may have been that the former saw it as inevitable that if applicable the best interest of the child test would effectively replace the "manifestly without reasonable foundation" test and this would be too profound an intrusion on the legislature's capacity to govern (see Lord Reed at [79] and Lord Hughes at 147). However, this is surely an unwarranted interpretation of the requirements of Article 3 which are plainly of a process and not substantive quality.

e. Finally, there is potentially another problem with the analysis of the majority. It is clear that Lords Reed, Hughes and Carnwath could not see a means by which the interest of the their children could be relevant to the whether or not an interference with their property is justified (Lord Reed at 89, Lord Carnwath [131], Lord Hughes, [146]) but Lord Hughes

[30] Lord Carnwath at [120] and Lord Kerr at [268]

appeared to concede that the CRC would have been relevant had the Claimants' Article 8 rights to respect for family life been engaged by the measure in question [146].

The Court of Appeal found that Article 8 was engaged and this finding was not appealed. Furthermore, it was agreed that the Appellants' case under Article 14 was put on both Article 8 as A1P1. However, only Lord Reed expressly considered (and rejected) whether the benefit cap did indeed engage Article 8 [79] whilst Lord Carnwath stated somewhat ambiguously that the Appellants' argument that they were discriminated under Article 14 in connection with Article 8 didn't add anything of substance to the claim based on A1P1.

The result is that the compatibility or otherwise of the benefit cap with Article 14 taken with Article 8, with explicit reference to the best interests of the children, remains somewhat unclear. This is likely to be in issue in the event that the proposed reduction in the cap is challenged.

63. Interesting in *Mathieson* Lord Wilson limited his conclusion on the CRC issue to the observation that the Article 14 breach "would harmonise with [although not be based on] a conclusion" that Conrad Mathieson's best interests had not been treated as a primary consideration.

64. In any event and in the meantime we are left with the situation described by Carnwath at [130]

"In each of these cases, it can plausibly be argued that the court was using the international materials to fill out, or reinforce, the content of a Convention article dealing with the same subject matter. They can be justified broadly as exercises in interpretation of "terms and notions" in the Convention, consistently with the *Demir* principle."

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