

Social Security Salami Slicing: What's Left to Cut?

Jamie Burton (Doughty Street), Sarah Clarke (PLP) and Michael Spencer (CPAG)

Introduction

“Austerity measures must respect the principle of equality and scrupulously avoid discrimination. They should be accompanied by the simultaneous adoption of measures to mitigate the effect of the crisis on the most vulnerable.” Navi Pillay, UN High Commissioner for Human Rights, Statement to the General Assembly (October 2012).

1. The current Government was elected on a promise to cut £12 billion from the social security budget. Detailed plans were announced post-election in the July 2015 Summer Budget and legislation has been published in the form of the Welfare Reform and Work Bill ('the Bill').
2. Social security is an area in which the domestic and European courts have traditionally been reluctant to intervene with policy decisions and have tended to accord the State a high margin of appreciation.¹ Nevertheless, recent cases have shown the importance of ensuring that cuts to social security are implemented in a way which:
 - a. does not unjustifiably discriminate against protected groups, such as women² or the disabled;³
 - b. complies with the UK's obligations under international law, such as those which protect children and the disabled;⁴
 - c. complies with the duty under s149 of the Equality Act 2010 to have due regard to the need to eliminate discrimination and promote equality of opportunity;⁵
 - d. complies with common law principles and where relevant is within the *vires* of existing legislation.⁶
3. The Government has published a memorandum (the 'Memorandum') stating that in its view the Bill complies with the European Convention on Human Rights (ECHR), the UN Convention on the Rights of the Child (UNCRC), the UN Convention on the Rights of Persons with Disabilities

¹ See for example, *Stec v United Kingdom* (2006) 43 EHRR 1017at [52] and *Humphreys v HM Revenue and Customs* [2012] UKSC 18 at [15].

² *R(SG and Others) v Secretary of State for Work and Pensions* [2015] UKSC 16

³ *Burnip v Birmingham City Council* [2012] EWCA Civ 629; [2013] PTSR 117; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47

⁴ *Ibid.*

⁵ *R(Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345

⁶ *R(Reilly and Wilson) v Secretary of State for Work and Pensions* [2013] UKSC 68.

(UNCRC), the UN Convention on the Elimination of Discrimination against Women (CEDAW), the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD) and the International Covenant on Economic and Social Rights (ICESR).⁷

4. This paper considers whether the proposals as currently drafted are lawful and specifically whether certain measures in the Bill comply with domestic and international law.

The Welfare Reform and Work Bill

5. The Bill contains a series of wide-sweeping changes to social security, including:
 - a. Lowering the benefit cap threshold and varying it between London and the rest of the UK (estimated saving by 2020-21: £500 million).
 - b. A four year freeze on most working age benefits (£4 billion).
 - c. Abolishing the Family Element of Child Tax Credit and Universal Credit for families with children born after April 2015 (£675 million)
 - d. Limiting entitlement to Child Tax Credits and Universal Credit to the first two children from April 2017 (£1.4 billion).
 - e. Abolishing the Work-Related Activity Component of Employment and Support Allowance (the “WRAC”) and the Limited Capability for Work Component in Universal Credit (£640 million).
 - f. Increasing conditionality for responsible carers of pre-school children in Universal Credit (£0 million).
 - g. Replacing Support for Mortgage Interest with Loans for Mortgage Interest (£2 billion).
6. In addition, the Government also intends to make the following changes by way of regulations:
 - a. Reducing the income thresholds for tax credits and Universal Credit work allowances (which governs how much income someone can receive before their maximum tax credit entitlement is reduced) (£3.4 billion);
 - b. Increasing the tax credits withdrawal rate (taper) from 41% to 48%, so that tax credits reduce more sharply as income increases (£245 million);

⁷ *Memorandum to the Joint Committee of Human Rights on the Welfare Reform and Work Bill*
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/458886/welfare-reform-and-work-bill-2015-human-rights.pdf

- c. Freezing the local housing allowance and restricting entitlement to housing benefit for young people aged 18-21 from April 2017 (£50 million).
7. In this paper we will consider four of the more controversial measures in the Bill, which together account for £2.5 billion or around 20% of the cuts: (i) the reduced benefit cap; (ii) the two child limit; (iii) the abolition of the WRAC and (iv) the increase in conditionality for responsible carers of pre-school children.

The reduced benefit cap

8. Clauses 8 and 9 of the Bill will reduce the benefit cap to £23,000 per annum for families (or £15,410 for single claimants) in London and £20,000 for families (or £13,400 for single claimants) outside of London.
9. The benefit cap was introduced under the Welfare Reform Act 2012. Ss96 and 97 limit the total amount of prescribed welfare benefits a claimant can receive to the average weekly earnings of a household in Great Britain net of tax and National Insurance, currently set at £500 per week (or £26000 p.a.) or £350 per week (£18,200 p.a.) for single claimants. There are prescribed exemptions, for example for pensioners, claimants who are in work (defined as being eligible to claim working tax credit) or claimants receiving disability living allowance or in the support group for employment and support allowance.⁸ However, children's benefits (including child benefit and child tax credit) are included within the cap and lone parents with young children (who are currently exempt from having to seek work) are not exempted.
10. The Bill will:
 - a. remove the link with average earnings, setting instead setting the cap according to arbitrary figures in primary legislation;
 - b. grant the Secretary of State a power to lower or increase the benefit cap taking into account the national economic situation and any other matters the Secretary of State considers relevant;
 - c. prescribe for the first time in primary legislation the benefits that must be included within the cap.

⁸ Regulations 75F and G of the Housing Benefit Regulations 2006 (as amended).

Article 14

11. In *SG and Others*⁹ a divided Supreme Court came very close to finding that the regulations introducing the current benefit cap breached Article 14 ECHR in conjunction with Article 1 Protocol 1.
12. The Claimants were two single mothers and their children who had fled domestic abuse. It was not disputed that the regulations disproportionately affect lone parents, who are overwhelmingly women. The claimants also claimed the regulations discriminated against them as victims of domestic violence. The dividing issue was whether this discriminatory treatment could be justified.
13. The Court was split three ways. Lady Hale and Lord Kerr gave strongly worded dissenting judgments which would have allowed the appeal. They gave particular weight to what they saw as the Government's failure, in introducing the cap the Government to comply with its obligations under the UNCRC to treat children's best interests as a primary consideration. Lord Kerr said "it cannot be in the best interests of the children affected by the cap to deprive them of the means of having adequate food, clothing, warmth and housing" [269]. Lady Hale noted that the children "suffer from a situation which is none of their making and which they themselves can do nothing about (per Lord Kerr at [227]).
14. Seen in this light, the Government's justification for the discriminatory effects did not stack up:

"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." [229]
15. Lords Reed and Hughes for the majority found that the Government had had the best interests of children in mind when introducing the cap. Further, the UNCRC was not incorporated into UK law and could not be relied upon in a case involving sex discrimination under the Human Rights Act. The courts should not interfere lightly with the decisions of Parliament on issues of socio-economic policy and the Government's aims were legitimate. Although the short-term savings are a small proportion of the total welfare budget, they would nevertheless contribute towards deficit reduction, and the cap is also intended to change behaviour over the longer term.

⁹ *R(SG and Others) v Secretary of State for Work and Pensions* [2015] UKSC 16

16. Lord Carnwath provided the swing vote. He agreed with Lady Hale and Lord Kerr that the Government had not shown compliance with the UNCRC. Children's benefits (such as child benefit and child tax credit) are intended for the children, not the parent:

"The cap has the effect that for the first time some children will lose these benefits, for reasons that have nothing to do with their own needs, but are related solely to the circumstances of their parents." [126]

17. However, following post-hearing submissions, he agreed with Lord Reed and Lord Hughes that the UNCRC could not be relied on in a case involving sex discrimination under Article 14 of the European Convention. As a result, the appeal was dismissed by a majority, with Lord Carnwath stating his hope that the Government will reconsider the effect on children when it reviews the cap, but leaving such issues to "the political, rather than the legal arena" [133].

Justification

18. Far from heeding Lord Carnwath's advice to review the cap's effect on children, the Government has pressed ahead with legislation to make it more severe, albeit on the strength of a pre-election manifesto commitment.

19. Reducing the cap will intensify its effect on families already capped and increase the numbers affected, while removing one of the Government's main justifications for the cap - the link with average earnings. The Government estimates an increase in 90,000 families affected, although ironically perhaps the proposed cuts to tax credits and ESA may reduce this number.¹⁰ Claimants who are affected will have fewer options to avoid it. Shelter estimate that even families with one child will struggle to find housing in cheaper areas of London such as Tottenham and Catford. Families who need four bedrooms to be adequately housed will find that their housing benefit will no longer cover the cost of private sector rent in any part of the country.¹¹ These and other effects could potentially shift the proportionality assessment of the majority in *SG and Others* (see Lord Reed at [67]-[77]).

20. Evidence from the first two years of implementation suggests that overall savings to the public purse were over-estimated, and that the cap may even have presented a net cost to date, when the cost of Discretionary Housing Payments (DHP's) and the pressures on local authority housing budgets are taken into account.¹² The reduced cap is justified in the interests of increasing work incentives and

¹⁰ *Welfare Reform and Work Bill: Impact Assessment on the Benefit Cap*, available <http://services.parliament.uk/bills/2015-16/welfare-reform-and-work/documents.html>

¹¹ Citizens Advice, *Citizens Impact Assessment: Lowering the Benefit Cap* (2015) [https://www.citizensadvice.org.uk/Global/CitizensAdvice/welfare%20publications/Benefit%20Cap%20Impact%20Assessment%20\(1\).pdf](https://www.citizensadvice.org.uk/Global/CitizensAdvice/welfare%20publications/Benefit%20Cap%20Impact%20Assessment%20(1).pdf)

¹² Children's Society, Gingerbread, CPAG, *Joint Parliamentary Briefing on the Benefit Cap* (2015).

creating 'more fairness' between families in and out of work. As families in work already can receive substantial social security benefits, for example housing benefit, and/or tax credits, to top up wages, this concept of fairness is necessarily a 'broad political concept'.¹³

21. The Bill seeks to insulate the cap from further challenge by setting in primary legislation the list of benefits that must be included. The intention is no doubt to ensure that any challenge must be brought by way of a declaration of incompatibility under s4 Human Rights Act 1998, rather than as previously by way of a challenge to the regulations. Nevertheless, a new challenge might focus on the Secretary of State's failure to exercise his new power to increase the level of the cap under proposed new section 96A(1) (inserted by clause 8 of the Bill) or to exempt certain groups under existing s96(3)(c) of the Welfare Reform Act 2012.

Article 8

22. In relation to current cap, the Court of Appeal in *SG* found:

"having regard to the sums which are available to the appellants on a weekly basis, we are in total agreement with the Divisional Court that the circumstances of these three families (including MG's family) do not approach the level of destitution. Accordingly we conclude that the appellants fall well short of demonstrating a breach of article 8." [105].

23. That analysis may change once evidence emerges of the effects of the reduced cap on destitution. The move to Universal Credit also increases the likelihood of destitution in larger families, as claimants can lose income directly intended for subsistence as well as housing costs.

Conclusion

24. The reduced cap shifts the proportionality assessment and so is more likely to lead to a breach of Article 14. In order to comply with the UNCRC (as recommended by Lord Carnwath in *SG*), the Government will need to (i) conduct a full review of the impact on children of both the current cap and the proposed reduction and (ii) consider whether to take child benefit and/or child tax credit as paid to lone parents out of the list of benefits included in the cap.

The two child limit

25. Clauses 11 and 12 will limit entitlement to child tax credits or the child element of universal credit to the first two children in a household. Parents will not be entitled to claim for any third or subsequent

¹³ [94] of the Divisional Court judgment in *JS and Others v SSWP* [2013] EWHC 3350 (QB).

children born after April 2017, unless the child is disabled (in which case they will only be able to claim the disability element and not an additional child element) or a prescribed exception applies. The Government has not yet published regulations setting out these exceptions, but has controversially proposed that they include an exemption for children born as a result of rape.¹⁴

Articles 14

26. As with the benefit cap, the two child limit will disproportionately affect women as mothers. Article 16(e) of CEDAW guarantees women's rights:

"to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights".

27. As the Government acknowledges in the Memorandum, it may be argued that the measure discriminates against large families and that large families have status for the purpose of Article 14.

28. The proposal would, on its face, discriminate against members of religious groups who have a conscientious objection to the use of contraception or abortion, such as Catholics or Muslims, contrary to Article 14 read with Article 9 of the ECHR. Similar laws in other countries used for the purpose of population control, for example laws denying benefits to families with more than two children in some Indian states, are often criticised for discriminating against women and religious minorities and interfering with reproductive rights.¹⁵

Article 8(1)

26. The Court of Appeal in *SG* found that Article 8 was engaged by the benefit cap [85] but that it would be *"a premature and pessimistic assumption to conclude that in some instances family life would not be able to continue"* [100].

27. Given that the two child limit involves an attempt by the state to discourage poor families from having more than two children, whilst impinging on the ability of larger families to support their children, it is likely to engage Article 8(1).

28. According to the 1968 proclamation of the International Conference on Human Rights:

"Parents have a basic human right to determine freely and responsibly the number and the spacing of their children."

¹⁴ Summer Budget 2015, available <https://www.gov.uk/government/publications/summer-budget-2015>

¹⁵ The Hunger Project, 'Nine Facts about Two Child Norm' <http://thp.org/files/Coalition%20fact%20sheet-%20final.pdf>

UNCRC

29. Unlike the benefit cap, it cannot be said that two child rule will benefit the children affected directly, as their parents cannot avoid it by moving into work. Children can only be said to benefit to the extent that parents decide not to have them in the first place. However, the Government argues the savings afforded by the Bill as a whole in reducing spending on welfare “will allow the Government to protect expenditure on education, childcare and health and the improvements to the overall economic situation will have a positive impact on children and their best interests”.

Justification

30. The Government says the two child rule is motivated by:

*“a desire to ensure families in receipt of benefits are encouraged to make the same financial decisions as families supporting themselves solely through work, to ensure fairness for the taxpayer and to secure the economic recovery of the country”.*¹⁶

31. Further:

*“The current benefits structure, adjusting automatically to family size, removes the need for families supported by benefits to consider whether they can afford to support additional children. This is not fair to families who are not eligible for state support or to the taxpayer.”*¹⁷

32. This justification can be criticised on a number of grounds.

33. Firstly, this takes the concept of 'fairness' developed to justify the benefit cap to absurdity. Rather than fairness between families in work and those out of work, the two child limit seeks to ensure fairness between families receiving benefit (whether or not they are in work) and families “who are not eligible for state support”. The problem with this concept is that the Government is in effect talking about the same family. If a family with two children is not eligible for tax credits (i.e. because their income is too high – currently about £36,400) but “cannot afford” a third child, then on the birth of their third child they will by definition become a family that is eligible for tax credits, and thus fall onto the other side of the fairness equation.

34. The Government might say it wants to ensure fairness between families who “choose” to have a third child and those who do not (and therefore object to having to pay for them). As an

¹⁶ Memorandum, [41].

¹⁷ *Welfare Reform and Work Bill: Impact Assessment of Tax Credits and Universal Credit, changes to Child Element and Family Element* (2015).

objective, however, that would come dangerously close to discriminating directly against children in larger families, as well as interfering with parents' rights to choose the number of their children. The Government haven't sought to justify the policy on population control grounds and there is no suggestion that they are concerned to ensure that families have fewer children generally. The Impact Assessment assumes there will be no behavioural response to the policy, which means any money saved will be at the expense of those children whose parents make the 'wrong' choice.

35. Secondly, the policy assumes that, rape aside, women always have a free choice over whether or not to have a child. The Government has confirmed that only a conviction for rape will be considered adequate evidence, but women may have a third child for a number of reasons and the level of 'choice' may vary greatly. Consider for example the following hard cases: women in abusive relationships who feel pressured into having a third child; women who object to the use of contraception or abortion; women who use contraception in good faith but the contraception fails; women who decide they can afford a third child but whose income is reduced a result an unforeseen event (e.g. the death or serious illness of a parent, redundancy, breakdown of relationship due to domestic violence). These will need to be carefully considered in regulations.
36. Thirdly, the policy punishes the child for the parent's supposed transgression of having a third or subsequent child. This sits badly with the concept of fairness or with the best interests principle under the UNCRC.
37. Fourthly, the measure promotes perverse incentives, i.e. a very strong incentive for larger families to split up and a very strong disincentive for new couples to re-partner if they already have children. There is also an incentive to abort a third pregnancy. The Government does not appear to have considered these impacts at all.
38. Finally, unlike the benefit cap, once a third child is born there are no practical options for mitigation, short of a significant increase in income, splitting up the family or putting the children into care. Parents cannot avoid the policy by moving house or moving into work. There is no mitigating fund equivalent to DHP's for hard cases. Where children become destitute, parents may be able to rely on local authority payments under s17 of the Children Act 1989, but no additional funding has been made available from central government to allow for this.

Conclusion

39. Introducing what is, in effect, a blunt population control measure on the poor raises serious human rights concerns. If the clauses are passed, any regulations will need to include extensive exceptions protecting *inter alia* women, family integrity and religious freedom. The Government

will also need to conduct a thorough assessment of the policy's impact on the best interests of children and consider how to protect children from destitution.

The abolition of the Work Related Activity Component (WRAC)

40. Clauses 13 and 14 will abolish the payments made to claimants who are found to have limited capability for work by reason of illness or disability. This is called the "work -related activity" component for employment and support allowance (ESA) and the "limited capability for work" component for universal credit and amounts to £29.05 per week. As a result, claimants who are found unfit for work following assessment will receive the same amount as JSA claimants or those in universal credit found fit to work, i.e. £73.10 per week.

Article 14

41. The European Court of Human Rights in *Thlimmenos v Greece* (2001) 31 EHRR 15 ruled that:

"The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different." [38]

42. In *Burnip* the Court of Appeal found on this basis that the housing benefit regulations discriminated against certain groups of severely disabled people, while in *Mathieson* the Supreme Court found that the rules preventing payment of DLA whilst in hospital discriminate unlawfully against severely disabled children.

43. The abolition of the WRAC removes the additional support relied on by disabled claimants who are found to have limited capability for work. Claimants placed in the WRAG are a distinct identifiable group and are therefore likely to have a status which falls under Article 14. The question therefore is whether the disproportionate impact on disabled people can be justified.¹⁸

Justification

32. The Government's Impact Assessment states:

"This measure is intended to provide the right incentives and support to enable those who have limited capability, but who have some potential for work to move closer to the labour market and when they are ready, back into work."

¹⁸ *Mathieson* at [24].

44. It is worth stressing that a claimant with limited capability for work has already passed a medical assessment which finds it is “*not reasonable to require him to work*”.¹⁹ Further, for anyone on ESA working fewer than 16 hours at minimum wage, the cut does not increase work incentives at all, because their income is already discounted under the permitted work rule.²⁰
45. Another, possibly unintended, consequence is that it places an ESA claimant in a worse position than a JSA claimant when it comes to benefit sanctions. Currently an ESA claimant who is sanctioned (for example for non-participation in the Work Programme) loses all of the main ESA component (£73.10 p/w) but is still able to rely on the payment of WRAC, in recognition of the fact that ESA claimants are by definition vulnerable. Now, sanctioned ESA claimants will receive nothing and, unlike JSA sanctions ESA sanctions are open ended until the person carries out the relevant action responsible for the sanction being imposed.
46. As in *Mathieson*, a key issue will be the extent to which claimants can show that they have additional disability-related needs above those of JSA claimants which will not be met because of the withdrawal of £29.05 per week. Whether the Government has complied with the public sector equality duty will also be relevant.²¹

Public Sector Equality Duty

34. The equality assessment in relation to the impact on the disabled is so far limited to the following statement:

“The majority of those affected are in families where someone describes themselves as disabled, (under the Equalities Act 2010 definition). This is because those who report themselves as having a disability are more likely to qualify for those benefits which are affected by the policy change. Disability status on the survey is self-reported and so does not necessarily compare directly to benefit eligibility but is the best evidence available in the context to assess the impact on disabled people.”

47. It is highly questionable whether this is sufficient to meet the obligation under s149 Equality Act 2010. There is no recognition of the similarities between the limited capability for work test and the test for disability under the Equality Act 2010 which means that the vast majority of those found not fit to work will be, by definition, classed as “disabled”. There is no attempt to consider the severe effects the policy will have on the ability of disabled people to meet their basic needs

¹⁹ S8 Welfare Reform Act 2007.

²⁰ Schedule 7, paragraph 5 ESA Regs

²¹ *R(MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13 at [98] and [99].

or on how they will cope with the move into work. There is no attempt to consider less harsh or blunt policies or ones that might mitigate its effects. As McCombe LJ noted in *Bracking*:

“In the absence of evidence of a “structured attempt to focus upon the details of equality issues” (per my Lord, Elias LJ in Hurley & Moore) a decision maker is likely to be in difficulties if his or her subsequent decision is challenged.”

Conclusion

48. As a minimum, the Government will need to conduct a full impact assessment of the effect of the cut on disabled people who have limited capability for work and consider other less severe alternatives.

Full conditionality for carers of pre-school children

49. Clause 15 will subject responsible carers of three and four year olds who are claiming universal credit to full work-related conditionality. A responsible carer is someone who is either a lone parent or a member of a couple who has been designated by the couple jointly as responsible for a child (i.e. a “stay-at-home” parent).²²

50. The Bill will amend ss 20 and 21 of the Welfare Reform Act 2012 so that:

- a. Responsible carers whose children are **aged under one** will continue to be **exempt** from all work-related requirements;
- b. Responsible carers whose children are **aged 1** (rather than the current ages 1 and 2) will be subject only to a **work-focused interview requirement**. This is a requirement to attend regular work-focused interviews at the job centre with a view that to making it more likely for the claimant to attend work or better paid work.
- c. Responsible carers whose children are **aged 2** (rather than the current ages 3 and 4) will be subject only to a **work preparation requirement**. This is a requirement to take particular specified actions for the purpose of making it more likely that the claimant will obtain paid work or better-paid work, such as attending skills assessment or participating in training.
- d. All responsible carers whose children are **aged over 2** (rather than the current age of 5 or over) will be subject to **all work-related requirements**. This includes requirements to be actively available for and seeking full time work, to conduct at least 35 hours of

²² S19(6) Welfare Reform Act 2012.

work search per week and to attend unpaid work placements through programmes such as the Work Programme.

Article 14

51. The measure is likely to disproportionately affect women because:

- a. Responsible carers are overwhelmingly women. 92% of lone parents are women.²³ 84% of partners who stay at home to care for children are women.²⁴
- b. A woman who is a responsible carer of a child under five may be required to choose between caring for her young children and searching for a job, attending an unpaid work placement or taking up work that conflicts with her childcare responsibilities.
- c. Women are therefore disproportionately more likely to be sanctioned as a result of the measure. While they can appeal against the sanction, this is of scant comfort for the intervening period of destitution.²⁵

52. Age 5 is important because it is the age children first attend primary school. Currently, responsible carers with children aged between 5 and 13 who claim universal credit can restrict their hours of job search and availability for work during school hours.²⁶ Responsible carers whose children are aged 3 and 4 will obviously be unable to benefit from this protection. So whether adequate childcare will be made available and whether the regulations will be amended so that responsible carers can restrict their hours of job search around affordable and available childcare will be crucial.

53. The Government has promised that up to 30 hours free childcare will be made available to “working” parents from September 2017, but the hours will not cover school holidays and will not be available to parents who are not working (but who will be required to spend 35 hours searching for work). There may also be problems with implementation, as currently half of local authorities say they cannot meet the Government’s current childcare commitments.

²³ SG and Others at [2].

²⁴ <http://www.bbc.co.uk/news/magazine-27626510>

²⁵ *R(Reilly and Wilson) v SSWP* [2013] UKSC 68, per Lords Neuberger and Toulson at [64]: “*The ability to appeal against a notice or a withholding of benefits (to a First-tier Tribunal of the Social Entitlement Chamber under section 12(2) of the Social Security Act 1998) is a form of protection. However, it is necessarily retrospective and, in practice, it may be small comfort to a person who is faced with an immediate termination of benefit.*”

²⁶ Regulation 88(2)(b) Universal Credit Regulations 2013.

Justification

54. The Government does not expect to save any money from the change, so technically this is not a budget cut. According to the Impact Assessment, the costs of providing childcare to 3 and 4 year olds and work-focused interviews to responsible carers (average: £40m) will outweigh the savings from responsible carers moving off benefit altogether (average £25m). Work incentives mean that responsible carers who avoid conditionality by moving into work will still be entitled to roughly the same amount of benefit.

55. The Government's justification is entirely focused on the proposed economic and social benefits:

*"The main policy driver for these changes is to ensure full employment and as such the measures are within the margin of appreciation of the state in the sphere of economic and social policy. Increased numbers of the population in work is good for the economy and for those who become employed... The evidence shows that children in working households have better outcomes in academic attainment, training and future employment. Work provides a route out of poverty for families and improves children's wellbeing and life chances as fewer will grow up in workless households."*²⁷

56. Requiring responsible carers to enter full-time work at an early stage and sanctioning them for failing to do so would be likely to impact on the child's right to an adequate standard of living under Article 27 of the UNCRC. Further, Article 18 provides that "*parents... have the primary responsibility for the upbringing and development of the child*" and that the state must "*render appropriate assistance to parents and legal guardians in the performance of child-rearing responsibilities*" and ensure that children of working families can benefit from child-care facilities.

57. The Government's view is that the measure will promote the best interests of pre-school age children by encouraging both parents into work. The evidence behind this could be criticised: none of it appears to relate to children under five or looks at the impact on children of having one rather than both parents in work. The Government claims these are social issues within the margin of appreciation. As Lord Wilson pointed out in *Mathieson*:

"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" [25].

²⁷ Human Rights Memorandum, paragraph 65.

58. The UN Committee on the Rights of the Child has stressed the importance of supporting parents during early childhood:

“Early childhood is the period of most extensive (and intensive) parental responsibilities related to all aspects of children’s well-being covered by the Convention: their survival, health, physical safety and emotional security, standards of living and care, opportunities for play and learning, and freedom of expression. Accordingly, realizing children’s rights is in large measure dependent on the well-being and resources available to those with responsibility for their care.”²⁸

59. If the Government is found to be in breach of the UNCRC, applying the decision of the majority in *SG* (and absent any onward appeal to Strasbourg), this would not be taken into account in considering justification of discrimination on grounds of sex.²⁹

Conclusion

60. A lot will depend on whether the childcare offer for children aged 2 and 3 is adequate and accessible to responsible carers claiming universal credit and whether the regulations allow claimants to adjust their work search and work availability requirements accordingly. So far there have been few details on this.

²⁸ UN Committee on the Rights of the Child, General Comment No. 7 (2005) at [20]

<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf>

²⁹ Per Lord Reed at [18], Lord Carnath [129]-[131] and Lord Hughes [146].