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Social security reform and the untapped potential of human rights law

Abstract

The courts have done little to ameliorate the harsh 'austerity' reforms pursued by the government since 2010, adopting a highly deferential approach towards human rights claims in the social security context. This article identifies the two key moves to achieve this result: adopting the manifestly without reasonable foundation standard of justification and treating indirect discrimination claims on suspect grounds as not 'real' discrimination claims. It shows nonetheless the untapped potential of Convention rights, since even within this framework strong arguments were still available to the courts, based on the functioning of the social security system, which should have rendered two of the harshest reforms, the two-child limit and especially the benefit cap, Convention incompatible. The cap, which limits the subsistence benefits of unemployed families, is justified as a work-incentive policy, yet through Universal Credit the state also independently assesses families affected by the cap as doing all that they reasonably can to find work.

Key words: social security law; austerity; human rights; discrimination; Article 14.

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1. Introduction

Philip Alston in his UK visit as UN Special Rapporteur on extreme poverty and human rights claimed that since 2010 the government had pursued a set of social security policies that 'amount to retrogressive measures in clear violation of the country's human rights obligations' with 'great misery… inflicted unnecessarily'.[1] As is increasingly recognised, the courts have done little over the last decade to ameliorate the misery Alston described, despite seemingly manifold opportunities in a series of high-profile cases challenging the harshest reforms, including the bedroom tax, benefit cap and, most recently, the two-child limit. In particular, the academic literature has highlighted the consequences of the decision by the courts to adopt a very lax test by employing the manifestly without reasonable foundation standard of justification in Human Rights Act 1998 (HRA) challenges to social security measures. This test which, as used, approximates non-intense *Wednesbury* reasonableness review at common law has unsurprisingly meant that it is very difficult for claimants to succeed in these cases. As a result, this literature has argued that the courts should take a more demanding approach, particularly through the adoption of a conventional four-stage proportionality test.[2] Recently, even more ambitious approaches have been canvassed, with Campbell arguing that the courts

[1] P. Alston, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights 11 October 2019', (UN A/74/493) paras 29, 11.

[2] J. Meers, 'Problems with the "manifestly without reasonable foundation test', (2020) 27(1) *Journal of Social Security Law* 12. M. Cousins, 'Social security, discrimination and justification under the European Convention on Human Rights' (2016) 23(1) *Journal of Social Security Law* 20, 40-4.

should adopt Fredman's four-dimensional model of equality,[3] which 'reveals a synergistic relationship between differing types of inequality which should point towards a more searching justification standard.'[4] Mantouvalou has gone further, arguing for an approach to the European Convention on Human Rights that can limit welfare conditionality, prevent zero-hour contracts, and protect gig-economy workers and others doing precarious work.[5]

A difficulty with these arguments, at least insofar as they seek to influence or engage with judicial decision-making in the UK, is that they seek to overturn, sometimes radically, a very deferential framework in social security cases, which far from at risk of 'crumbl[ing] away' has never been more entrenched.[6] As has been widely noticed, Lord Reed's recent judgment in *SC*, the two-child limit case, deployed some robust rhetoric about the limits of legal reasoning and the importance of 'democratically elected institutions' determining 'what is fair'.[7] Less noticed, and positively obscured by the lively reaction to *SC* and perplexing claims of 'a return to judges tying themselves in hopeless knots over indirect discrimination',[8] is that the actual

[3] S. Fredman, 'Substantive Equality Revisited' (2016) 14 *ICON* 712.

[4] M. Campbell, 'The Austerity of Lone Motherhood: Discrimination Law and Benefit Reform' (2021) 41(4) *OJLS* 1197, 1219.

[5] V. Mantouvalou, 'Welfare-to-Work, Structural Injustice and Human Rights' (2020) 83 *MLR* 929.

[6] Campbell, 'The Austerity of Lone Motherhood', above n.4.

[7] *R (SC & others) v Secretary of State for Work and Pensions* [2021] UKSC 26, [208].

[8] C. O'Brien, 'Inevitability as the New Discrimination Defence: UK Supreme Court Mangles Indirect Discrimination Analysis While Finding the Two-Child Limit Lawful' (*Oxford Human Rights Hub*, 26 July

legal arguments made by Lord Reed are almost identical to those regularly employed by the Supreme Court since *Humphreys*, decided almost a decade earlier.[9]

It was in *Humphreys* that the court made the two key moves which have determined the outcome of human rights claims in the social security context over the last decade. Not only was the manifestly without reasonable foundation test first adopted as the general standard of justification,[10] but just as importantly a sceptical, reductionist approach to Article 14 indirect discrimination claims on suspect grounds was taken: the main form of challenge to social security measures. For Lady Hale, giving the unanimous judgment of the court, the 'reality [was] that, although the rule does happen to be indirectly discriminatory… the complaint would be exactly the same if it did not discriminate between the sexes.'[11] As a result, the 'real object of the complaint' was not the suspect ground of sex, but the non-suspect ground of 'discrimination between majority and minority shared carers.'[12]

Yet, despite the pivotal importance of *Humphreys* which would indirectly impact on millions of low-income citizens, it has been barely discussed by academic lawyers.[13] This is all

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2021) available at: https://ohrh.law.ox.ac.uk/inevitability-as-the-new-discrimination-defence-uk-supreme-court-mangles-indirect-discrimination-analysis-while-finding-the-two-child-limit-lawful/

[9] *Humphreys v HMRC* [2012] UKSC 18.

[10] Ibid, [19].

[11] Ibid, [20].

[12] Ibid, [20].

[13] For an exception: M. Cousins, 'Equal treatment and objective justification under the European Convention on Human Rights in the light of Humphreys and Burnip' (2013) 20(1) *Journal of Social Security Law* 13.

the more remarkable when the political context of the case is considered: decided whilst the extremely controversial Welfare Reform Act 2012 was making its way through Parliament, containing policies including the bedroom tax and the benefit cap, which would inevitably lead to litigation in a period in which arguably 'austerity' or 'cuts' was the dominant political issue in the UK. A year earlier, 250,000 people had marched through London, in one of the biggest demonstrations in British history, protesting these policies.[14]

This neglect of the social security case law has led to a contemporary public debate that is in some respects, at least, highly misleading, with *SC* widely cited as the primary evidence that the Supreme Court has 'reformed itself'[15] and is now 'in the shallow end',[16] with the court departing from Lady Hale's 'progressive'[17] attempt to 'reimagine what the law could do'.[18] As will be shown below, Lord Reed adopted a more 'progressive' approach to indirect discrimination claims in *SC* and elsewhere than Lady Hale in *Humphreys.* In reality, the latter's lauded jurisprudence in this context amounted to taking the lead role in creating a highly

[14] 'Anti-cuts march: Tens of thousands at London protest' (*BBC*, 27 March 2011), available at: https://www.bbc.com/news/uk-128643538

[15] A. Horne, 'Has the UK Supreme Court reformed itself?' (*Prospect*, 5 August 2021), available at: https://www.prospectmagazine.co.uk/politics/supreme-court-lord-reed-reforming-itself-child-benefit-cap-law

[16] C. Gearty, 'In the Shallow End' (*London Review of Books*, 27 January 2022), available at: https://www.lrb.co.uk/the-paper/v44/n02/conor-gearty/in-the-shallow-end

[17] A. Dean, 'The government wanted to rein in the Supreme Court. Now it may not need to' (*Prospect,* 16 October 2021), available at: https://www.prospectmagazine.co.uk/politics/the-government-wanted-to-rein-in-the-supreme-court-now-it-may-not-need-to-hale-reed-prorogation

[18] Gearty, 'In the Shallow End', above n.16.

deferential approach, which foreseeably neutered the Convention and was never later repudiated, albeit in some instances an implausible dissent was registered that the application of a measure (eg the bedroom tax) to one group (women in a Sanctuary Scheme) but not the rest (including, disabled people without a transparent medical need for an extra bedroom) was manifestly without reasonable foundation.[19]

Nonetheless, whilst for the first time this article provides a clear account of the very deferential framework adopted by the courts in the social security context, highlighting the significance of the treatment of indirect discrimination claims and not just the approach towards proportionality, its primary concern is to demonstrate that even within this framework strong arguments were still available to the courts which could have shown that two of the harshest reforms of the last decade, the two-child limit and particularly the benefit cap, were Convention incompatible. The key to this approach is to focus on the nature and functioning of the social security system as a whole, and to carefully consider its implications for human rights challenges to specific social security measures. These arguments are not only of academic interest, since the Child Poverty Action Group, which supported the litigation in both cases is keen to challenge both the limit and the cap in Strasbourg.[20] The European Court of Human Rights has been less consistently deferential in the social security sphere than the domestic

[19] *R (Carmichael and Rourke) v SSWP* [2016] UKSC 58, [78].

[20] 'TWO CHILD LIMIT CHALLENGE', available at: https://cpag.org.uk/welfare-rights/legal-test-cases/two-child-limit-challenge. 'REVISED BENEFIT CAP', available at: https://cpag.org.uk/welfare-rights/legal-test-cases/current/revised-benefit-cap.

courts, as shown recently in *JD*.[21] As a result, the prospects of claimant success are reasonably good if the strongest arguments are recognised and deployed, which fully capture the harshness and distinctiveness of the limit and the cap through a thorough understanding of how the two policies interact with the wider social security system and the cumulative impact this has on users.

All of the claims challenging the limit and cap were brought by recipients of child-tax credit, with all parties, intervenors and judges agreeing that it was 'common ground that the relevant considerations are the same in each case and that… what goes for one [child-tax credits], goes for the other [Universal Credit]'.[22] This article shows that this was a serious strategic error by the claimants, and those who intervened in their support. Universal Credit (UC) is a significantly different system, far more comprehensive in scope with practically all working-age welfare recipients included, whilst placing recipients under stricter conditionality than the prior regime, which for most claimants in these cases involved support through a mix of housing benefit and income support, along with child-tax credits.

This error is clearest in respect of the benefit cap litigation where the primary justification for the cap was to incentivise work, but the cap simply crudely and unfairly reproduces the incentives that are already incorporated into the UC scheme. UC creates a notoriously strict, but also crucially individualised conditionality regime, which means that in principle at least adults who try hard to find work, as regularly assessed by a street-level

[21] *JD & A v UK* (Applications nos. 32949/17 and 34614/17), 24 October 2019, not yet reported.

[22] *R (SC & Others) v SSWP* [2019] EWCA Civ 615, [5].

bureaucrat or 'work coach', will receive the full subsistence needs benefit entitlement for their families; if they do not take all reasonable steps to find work, then they will be sanctioned with their entitlement cut. In contrast, the cap restricts social security entitlement regardless of need and whether the person is subject to the UC regime. This article argues that even within a very deferential framework of review, the courts should have found that the cap is unjustified when applied to individuals who are also within this regime. If the state assesses a family as already doing all that it reasonably can to find work, incentivising work is a manifestly unreasonable justification for interfering with their Convention rights.

In respect of the two-child limit, it is argued that recognition of the way in which UC functions could have helped to trigger a direct discrimination claim between children and adults for the purposes of Article 14. This was crucial, since, unlike the benefit cap, no claim that the limit is irrational or, given the government's aims, unnecessary is plausible, whilst the limit also saves a far greater sum of public money than the cap. As a result, the claimants needed to put forward an argument that would lead the courts to apply a relatively stringent standard of justification, which the courts have consistently refused to do in respect of indirect discrimination claims in the social security context. Any prospect of success, therefore, very largely depended on the direct discrimination claim, which also highlights the distinctiveness of the two-child limit in the contemporary European welfare state and is less likely to raise 'overreach' and particularly 'floodgate' concerns. Yet, both the Court of Appeal and the Supreme Court held that there was no analogous situation between adults and children for the purpose of this claim, pre-empting justification. This article shows that if the claim was made by

UC recipients, given the comprehensive nature of UC with both adults and children receiving the same benefit, it would have been significantly more difficult for the courts to reach this conclusion regarding the analogy test. It should also be noted that most working-age social security recipients now receive UC, with new applications for tax credits no longer possible, and so arguments based on the latter are increasingly obsolete.

This article employs an internal perspective, working with the law as it is, rather than, as with the existing legal literature in this area, taking an external view, primarily based on how the law should be. As a result, the critique below focuses on the application of the legal framework adopted by the courts, rather than on the framework itself. The methodology employed is doctrinal, but the argument rests on an understanding of how the social security system operates and affects recipients. As has been extensively discussed, over the last 40 years in the UK and elsewhere there has been 'a relentless tightening of rules, procedures and sanctions intended to encourage, assist or compel people to engage or re-engage with the labour market', with access to unemployment benefit in particular dependent on engaging in increasingly onerous and monitored activities.[23] Universal Credit exemplifies this already 'reigning paradigm of conditionality and reciprocity',[24] with conditionality intensified for the

[23] H. Dean, *Social Rights and Human Welfare* (London: Routledge, 2015), 24.

[24] A. Paz-Fuchs, *Welfare to Work: Conditional Rights in Social Policy* (Oxford: OUP, 2008), 1.

unemployed and extended to new groups, particularly the low paid self-employed and wage labourers who in the UK system had previously received tax credits.[25]

In this reigning paradigm, what matters for access to social security benefits is conscientiously searching for work (and providing the requisite supporting evidence to street-level bureaucrats), and not whether a job is actually secured. Under UC, the consequences in terms of sanctioning may be (unduly) harsh for individuals who fail to display the correct attitudes and behaviours,[26] and the system as a whole may be very far from one of 'fair reciprocity' for a host of reasons,[27] but, as long as the system is functioning according to its underlying logic, it is still in the control of all UC recipients to secure access to their full subsistence benefit entitlement. In contrast, the benefit cap is based on an expressly punitive logic, with entitlement cut regardless of the effort made to seek and find work. What matters for the purpose of the cap is not an individual's attitude or behaviour, but an outcome: have they secured employment at a level such that they will then no longer be subject to the cap. Given that nobody can secure employment alone, what is most distinctive about the cap is that it explicitly takes access to subsistence benefits outside the control of the individual and the family. Breaking with the reigning paradigm, access is now conditional on the hiring decisions of

[25] K. Puttick, 'From Mini to Maxi Jobs? Low Pay, 'Progression', and the Duty to Work (Harder)' (2019) 48(2) *ILJ* 143. C. Rowe, 'Self-employed surfers, universal credit and the minimally decent life' (2022) 42(1) *LS* 81.

[26] Welfare Conditionality Project, *Final Findings Report* (York, 2018).

[27] S. White, *The Civic Minimum: On the Rights and Obligations of Economic Citizenship* (Oxford: OUP, 2003).

employers. By elucidating the different logics underlying social security reforms of the last decade, this article should also be of interest to labour lawyers, or others, uninterested or sceptical of the value of doctrinal or court-focused scholarship.

This article proceeds as follows. First, it describes the benefit cap and discusses the litigation in the two challenges that reached the Supreme Court in 2015 and 2019. Second, it explains why the case would have been considerably stronger if made by claimants in receipt of UC rather than tax credits. Third, it outlines the two-child limit and the litigation in *SC,* along with discussion of the Strasbourg case law, particularly *JD*. Fourth, it explains why the claim in *SC* would have been stronger if argued on the basis of UC.

2. Benefit cap

The Welfare Reform Act 2012 (ss96-97) included a power to introduce a cap on household social security entitlement. The level of the cap was not specified but should 'be determined by reference to estimated average earnings' (s96(6)). The initial amount set through regulations was £26,000 for families and couples, and £18,200 for single adults without children per annum,[28] with the cap brought into force in April 2013.[29] The cap was reduced by section 8 of the Welfare Reform and Work Act 2016, with the level itself this time specified in primary legislation: for families and couples a sum of £23,000 if living in London, £20,000 if outside; for single adults with no children, £15,410 and £13,400, respectively. This revised cap, brought into

[28] The Benefit Cap (Housing Benefit) Regulations 2012, SI 2012/2994, reg 2.

[29] The Welfare Reform Act 2012 Order 2012, SI 2012/2946.

effect in November 2016,[30] was initially set at the 40th percentile wage, although working families will also have access to in-work benefits.

Households are exempt from the cap if they are entitled to working-tax credit, which for a single parent household means that the parent works for at least 16 hours per week and in the case of a couple with children that they work between them at least 24 hours per week, with one partner working for at least 16 hours per week.[31] Without children, either a single adult or one member of the couple must work 30 hours per week to receive tax credits.[32] Under UC, the exemption rules are more straightforward: a household must earn the equivalent of the minimum wage at 16 hours per week, currently £142.56 or £617.76 per month.[33] This amount is the same for both single people and couples, with or without children. A nine month grace period also applies from the point at which the income level falls below this amount under UC if it had been above this level for the prior year,[34] whilst for tax credit recipients the same grace period applies if they or their partner had been in work for the prior year.[35] The cap does not apply to people in receipt of certain disability benefits or Carer's

[30] *R (DA & others v SSWP)* [2019] UKSC 2, [7].

[31] The Working Tax Credit (Entitlement and Maximum Rate) Regulations (2002), SI 2002/2005, reg 4.

[32] Ibid.

[33] Universal Credit Regulations 2013, SI 2013/376, reg 82(1); Universal Credit (Benefit Cap Earnings Exception) Amendment Regulations 2017, SI 2017/138, reg 2(3)(a).

[34] UC Regulations 2013 (ibid), reg 82(2).

[35] Housing Benefit Regulations 2006, SI 2012/2994, reg 75E, as amended by Benefit Cap (Housing Benefit) Regulations 2012, SI 2006/213.

Allowance.[36] Capped households can apply for a Discretionary Housing Payment to help with housing costs.[37]

The government justified the cap on three grounds.[38] First, to improve the fairness of, and increase public confidence in, the social security system by setting a reasonable limit to the amount of support a non-working family could receive. Second, to achieve savings in public expenditure. Third, to provide members of potentially affected households of working age with a greater incentive to work. The 'main aim' specified in the impact assessment and the focus of the challenge in both the original and revised cap litigation was the work-incentive justification,[39] with Lord Wilson observing that the fiscal savings objective was 'scarcely… pressed' in *DA,* with equally little attention given to the first aim.[40]

The initial cap was challenged in *SG*. The claimants' main argument was that the scheme had a disproportionate impact upon lone parents, 92% of whom are women;[41] hence, the

[36] Ibid, reg 75F. UC Regulations 2013, above n.33, reg 83.

[37] Discretionary Financial Assistance Regulations 2001, SI 2001/116. DWP, 'Discretionary Housing Payments guidance manual' (Updated 1 February 2021), Annex A: Section 1: Support for claimants affected by the benefit cap.

[38] *R (SG & others) v SSWP* [2015] UKSC 16, [4]. *DA v SSWP* [2019] UKSC 2, [7].

[39] Ibid (*DA*), [8]. DWP, 'Household Benefit Cap Equality impact assessment' (October 2011), 3: 'The Benefit Cap is intended to improve work incentives'.

[40] Ibid (*DA*), [32]. 'the policy is primarily a work incentive aimed at people of working age' (R. Holmes, the DWP's lead official on the benefit cap policy, Witness Statement) quoted in *SG v SSWP* [2015] UKSC 16, [200].

[41] Ibid (*SG*), [2].

scheme was unjustifiably indirectly discriminatory on grounds of sex. A three-two majority rejected the claim, finding that the cap was Convention compatible. For Lord Reed, giving the majority judgment, the issue of justification was a narrow one: the government had to justify the differential impact of the cap on women; the government did not have to show that the policy, all things considered, was justified or sound.[42] Departing from Lady Hale in *Humphreys,* Lord Reed accepted that disparate impact on the grounds of sex constituted a genuine difference in treatment and so the claim did not have to be reframed on a non-suspect ground, such as single parent status (like main or minority carer in *Humphreys*). Nonetheless, it was 'inevitable' that any policy which impacted on families with children would differentially impact on women, given that women head the overwhelming majority of single parent families, whilst the claimants were unable to identify any alternative policy which could achieve the government's aims without the differential gender impact.[43] Lord Reed also evinced some scepticism as to the general harshness of the cap, with doubt about whether it would result in destitution,[44] whilst capped families being forced to move from expensive to cheaper parts of the county was a routine part of life for working families.[45] Finally, the cap involved 'controversial issues of social and economic policy', with the determination of these issues 'pre-eminently the function of democratically elected institutions' requiring 'the court to give due

[42] Ibid, [15].

[43] Ibid, [96].

[44] Ibid, [73].

[45] Ibid, [76].

weight to the considered assessment made by those institutions.'[46] Given that the manifestly without reasonable foundation test applied as the standard of justification in this context, then unsurprisingly Lord Reed was, as he laconically put it, 'unpersuaded' that the cap was Convention incompatible.[47]

In the challenge to the revised cap, the claimants were lone parent mothers with young children (under two in *DA* and under five in *DS*), along with the children themselves. The cojoined claim was primarily framed as *Thlimmenos* discrimination,[48] with the claimants discriminated against by being treated the same as others subject to the cap when their situation was relevantly different. Lord Wilson in the main judgment was more sympathetic to the claimants than Lord Reed in *SG*, recognising that the cap inflicted poverty on those affected and the harm this can do to children, 'negatively affecting their educational attainment, health, and happiness as well as having long-term adverse consequences into adulthood'.[49] Lord Wilson held that for 'lone parents of children all of school age, it is… obvious that the government can justify [the cap]',[50] but that there was 'clear prima facie evidence' that the two cohorts were in a relevantly different situation to parents with older children.[51] This was due to the fact that 'the extra difficulty, beyond that faced by others subjected to the cap, which

[46] Ibid, [93].

[47] Ibid, [96].

[48] *Thlimmenos v Greece* (2000) 31 EHRR 15.

[49] *DA v SSWP* [2019] UKSC 2, [34].

[50] ibid, [45].

[51] Ibid, [51].

confronts such parents in finding not only suitable work but also suitable childcare is plain'.[52] Nonetheless, the manifestly without reasonable foundation test applied.[53] As a result, by a 'narrow margin', Lord Wilson concluded that 'even the stronger [child under two] case fails', since the claimants had not 'entered any substantial challenge to the government's belief that there are better long-term outcomes for children who live in households in which an adult works'.[54]

Lord Kerr and Lady Hale dissented for similar reasons in both cases. In *SG*, Lady Hale held that it is 'much more difficult for lone parents to move into paid employment, even for the 16 hours which would take them out of the cap',[55] with the policy objective of incentivising work having 'little force in the context of lone parents',[56] although the problem is 'obviously more acute when any or all of them are under school age.'[57] Both would have made a declaration that the regulations were incompatible with the Convention rights of lone parents.[58] In *DA,* Lady Hale highlighted that 'any lone parent who has small children will face considerable difficulties in finding suitable work',[59] whilst for Lord Kerr '[o]ne can only incentivise parents to obtain work if that is a viable option' but the 'evidence… overwhelmingly

[52] Ibid.

[53] Ibid, [59].

[54] Ibid, [88].

[55] *SG v SSWP* [2015] UKSC 16, [182].

[56] Ibid, [229].

[57] Ibid, [182].

[58] Ibid, [232], [270].

[59] *DA v SSWP* [2019] UKSC 2, [145].

shows that in most cases in the *DA* and *DS* cohorts, this is simply not feasible.'[60] Both would have made a declaration that the 2016 Regulations 'are unlawful insofar as they apply to lone parents with a child or children under the age of five'.[61]

Intensified conditionality

UC was heralded as 'the biggest welfare revolution in over 60 years.'[62] It replaced six existing payments (Income Based Jobseekers Allowance, Employment and Support Allowance, Income Support, Working Tax Credit, Child Tax Credit and Housing Benefit) and aimed to simplify working-age benefits, ease the transition into employment, reduce fraud and increase incentives to 'ensure that work always pays more than being on benefit.'[63] Particularly significant was the proposal to extend welfare conditionality to the low-paid self-employed and low-paid wage labourers who had previously been eligible for tax credits, which was described by the Work and Pensions Select Committee, as 'a radical policy departure… potentially the most significant welfare reform since 1948'. In principle at least this extension of conditionality is a partial solution to one problem with Speenhamland type wage-subsidies:[64] if low-paid

[60] Ibid, [190].

[61] Ibid, [157], [197].

[62] D. Cameron, 'Official email from the PM about Universal Credit, the benefit cap and changes to housing benefit' (1 March 2012), available at https://www.gov.uk/government/news/prime-ministers-message-on-welfare-reform.

[63] Ibid.

[64] For critical discussion, see F. Wilkinson, 'The theory and practice of wage subsidisation: some historical reflections' (2001) *Radical Statistics* 77 (Spring). H. Dean conducted interviews with tax-credit recipients and concluded that whilst they relieve poverty, they 'function as a subsidy to lowpaying

workers are forced to conscientiously search for more hours or higher paid-work, since otherwise they will be sanctioned and their social security payment reduced, then this recreates the incentive to search for higher-pay, supposedly diminished though wage-subsidies, whilst it may also strengthen the incentive for some employers to pay higher-wages to limit the loss of employees.

A clear example of what the shift from tax credits to UC can mean for recipients is provided by CB, one of the claimants in the two-child limit challenge discussed below. CB, who has five children, was entitled to social security benefits considerably in excess of the cap – £516.48 per week at one point not including housing benefit, which would be sizeable in any part of the country with this number of children. She qualified for tax credits and so was able to escape the cap because she was earning on average £25 per week working from home in a 'self-employed enterprise'.[65] Yet, this virtually undiscussed 'loophole',[66] which allowed very low earning self-employed individuals to qualify for tax credits by claiming to meet the hour-

employers and perpetuate essentially exploitative terms and conditions of employment', 'Welcome relief or indecent subsidy? The implications of wage top-up schemes' (2012) 40(3) *Policy and Politics* 305, 305.

[65] *R (SC) v SSWP* [2018] EWHC 864 (Admin), [16].

[66] Closing 'all kinds of nooks and crannies in our benefits system' including those which supported 'the people who are self-employed for year after year and only earn hundreds of pounds or a few thousand pounds' was an important part of the motive behind the adoption of UC, according to Lord Freud, former Minister of State in the DWP. P. Waugh and S. Macrory, 'Freudian analysis' (*Politics Home*, 23 November 2012), available at https://web.archive.org/web/20160419004828/https://www.politicshome.com/news/uk/economy/house/67295/freudian-analysis.

threshold, is no longer available under UC: a self-employed person, like a wage-labourer, must now earn the equivalent of the minimum wage for at least 16 hours per week to escape the cap.

UC claimants are placed in one of four 'work-related requirements' (WRR) groups: subject to no WRR; a 'work-focused interview requirement' only; a 'work preparation requirement'; and subject to all the WRR.[67] Claimants who are unemployed, fit for work and neither a 'responsible carer' (eg the nominated parent in a couple) for a child under three or with 'regular and substantial caring responsibilities for a severely disabled person' will be placed in the all-WRR group.[68] A responsible carer for a child under one is exempt from the WRR, whilst with a child aged one they are subject only to the 'work-focused interview' requirement and if aged two to the 'work preparation' requirement. All recipients must sign a 'claimant commitment',[69] which for those placed in the all-WRR group will generally mean, if unemployed, being available and searching for work for 35 hours a week, as well as attending training events as directed by their 'work coach'. The number of hours will usually be reduced to 25 per week if they are the 'responsible carer' for a child aged five to 12 and to 16 hours per week if aged three or four.[70] Sanctions will be applied if the claimant commitment is broken,

[67] Welfare Reform Act 2012, s 13.

[68] Ibid, ss 19-22.

[69] Ibid, s 4(1)(e).

[70] DWP Guidance, 'ADM Work-related Requirements - Article J3', para J3058, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/963801/admj3.pdf.

with a three-tiered system depending on the severity of the breach. For higher-level sanctions (eg refusing for 'no good reason' to comply with a work-search requirement[71]) the standard allowance (ie the non-housing amount of the adult's entitlement) is withheld for three months for the first breach and six months for subsequent breaches in the following year.[72] Until 2019, a third breach would result in the benefit being withheld for three years.[73] An OECD study found that the UK had the second, after Malta, strictest job-search requirement and monitoring system amongst high-income countries.[74]

For unemployed single parents in receipt of a combination of income support and child-tax credits, the position of all the claimants in *SG* and *DA*, the rules are less stringent, but have still tightened very significantly. Until 2008, lone parents with a youngest child up to the age of 16 could claim income support, with the age threshold reduced to five in 2012.[75] From 2000 onwards, conditionality has been introduced for income support recipients, initially a work-focused interview requirement if the youngest child was aged five or above.[76] Since 2014,

[71] Welfare Reform Act 2012, s 26(2).

[72] The Jobseeker's Allowance and Universal Credit (Higher-Level Sanctions) (Amendment) Regulations 2019, SI 2019/1357. Welfare Reform Act 2012, s 26.

[73] UC Regulations 2013, above n.33, reg 102(2).

[74] H. Immervoll and C. Knotz, *How Demanding Are Activation Requirements for Jobseekers?* (Paris: OECD Publishing, 2018), 35.

[75] The Social Security (Lone Parents and Miscellaneous Amendments) Regulations 2008, SI 2012/3051, regs 2-4. Welfare Reform Act 2012, s 58(3).

[76] Social Security (Work-focused Interviews for Lone Parents) and Miscellaneous Amendments Regulations 2000, SI 2000/1926, reg 2; Social Security (Lone Parents and Miscellaneous Amendments) Regulations 2008, ibid, regs 5-10.

requirements can include work-related activity (eg training courses), with the age-threshold for the youngest child lowered to three (although unlike for UC recipients this does not include an obligation to apply for or undertake work).[77] Sanctions for failure to engage can be applied, although they are less severe (a 20% reduction until the breach is rectified).[78] When the oldest child reaches five, income support recipients are moved to Jobseeker's Allowance (JSA) and are then subject to the full work-search conditionality rules, which are now identical to those for UC recipients subject to the all-WRR.

Webster, the leading UK analyst of sanctions, refers to the period from 2010 to 2016 as the 'great sanctions drive', instigated by 'an unannounced change of policy by ministers in May 2010 to pressurise DWP [Department of Work and Pensions] staff to make more referrals for sanctions.'[79] Between 2010 and 2015, the National Audit Office found that almost a quarter of JSA claimants were sanctioned, although the rate has since decreased.[80] Adler has described this 'enhanced sanctioning regime', which applies to both UC and JSA recipients, as 'cruel,

[77] The Income Support (Work-Related Activity) and Miscellaneous Amendments Regulations 2014, SI 2014/1097, reg 2.

[78] Ibid, reg (8)2.

[79] D. Webster, *Explaining the rise and fall of JSA and ESA sanctions 2010-16* (3 October 2016), 2, available at https://cpag.org.uk/policy-and-campaigns/briefing/david-webster-university-glasgow-briefings-benefit-sanctions.

[80] National Audit Office, *Benefit sanctions* (DWP, 2016), 7.

inhuman, and degrading'.[81] There is strong evidence, albeit denied by the DWP,[82] that at least some job centres and staff felt pressurised to increase sanctioning. Some staff with low referral rates (ie front-line workers not referring possible cases of non-compliance to an Independent Decision Maker, who then decides whether to impose a sanction) were subject to performance review and possible loss of pay improvement.[83] Performance measurement was also changed to 'off-benefit flows', with a successful outcome recorded when a claimant ended their claim, regardless of whether they had entered employment or simply dropped out of the system, becoming destitute or, as reported in academic research, turning to crime.[84] Even Serco, a private contractor delivering welfare services that might have been expected to readily embrace the 'gaming' of targets, warned that the department's 'current off-benefit targets create a disconnect', with the need to focus 'on sustained job outcomes'.[85] There is now an

[81] M. Adler, *Cruel, inhuman or degrading treatment? Benefit sanctions in the UK* (Basingstoke: Palgrave Macmillan, 2018), 23.

[82] N. Couling, *Conditionality and sanctions* (DWP, 2013).

[83] N. Timmins, *Universal Credit Getting it to work better* (Institute for Government, 2020), 8.

[84] D. Finn, 'The role of jobcentres and contracted providers in the delivery of employment services and benefits' in J. Millar and R. Sainsbury *Understanding Social Security* (Bristol: BUP, 2018), 226. D.R. Fletcher and S. Wright, 'A hand up or a slap down? Criminalising benefit claimants in Britain' (2018) 38(2) *Critical Social Policy* 323.

[85] Work and Pensions Committee Written evidence submitted by Serco Limited, 'The Governance of Jobcentre Plus' (24 May 2013), available at https://publications.parliament.uk/pa/cm201314/cmselect/cmworpen/479/479vw29.htm

extensive amount of qualitative research on UC that highlights the strictness of the regime, likening it to a 'panopticon'.[86]

Disadvantaged?

As a result, given the stringency of this regime, it is important to recognise the oddity of the claimants' argument in *DA*. An unemployed single parent subject to the cap with an older child (over two or five depending on which claim) or a couple in receipt of UC would be able to point out that not only has their benefit entitlement been reduced by the cap, but that they are also subject to a notoriously demanding work-search regime, which if they fail to comply with leads to tough sanctions. Yet, according to the minority in *DA*, the benefit cap discriminates in their favour: it advantages people who may be doing all that they reasonably can to find work, as assessed by the UC conditionality regime, and still have the subsistence benefit entitlement of their family limited by the cap.

To find this claim very unintuitive it is not necessary to deny, ceteris paribus, that caring for a young child will make it more difficult to find work than for a school-aged child, or that it will be more difficult as a single parent than as part of a couple. The crucial issue that arises with the claimants' argument is to explain why when the cap cuts the benefit entitlement of two households in order to incentivise work: one which has been assessed as doing all that it reasonably can to find work by the state; the other, with a younger child, which has not been so assessed, the cap discriminates in favour of the former. Even if caring for a young child is the

[86] Fletcher, 'A hand up or a slap down?', above n.84, 338.

most important factor impeding work-search and in a great many or every case these difficulties mean that a single parent cannot reasonably be expected to find work and so the application of a work-incentive scheme is unjust or unfair, it does not follow that somebody in this position has been disadvantaged in comparison with a household that has actually been assessed as doing all that it reasonably can to find work and is also subject to the cap. At most, it looks like both households have been treated unjustly, rather than that one household has been favoured over another. Although this may not have been intended by Lord Kerr and Lady Hale, their position in *DA* implies that an out-of-work household is only legitimately entitled to the full amount of subsistence benefits if it is headed by a single parent with a young child, since otherwise the cap lawfully applies. In effect, they come close to drawing a distinction between the deserving and undeserving poor, with a single parent taking care of a young child the only genuine justification for unemployment.

The real issue, therefore, which comes into view once the cap is viewed in relation to, and interaction with, the wider UC regime is not whether a certain sub-group should be exempted, but the proportionality and, most importantly, the rationality of the benefit cap scheme itself. That is, what stands out as requiring justification is the state creating a harsh and comprehensive welfare conditionality regime, the second strictest in the OECD, and yet the state still deciding to impose a crude cap on subsistence benefit entitlement. This justificatory burden appears considerably heavier for the government**.** The issue is not, as it was misleadingly presented in both *SG* and *DA*, simply justifying the withdrawal or limiting of social security benefits in order to incentivise work and which is, for better or worse, a standard

feature of the contemporary welfare state in the UK and elsewhere. Rather what requires justification is duplicating an already strict and crucially individualised system in which sanctioning is dependent on individual action (eg failing to apply for a suitable job), with a crude cap, which means that subsistence benefits are cut even if recipients are fulfilling their 'claimant commitment' and assessed by the state as doing all that they reasonably can to find work.

Direct interference

This argument, which attacks the principle of a crude benefit cap, set at a level below subsistence benefits, when combined with an individualised conditionality regime, resembles a *Wednesbury* reasonableness claim, since it is the duplicative and therefore irrational nature of the cap combined with its harsh consequences, rather than these effects, in and of themselves, which is the crux of the objection. It is unlikely that a common law claim would be viable, since following the Welfare Reform and Work Act 2016 both the principle and the level of the cap is contained in primary legislation. The common law has also barely featured in human rights challenges to social security measures over the last decade, likely reflecting the lack of any appetite on behalf of the judiciary to pursue a common law approach in this area.

The argument advanced here is also available under the Convention. Applying a standard four-stage proportionality test, the argument is very strong. First, the cap appears unnecessary or, as it is sometimes put, 'a less intrusive measure could have been used',[87] given

[87] *Bank Mellat v Her Majesty's Treasury* (No 2) [2013] UKSC 39.

that the UC conditionality regime already fulfills more fairly and effectively the work-incentive justification. If the government judges the UC regime insufficiently stringent, then it can always strengthen the sanctioning system or increase the work-search demands (the geographical range of the mandated job-search etc). Second, the cap fails to strike a fair balance, since it cuts subsistence benefits for families, including children, even if the responsible adult is doing all that they reasonably can, as independently assessed by their 'work coach', to attain work. The logic of the benefit cap as applied to UC claimants is effectively that of the nineteenth century workhouse: the poor should be punished simply for being poor, rather than because of any personal fault, if subsistence benefits are withheld even when the adult is independently judged as doing their best to find work. It is difficult to think of another example in contemporary human rights law which so transparently fails to strike a fair balance as the cap when applied to families in this position: in full compliance with a regime, which the UN Special Rapporteur described as imposing 'draconian sanctions for even minor infringements' and as 'instilling a fear and loathing of the system'[88] in claimants. Both the necessity and fair balance points are sufficiently strong that they meet a 'manifestly without reasonable foundation' standard or other very lax test.

The primary difficulty with this argument is whether the cap interferes with a Convention right so as to require justification and the application of a standard four-stage proportionality test. When Strasbourg has held that the Convention imposes obligations on the state to make socio-economic provision for basic needs, it has done so by invoking Article 3,

[88] Alston, 'Report of the Special Rapporteur', above n.1, para 3.

which prohibits inhuman or degrading treatment. As an unqualified right, interference with which cannot be justified by the state, the test for a breach of Article 3 is unsurprisingly stringent and the alleged 'mistreatment must attain a minimum level of severity'.[89] In *MSS v Belgium and Greece* (2011) 53 EHRR 2, the leading case, the latter was found in breach by failing to meet the basic needs of an asylum-seeker, who was left street homeless. It is very unlikely that Article 3 would be interfered with by the benefit cap due to the availability of Discretionary Housing Payments (DHPs),[90] which should prevent families becoming homeless. Councils administering DHPs are obviously required under s6 of the HRA to make awards compatibly with Article 3 and the Convention generally. In respect of Article 8, requiring respect for family life and home, the well-established rule is that it does not impose an obligation on the state to put in place a programme of financial support for private or family life.[91] The domestic courts held that the cap did not interfere with Article 8 and so did not require justification on this ground.[92]

The relationship between Article 1, Protocol 1 (A1P1), protecting property, and social security benefits is more uncertain, with ongoing academic debate over whether Strasbourg is (slowly) moving towards recognition of a social minimum or at least adopting an 'increasingly

[89] *O'Rourke v UK* (Application no. 39022/97), 26 June 2001, not yet reported, [2].

[90] Discretionary Financial Assistance Regulations 2001, SI 2001/1167.

[91] *Petrovic v Austria* (1998) 33 EHRR 14, [26].

[92] *SC v SSWP* [2019] EWCA Civ 615, [27-33].

social interpretation of the property right.'[93] The basic position is that whilst the Convention does not restrict a state's choice of social security scheme, this does not prevent legislation which provides social security entitlements giving rise to rights protected by A1P1, with any subsequent interference requiring justification. [94] Following the decision in *Stec v UK* (2006) 43 EHRR 47, this can include non-contributory benefits: the type affected by the benefit cap. The key point is that A1P1 cannot facilitate the 'acquisition' of a possession or a social security entitlement; this must have a prior, independent existence.

It is arguable given this approach that the cap interferes with an existing and independent social security entitlement, and so engages interests protected by A1P1 with the cap therefore requiring justification under the Convention. The conditions for receiving UC, tax credits, housing and other benefits are set out in various pieces of legislation: absent the cap, people who fulfill these conditions have a right to receive these benefits at a level specified in the relevant legislation, which they can enforce through the social security tribunal system.[95] The cap, therefore, functions to reduce this level of entitlement which has an existence in law independent of the cap for some specified groups; households entitled to working-tax credit etc

[93] I. Leijten, 'The Right to Minimum Subsistence and Property Protection under the ECHR: Never the Twain Shall Meet?' (2019) 21 *European Journal of Social Security* 307, 323. See also: D. Kagiaros, 'Austerity Measures at the European Court of Human Rights: Can the Court Establish a Minimum of Welfare Provisions?' (2019) 25 *European Public Law* 535.

[94] *Krajnc v Slovenia* (Application no. 38775/14), 31 October 2017, not yet reported, [40].

[95] The 'basic conditions' to receive UC are set out in the Welfare Reform Act 2012 ss 3-6 (resident in the UK, not in education etc). The current sums paid for the various elements of UC (child, housing etc) are listed in the Universal Credit Regulations, SI 2013/376, reg 36, as amended.

are unaffected. What the cap does not do is cut or set limits to the level of the various benefits which make up the cap (eg amending legislation so that the maximum housing benefit is £10,000).

As a result, the cap operates quite differently to a situation when not only is there no initial entitlement to the benefit – as is the case for students or people without settled status to UC – but when an existing benefit is cut or removed, which means that in law, following the cut, there will be no entitlement to the precut level of or the removed benefit. A good example of this difference is with the two-child limit discussed below. Parliament amended primary legislation which had previously given households an entitlement to child-tax credit or the child amount of UC for all children in the household, replacing it with an entitlement for only the first two children if the third or subsequent child was born from 2017 onwards.[96] Whilst if Parliament had removed the benefit for existing recipients, it is very likely Strasbourg would hold that this interfered within an existing proprietary interest, for future families who would have otherwise received the benefit there is no plausible argument that the limit interferes with such an interest: the nature of any claim would appear to be to 'acquire' the right to the benefit for subsequent children, which is expressly what A1P1 cannot do. In contrast, the argument that the cap interferes with interests protected by A1P1 is particularly plausible, since families affected by the cap can point to the in-force legislation that created UC etc, and claim that this grounds their proprietary interest to the full benefit entitlement, which is then interfered with by the cap and therefore requires justification. Whether the courts would

[96] Welfare Reform and Work Act 2016, ss 13-4.

accept this argument is of course open to question, but the structure of the legislation creating the cap, at least, potentially enables claimants to avoid the usual problem with social security A1P1 claims.

Article 14

Formulating an Article 14 claim, protecting against discrimination in the enjoyment of Convention rights, is far more straightforward, since there is no dispute that the cap is within the ambit of both Article 8 and A1P1, even if neither Article is interfered with by the cap. The most effective way to challenge the cap would be on the same basis as *SG* by arguing that the cap is indirectly discriminatory against women. However, once the nature of the UC conditionality regime is understood, the discriminatory impact of the cap is far clearer with justification much more difficult for the government. As discussed, whilst the cap in principle applies to all out-of-work households (more precisely, households which do not meet the earnings threshold under UC or another exemption), the cap differentially impacts on families with children and especially single parent households, which are largely headed by women. At the time *DA* was decided, 65% of households affected by the cap were female lone parent households.[97] However, similar numbers of men and women are not in employment and in receipt of UC, whilst more men are in receipt of JSA (either 'new style' which is contribution-based, available for 6 months and has not been replaced by UC, or long-term claimants under

[97] *DA v SSWP* [2019] UKSC 2, [22].

the old income-based JSA, who have not yet been moved onto UC).[98] The cap therefore appears to be a straightforward case of indirect sex discrimination, with the government introducing an additional work-incentive scheme that predominantly impacts on women. Moreover, there does not appear to be any reasonable justification for this disparate impact. As discussed above, the government is already fulfilling its work-incentive aim through the UC conditionality regime. If this regime is judged too lax, then it can be tightened for all, rather than a second additional scheme introduced for mostly women.

In *SC,* as discussed below, Lord Reed repeats the point made in *SG* that disparate impact on women is 'inevitable' if a policy seeks to limit or cut the social security entitlement of families and claims that this is the 'most important point' regarding justification.[99] In principle, it is possible to exempt certain groups – women generally or perhaps single mothers – from the cap, but this is clearly not a solution because it would either directly discriminate against men and/or incentivise 'sham' single parent families. Lord Reed's reasoning in *SC* has attracted a surprising amount of criticism, given that it has been the express approach since *SG* and in reality since *Humphreys*, with O'Brien claiming that Lord Reed has an 'astonishingly poor grasp of what indirect discrimination is, and why protections exist', since he treats 'disproportionate

[98] In Sept 2020, 1,798,511 men were in receipt of UC and not in employment; 1,670,578 women. In Sept 2021 (last available statistics), 1,670,430 and 1,755,596 respectively. For JSA for May 2021 (last available) 102,228 male, 76,837 female. Data available from https://stat-xplore.dwp.gov.uk/webapi/jsf/dataCatalogueExplorer.xhtml.

[99] *SC v SSWP* [2021] UKSC 26, [195].

impact as a defence to… disproportionate impact'.[100] However, although Lord Reed is far from alone in expressing concern about the potential 'floodgates' of indirect discrimination Article 14 claims,[101] the important point for the purposes of the argument here is that this debate is largely irrelevant, diverting attention away from the nature of the cap and whether it is justified. Despite appearances, the cap does not primarily function as a benefit cut but, as the government itself states, as a work-incentive scheme, with many families still receiving benefits in excess of the cap because they work a sufficient number of hours, as under tax credits, or earn enough under UC. Given this, there is nothing in fact 'inevitable' about a policy designed to incentivise work that it differentially impacts on women, as demonstrated by the UC conditionality regime. Sanctioning claimants who fail to meet their 'claimant commitment' incentivises work, but prima facie at least does not discriminate, directly or indirectly, on gender or other status grounds. If there is any disparate impact, then this is very likely to be justified, since under this regime each person is required to do all that they reasonably can to find work, as individually assessed by a work coach, with the requirements adapted, and less onerous, for those with caring responsibilities.

Hence, in respect of the cap, what the government needs to justify is not, as the claims were framed in *SG* and *DA*, the 'inevitable' disparate impact on women and/or children of

[100] O'Brien, 'Inevitability as the New Discrimination Defence', above n.8.

[101] For instance: P. Sales, 'The General and the Particular: Parliament and the Courts under the Scheme of the European Convention on Human Rights' in M. Andenas and D. Fairgrieve (eds) *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: OUP, 2009).

cutting family benefits, but the disparate impact of creating an additional work-incentive scheme, which predominantly affects women and children. However, this is a very difficult task even within a very deferential framework, given the fact that a non-discriminatory and considerably fairer, albeit still stringent, work-incentive scheme not only exists in theory, but in practice. This scheme, however harsh, appears to affect all out-of-work UC recipients equally and does not disproportionately target women. Lord Reed's challenge to the claimants in both *SC* and *SG,* therefore, to identify a 'way in which the legitimate aims of the measure might have been achieved without affecting a greater number of women than men' can be met in respect of the cap, with the alternative policy – the UC conditionality regime – already in existence. [102]

3. Two-child limit

The two-child limit, introduced through the Welfare Reform and Work Act 2016 (ss 13-4), means that the child element under UC or child-tax credits (both currently £2,845) will not be paid for a child born on or after 6 April 2017 if the child is the third or subsequent child in the household. There are certain, very limited, exceptions including multiple births and the notorious 'rape clause' exempting 'non-consensual conception'.[103] The limit echoes previous periods of social security reform and particularly the New Poor Law, which attempted to 'penalize those who tried to raise families which they could not support', yet whereas previously the aim was 'to punish mothers who gave birth illegitimately' reflecting 'the

[102] *SC v SSWP* [2021] UKSC 26, [198]. See also: *SG v SSWP* [2015] UKSC 16, [96].

[103] Child Tax Credit Regulations 2002, SI 2002/2007, regs 9-13. UC Regulations 2013, above n.33, sched 12.

Malthusian view that "intemperate" marriages and births outside wedlock were responsible for overpopulation and the pauperization of the labouring classes' the limit significantly impacts on larger low and lower-middle income families, regardless of their marital or cohabitation status.[104]

Work-incentivisation did not feature prominently in *SC* or in the government's justification for the limit, with emphasis placed on two other policy aims. First, 'ensuring that spending on welfare is sustainable and fair to the taxpayer'.[105] Second, that 'people in receipt of benefits should face the same choices as those who support themselves solely through work', with the 'current benefits structure, adjusting automatically to family size, remov[ing] the need for families supported by benefits to consider whether they can afford to support additional children.'[106] It is important to recognise that in achieving these aims the limit functions much more like a real cap on social security entitlement than the actual 'benefit cap'. Whilst many families can escape from the latter, there is nothing that affected families can do to gain access to child-tax credits or UC for additional children, with no DHPs or equivalent nor the possibility to meet an income or work-time threshold to trigger support. They must simply make do with what they have or increase earnings through work. Partly for this reason, the savings are far larger than from the cap, which, due to the various exceptions, saved relatively

[104] F. Wilkinson and S. Deakin, *The Law of the Labour Market*, (Oxford: OUP, 2005), 145.

[105] Her Majesty's Treasury, 'Welfare Reform and Work Bill: Impact Assessment of Tax Credits and Universal Credit, changes to Child Element and Family Element' (July 2015), 3.

[106] Ibid.

little money: an estimated £68m the year *DA* was heard.[107] In contrast, the government estimated that by 2020/21 the limit would save more than 2 billion annually – on any account, a significant amount of public expenditure – which would continue to rise thereafter.[108]

No argument therefore of the type that can be made in respect of the cap that the limit is merely irrationally duplicating in a discriminatory and harsh manner an existing policy is available: if the government wants to prevent benefits from automatically increasing when low and middle-income families have additional children – described by Lord Reed as the 'ratcheting' effect of per child benefits[109] – then there is no other way to achieve this; it is not being achieved by any other element of the social security system. Other entitlements – child benefit, housing benefit, free-school meals – still rise as the number of children in the household increases, whilst obviously 'additional' children do not find their access to healthcare or any other public service limited. In the context of a proportionality test, therefore, the policy is rationally connected to its aims, and it is necessary: no other policy option is available to prevent the ratcheting effect. As a result, the only way for the claimants to succeed in *SC* was for the courts were to make a value judgment that the limit does not strike a fair balance and is manifestly disproportionate or without a reasonable foundation. Given the longstanding reluctance of the courts to make such judgments in the social security field,[110] and the large amount of public money saved by the limit, with the 2015 Conservative party manifesto also

[107] *DA v SSWP* [2019] UKSC 2, [32].

[108] HMT, 'Welfare Reform and Work Bill', above n.105, 2.

[109] *SC v SSWP* [2021] UKSC 26, [60].

[110] *SC v SSWP* [2019] EWCA Civ 615, [158].

making an unspecified commitment to cut £12 billion from the welfare budget, the claimants needed to put forward a very strong case for a court to make such a finding.[111]

The arguments made by the claimants were a mix of Article 14 claims within the ambit of Article 8. Two arguments claimed that the limit constituted indirect discrimination against, first, women compared with men and, second, children compared with adults. Two arguments claimed that the limit was directly discriminatory: comparing, first, children with adults and, second, households with more than two children with households with two or fewer.

Indirect discrimination

The two indirect discrimination claims took the same form as the argument discussed above and dismissed in *SG*, with both facing the same problem that differential sex and child-adult impact is the inevitable consequence of any decision to cut, limit, freeze or increase child-related benefits, given that most single parent families are headed by women. As a result, it might have been expected that the two indirect discrimination claims had no prospect of success, with the reasoning in *SG* far more appropriately applied to the limit compared with the cap, given that the former is a straightforward benefit cut, rather a scheme to incentivise work.

However, in *JD*, a challenge to the bedroom tax, decided prior to the Supreme Court hearing in *SC* but after the decision by the Court of Appeal, the ECtHR seemed to determine that the domestic approach to justification in Article 14 social security cases was incorrect.

[111] Conservative party election manifesto, 'Strong leadership, a clear economic plan, a brighter, more secure future' (2015), 8.

Strasbourg held that its prior use of the manifestly without reasonable foundation test had been limited to 'circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality'[112] in cases such as *Stec v UK* (2006) 43 EHRR 47. Instead, given the need to prevent discrimination against people with disabilities and advance gender equality 'very weighty reasons would have to be put forward before… a difference of treatment [on these grounds] could be regarded as compatible with the Convention.'[113]

Nonetheless, Lord Reed rejected the argument that the reasoning in *JD* established 'a simple rule' that unless the case concerns a transitional measure complaints of discrimination on suspect grounds 'fall outside the scope of the wide margin and manifestly without reasonable foundation approach usually accorded in the field of welfare benefits'.[114] He argued that *JD* was consistent with the prior Strasbourg approach, which like the domestic courts, had sought to accord 'a high level of respect to the judgment of public authorities in the field of economic or social policy, but balances that with the need for close scrutiny where differences of treatment are based on "suspect" grounds'.[115] Lord Reed's argument regarding the significance of *JD* is highly plausible, since the actual test employed in the case appears much closer in substance to the manifestly without reasonable foundation standard, than an intensive, strict scrutiny approach that might have been expected according to 'very weighty

[112] *JD v UK*, 24 October 2019, [88].

[113] Ibid*,* [89].

[114] *SC v SSWP* [2021] UKSC 26, [137].

[115] Ibid, [146].

reasons' criteria. The Strasbourg court did not identify a single reason to justify limiting the housing benefit of a family with a severely disabled child, living in a specially adapted home, simply airily claiming that it would 'not be in fundamental opposition to the recognised needs of disabled persons in [such] accommodation but without a medical need for an 'extra' bedroom to move into smaller… accommodation.'[116] Regardless of whether or not a policy, considered in the abstract, is in 'fundamental opposition' to somebody's recognised needs, it obviously does not follow that 'very weighty reasons' exist to apply the policy in question. As is well known, there is a lack of smaller properties in the UK, which is why the claimants in *JD* were initially allocated three-bedroom houses. Strasbourg also, like the domestic courts, recognised the role of DHPs in amelioration, but the fact that the harshness of a measure can be diminished for some hardly amounts to a very weighty reason to justify its use, although it would help to show that the measure is not manifestly without reasonable foundation. In respect of the other claimant, A, where Strasbourg did find a violation, it essentially found, like Lady Hale when the case was heard domestically,[117] that the bedroom tax was irrational when applied to victims of domestic violence in the Sanctuary Scheme, with the aims of the two policies 'in conflict'.[118] Although, as the dissent pointed out, this reasoning is unpersuasive, it is compatible with a test far less stringent than very weighty reasons.

[116] *JD v UK*, 24 October 2019*,* [101].

[117] *R (Carmichael and Rourke) v SSWP* [2016] UKSC 58, [78].

[118] *JD v UK*, 24 October 2019*,* [103].

Although there is no space here to discuss the Strasbourg case law generally, there is very little support elsewhere for a very weighty reasons approach in indirect discrimination cases. Following *DH v Czech Republic* (2008) 47 EHRR 3, generally regarded as the starting point for express recognition of indirect discrimination at the ECtHR, the limited number of successful claims have tended to be in particularly clear cases,[119] sometimes where there is also a suspicion of a discriminatory intent. In *Biao*, for instance, where, the ECtHR 'dipped its toes into the waters of indirect discrimination',[120] the rule that Danish citizenship if held for at least 28 years can circumvent the otherwise, for expatriate and many other families, impossible to meet reunification rules (ie that a couple's combined connection is stronger to Denmark than the partner's country) appeared almost deliberately designed to allow 'native', disproportionately white, Danes to live in Denmark with their non-EEA spouse, but not newer citizens. As O'Cinnéide points out, in subsequent cases the Court has been 'clearly reluctant to probe deeply into allegations of disparate impact and structural discrimination against migrants' and *Biao* has 'so far not generated any real "follow-up" jurisprudence.'[121] To move, therefore, so rapidly to a very weighty reasons approach for indirect discrimination on suspect grounds would be a very significant development in the Strasbourg jurisprudence that would be in stark

[119] B. Havelková, 'Judicial Scepticism of Discrimination at the ECtHR Law' in H. Collins and T. Khaitan, *Foundations of Indirect Discrimination* (Oxford: OUP, 2018), 90.

[120] C. O'Cinnéide, 'Why Challenging Discrimination at Borders Is Challenging (and Often Futile)' (2021) 115 *AJIL Unbound* 362, 365.

[121] Ibid, 365-6.

tension with the generally restrained approach that has been observed in the post-Brighton Declaration case law.[122]

Unsurprisingly, given Lord Reed's approach, the indirect discrimination claims in *SC* failed, since, in effect, no compelling argument was made, including by reference to *JD*, to displace the two now firmly established positions in domestic law in relation to such claims. First, in the social security context the default position is a very deferential approach and the use of a lax justificatory test, whether labelled 'manifestly without reasonable foundation' or otherwise. Second, since it is 'inevitable' that policies which limit or cut benefits for families will have a disparate impact on women and children, then, absent some complicating factor such as the claimants identifying a different policy through which the government can achieve its aims without the disparate impact, this impact alone will carry little weight or normative force when assessing whether the policy is justified.

Direct discrimination against children

The main alternative argument made by the claimants focused on whether the limit directly discriminates against children. This argument appeared considerably more promising than the indirect discrimination claims. First, it was relatively novel and had not already been effectively rejected in prior Supreme Court cases. Second, declaring the limit Convention incompatible on

[122] M. Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9 *Journal of International Dispute Settlement* 199. L. Helfer and E. Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(3) *European Journal of International Law* 797.

this ground would not raise any obvious 'floodgate' concerns. Measures which exclude a certain class of children from an important benefit in the social security context, as elsewhere, appear to be extremely unusual in Council of Europe member states. No country in Western Europe has adopted any similar child limit, with the relevant benefits capped at four children for the two closest comparators, Romania and Serbia.[123] Domestically, the closest equivalent may be the exclusion of 'irregular' migrants, including children, without immigration status in the UK from certain services, although this does not extend to schooling or primary or emergency healthcare. NHS charging regulations have already been unsuccessfully challenged in the courts on this ground and so, unlike with the indirect discrimination claim, it is difficult to identify any other policies which would be brought into question in social security or elsewhere with a successful direct discrimination claim.[124]

Relatedly, preventing direct discrimination against vulnerable groups, including children, even if in the social security field, is much more likely to be recognised as a legitimate and core judicial task in comparison to determining when the seemingly 'inevitable' disparate impact of public policies falls foul of the Convention. It is the former situation that Lord Hope had in mind when he made his often-cited remarks that 'it is with [the courts] that the ultimate safeguard against discrimination rests'.[125] There is also a considerable academic literature on children's

[123] C. O'Brien, ''Done because we are too menny': the two-child rule promotes poverty, invokes a narrative of welfare decadence, and abandons children's rights' (2018) *International Journal of Children's Rights* 700, 707.

[124] *R (SHU & E) v Secretary of State for Health and Social Care* [2019] EWHC 3569 (Admin).

[125] *Re G (Adoption Unmarried Couple)* [2008] UKHL 38, [28].

rights, with various arguments that courts have a special responsibility towards children. For these reasons, it seems considerably more likely that in the specific circumstances of alleged direct discrimination against children that the courts would be more receptive to an argument that a very lax justificatory test should be displaced, whilst also less concerned about the jurisprudential and political consequences of a finding that such discrimination is Convention incompatible. For Strasbourg, the different implications of a positive ruling on the indirect and direct claims are potentially vast: the latter would appear to be simply a ruling against the UK, with minimal knock-on effects elsewhere in Europe; the former on the grounds of gender could bring into question a host of policies in social security, immigration and so on across the continent.

However, both Lord Reed and Leggatt LJ denied that that the limit directly discriminated against children. They both held that the only possible comparator was with adults, but that these two groups were not in an analogous situation. They did accept for the purposes of Article 14 that there was differential treatment of households with more than two children compared with households with two children or fewer. The difficulty was that this latter status was 'not a classification of a sensitive or suspect kind which requires particularly convincing or weighty reasons to justify making it a ground for treating people differently',[126] with both the Court of Appeal and the Supreme Court holding that the treatment was justified for the same reasons as discussed above in relation to the indirect discrimination claims. Although some might disagree with this reasoning, given that virtually any public policy will distinguish some

[126] *SC v SSWP* [2019] EWCA Civ 615, [78].

groups from others, it is readily understandable that the courts will only employ a lax test when the status group alleging direct discrimination is not 'suspect' or an otherwise vulnerable group.

Crucially, therefore, given the court's deferential approach, for the only claim where it might have been difficult for the government to justify the limit, the justification stage was not reached, since children could not show that they were in an analogous situation with adults to ground a direct discrimination claim. For Leggatt LJ:

> The two child limit on child tax credit does not disadvantage children in comparison with adults since child tax credit is a benefit that is payable solely in respect of children. There is no equivalent welfare benefit payable in respect of adults. So it cannot be said that adults are eligible for a benefit which is similar to the individual element of child tax credit but not subject to a similar limit on the number of individuals in a household for whom the benefit can be claimed.[127]

Lord Reed's argument is almost the opposite of Leggatt's. First, he claims that children are not entitled to any welfare benefits:

> welfare benefits payable to adults, which counsel treated as analogous to child tax credit, are paid to adults in order to support their individual needs. They are therefore payable to individual adults whether they live alone or with others, and are calculated

[127] Ibid, [81].

> on an individual basis. Children have no entitlement to receive welfare benefits: benefits are paid instead to the adults who are responsible for them.[128]

Second, since 'the limitation is not hypothecated to the care of particular children to the exclusion of other children in the household', but 'paid to the responsible adult as a lump sum in respect of the children living with him or her', then the limit 'does not, therefore, exclude any children from the scope of the support provided by child tax credit'.[129]

The difficulty with both arguments is much clearer under UC than tax credits. Leggatt LJ's argument is untenable since both adults and children are 'eligible' not just for equivalent benefits, but for the very same benefit: UC. Yet, there is no equivalent to the limit for adults. Lord Reed is wrong to claim that welfare benefits for adults, tax credits or UC, are simply 'calculated on an individual basis', since for couples their savings and income are combined when calculating the level of their entitlement, with the sum paid to a couple less than for two separate individuals.[130] UC is also paid as a lump sum, per household, to a nominated bank account, individual or joint, and not individually, highlighting the unimportance, from the perspective of the system, as to which member(s) of the household the benefit is paid.[131] More fundamentally, Lord Reed's argument is strikingly formal, resting on a technicality regarding to whom the benefit can be paid as the determining factor as to which categories of person have a

[128] *SC v SSWP* [2021] UKSC 26, [58].

[129] Ibid.

[130] Ibid.

[131] This design has raised concerns. For discussion: R. Griffiths et al, 'Uncharted Territory: Universal Credit, Couples and Money' (IPR Report, June 2020), 145-77.

Convention rights claim. Yet, it is difficult to identify any good reason why this should be considered so significant, which has troubling implications if the protection Article 14 provides to vulnerable groups is contingent on whether a benefit is paid to them directly or to another responsible person. As O'Brien points out, it would also seem to follow that if the government introduced a benefit paid only to men, then women would not have any claim under Article 14, since if women are not paid the benefit, then they are not in an analogous situation with men.[132]

Likewise, since UC is paid and calculated on a household basis and not 'hypothecated' for any individual, then if some women, when in a couple, were excluded or their individual allowance was less than for a man, then for Lord Reed it would, again, seem to follow that they had no discrimination claim, since they were not excluded 'from the scope of the support provided' by UC. Indeed, these issues are not hypothetical, with UC excluding from support individuals without settled status or indefinite leave to remain. For couples, what this means is that when one member has settled status and one does not, the income and savings of both are included when determining the level of entitlement, but the couple are treated as a single person, with no individual allowance assigned for the 'migrant'.[133] Whether a justified policy or not, it seems highly unintuitive to claim that the excluded migrant is not in an analogous situation for the purposes of Article 14 from somebody with settled status, because (a) they are not paid UC or (b) they are not excluded from benefiting from the (lesser) sum their partner

[132] O'Brien, 'Inevitability as the New Discrimination Defence', above n.8.

[133] UC Regulations 2013, above n.33, reg 3(3).

receives. If they are not in an analogous situation, then it is surely because of some property connected with their position as a person without settled status or, likewise, the status of being a child; not because of the consequences which flow from the treatment of that status within the UC system.

Moreover, the rigid approach of Leggatt LJ and Lord Reed to this stage of an Article 14 claim is not in keeping with the dominant approach, particularly in Strasbourg. As Lady Hale pointed out in *AL (Serbia),* 'the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator'. Rather, they 'ask whether differences in otherwise similar situations justify a different treatment', with 'the comparability test… glossed over, and the emphasis is (almost) completely on the justification test.'[134] A recent example of the Supreme Court taking a similar approach is in *Mclaughlin* where it held that the position of an unmarried widowed parent was analogous to that of a married parent – despite very unusually Strasbourg holding that there was no analogy in a similar case[135] – in respect of Widowed Parent's Allowance, since the purpose of the allowance was 'to benefit the children' the survivor was responsible for.[136] This purpose based approach strongly contrasts with Lord Reed's in *SC*, given that the primary goal of UC is to provide a minimum standard of living to individuals and families. In any case, it seems very unlikely that Strasbourg would follow the

[134] *AL (Serbia) v SSHD* [2008] UKHL 42, [25].

[135] *Shackell v UK* (Application no. 45851/99), 27 April 2000, not yet reported.

[136] *In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2018] UKSC 48, [27].

reasoning of Lord Reed and Leggett LJ and find that children and adults were not in an analogous situation.

If the argument presented here is correct that a claim which recognised the comprehensive nature of UC could have helped persuade the courts that children are in analogous situation with adults for the purpose of a direct discrimination claim it does not, of course, follow that the claim would succeed, with justification still needing to be considered. As discussed, given how unusual the two-child limit is, floodgate and overreach concerns are far less acute in a direct discrimination claim based on the status of a child. The direct discrimination claim also more fully captures why many consider the limit so objectionable, with a certain class of children simply excluded from the most significant source of financial support for children in low-income families. At Strasbourg, it would not be surprising if some judges were inclined to view the limit as a worrying development, given how alien it is to the traditions of the welfare state of both main types – social democratic and corporatist[137] – in Continental Europe. For feminists and people with traditional religious views, in particular, the limit raises very important concerns over and above its impact on poverty, albeit for different reasons. Nonetheless, any policy in the social security context, saving over two billion pounds a year will not lightly be found Convention incompatible, even if there is a strong direct discrimination claim. The primary purpose here has been to highlight how much more likely this prospect is if the claim is made on the basis of UC.

[137] G. Esping-Andersen, *Three Worlds of Welfare Capitalism*, (Princeton: PUP, 1990).

4. Conclusion

In their study of the law of the labour market, Deakin and Wilkinson argued that social security policy had 'ebbed and flowed' from one generation to the next, with at times 'the duty to work… counterbalanced by a right to subsistence or security', whilst at other times this right had 'been whittled away almost to vanishing point, to be replaced by a combination of charitable giving and state-organized punishment of the destitute.' There was little evidence of 'any progression within social and economic policy' nor 'capacity for institutional learning'.[138]

Universal Credit is a significant innovation in this cycle. In effect, it imposes a duty to conscientiously seek work, including more work or to 'work harder',[139] on all low-income working-age households deemed fit-for-work, but achieves this through the withdrawal of support from those who fail to meet this obligation, with a significant amount of support, which can considerably exceed the amount earned through the labour market,[140] for households that can demonstrate the correct attitudes and behaviours. The system of conditionality and monitoring previously largely confined to the unemployed, particularly without children, is now being extended to fit-for-work working-age adults in low-paid part-time work and the self-employed, and could potentially extend to full-time workers earning the minimum wage or above in receipt of social security benefits.[141]

[138] Wilkinson and Deakin, *The Law of the Labour Market*, above n.104, 195.

[139] Puttick, 'From Mini to Maxi Jobs?', above n.25.

[140] See the example of CB discussed above.

[141] Puttick, 'From Mini to Maxi Jobs?', above n.25.

This article has shown that the logic which underlies UC, based on an individualist ethos that values the attitude and behaviour of recipients, is significantly different from the expressly punitive logic underlying the benefit cap. Under the latter, the subsistence benefits of families are cut regardless of their efforts to find work, with access to the full subsistence benefit entitlement now dependent on the hiring decisions of employers. Families are punished because they are unemployed (or earn too little to escape the cap) and in need: the events that led to this situation and their present efforts to escape from it are irrelevant.

Given that many households affected by the cap will now also be subject to the UC conditionality regime, this means that the state will be limiting the benefits of families which it also assesses, through its street-level bureaucrats, as doing all that they reasonably can to find work. It is here that the strongest doctrinal argument against the cap can be found: if any justification for interfering with Convention rights is manifestly without reasonable foundation, then it is the state cutting subsistence benefits in order to incentivise families to work when it also assesses those families as already doing all that they reasonably can to find work. Likewise, the doctrinal argument against the two-child limit is significantly stronger if rooted in an understanding of the functioning of the social security system and particularly the comprehensive nature of UC.

Strong objections to 'workfare' and increasing conditionality in the welfare state have been consistently made by academics in a variety of disciplines. A sizeable contemporary literature in social policy has highlighted both the harsh consequences for claimants and the

dysfunctionality of the current system, arguing that it promotes crime and destitution.[142] The system has even been described in one journal article as 'social murder'.[143] This article has taken a different approach, proposing arguments, modest in scope, based in domestic human rights law directed at two specific policies. It has not sought to enter long-running debates over the relative efficacy of litigation focused human rights strategies, of which many will be rightly sceptical: it is notable that some of the harsher features of UC were dropped when the Labour party had a leader full-throated in his support for the welfare state.[144] The only claim underlying this article is given that over the last decade a litigation strategy has been consistently pursued, it is regrettable that the strongest arguments, adapted to the transparent framework adumbrated by the Supreme Court to assess such claims and rooted in an understanding of how the social security system functions, have not been made.

[142] Most notably the extensive outputs of the Welfare Conditionality Project (http://www.welfareconditionality.ac.uk/).

[143] C Grover, 'Violent proletarianisation: social murder, the reserve army of labour and social security 'austerity' in Britain' (2019) 39(3) *Critical Social Policy* 335.

[144] The abolition of the seven-day waiting period in which no entitlement was accrued after a claim was made (The Universal Credit (Miscellaneous Amendments, Saving and Transitional Provision) Regulations 2018, SI 2018/65, reg 3); expensive phone call charges for the UC helpline ('Theresa May to scrap universal credit helpline charges' (*BBC News*, 18 October 2017)); a reversal of some cuts to the taper-rate (The Chancellor of the Exchequer, 'Autumn Statement to Parliament' (23 November 2016)); and a reduction in the length of the maximum sanction from three years to six months (The Jobseeker's Allowance and Universal Credit (Higher-Level Sanctions) (Amendment) Regulations 2019, SI 2019/1357). The Cameron government also reversed some proposed cuts to tax credits ('George Osborne scraps tax credit cuts in welfare U-turn' (*The Guardian*, 25 Nov 2015)).