Delineating the Gulf between Human Rights Jurisprudence and Legislative Austerity: the Judicial Entrenchment of "Less-Eligibility"

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This article primarily deals with the interaction of a number of human rights provisions with the legislative introduction of the benefit cap in the Welfare Reform Act 2012, which sets limits to the amount of social security benefits each household may receive. Conflict between this legislative provision and human rights jurisprudence and European Court of Human Rights' decisions is clearly displayed in R. (on the application of SG (previously JS)) v Secretary of State for Work and Pensions, *which is the main focus of the article. The case also demonstrates different approaches among the senior judiciary on the issue of judicial activism, which is also discussed in the article.*

Introduction

It is commonplace that the field of human rights, both international and domestic, is intimately connected with the welfare and dignity of individual citizens. One might therefore expect human rights jurisprudence in the UK to have strong tangible connections with socio-economic concerns, such as the right to affordable housing, or a guaranteed minimum standard of income for citizens during periods of unemployment or sickness. However, as Fredman states, in the post-Second World War landscape of the UK, while positive duties to provide welfare to individual citizens have been firmly situated within the politics of the welfare state, conspicuously absent has been the discourse of human rights.[1] Despite the description by one commentator of the enactment of the Human Rights Act 1998 (HRA) as a human rights "revolution",[2] the remit of this revolution apparently did not extend to socio-economic rights. It is significant that when the decision was made to enact a justiciable bill of rights by the Labour Party in the 1990s it was the European Convention on Human Rights (ECHR), which focuses on civil and political rights, that was incorporated.[3] Fredman asserts that this development

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[1] S. Fredman, "Human rights transformed: positive duties and positive rights" [2006] P.L. 498.

[2] C. Harvey, "Governing after the rights revolution" (2000) 27 J. Law & Soc. 61.

[3] Fredman, "Human rights transformed: positive duties and positive rights" [2006] P.L. 498, 498.

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reflects the view that civil and political rights are duties of restraint, which prevent the state from interfering with individual freedom, rather than imposing a positive duty on government to act.[4] While there does exist the European Social Charter,[5] in which the Council of Europe created a separate regime for socio-economic rights, these rights are essentially declaratory and are unenforceable in the UK.[6] Although a "right" may be recognised and declared, this does not mean that it is guaranteed in practice, a reality that has been apparent since the enactment of the HRA 1998. Baroness Williams was confident to proclaim on the passage of the Act that the "constitutional Rubicon" had been crossed,[7] but citizen benefit recipients and the lower paid echelons of the UK workforce saw little difference to their own situation in the aftermath of the HRA 1998. However, this has not prevented at least some connection being forged between socio-economic rights to welfare benefit and the ECHR, primarily through European Court of Human Rights (ECtHR) decisions,[8] and certain leading British judges appear to be more amenable to protecting welfare benefits through the medium of human rights. The overall position of the judiciary in creating a strong nexus between human rights provisions has been somewhat lukewarm: certainly one leading judge has cautioned colleagues against finding declarations of incompatibility on matters of socio-economic policy since, in his view, such issues belong within the purview of the elected legislature.[9]

A number of the tensions inherent in the area of human rights provisions and their interplay with UK welfare legislation have arisen graphically in the Supreme Court decision in *R. (on the application of SG (previously JS)) v Secretary of State for Work and Pensions* (*SG*),[10] in which the legality of the benefit cap was challenged on human rights grounds. The key significance of the case lies in the divergence in approach between Lord Reed and Lady Hale on the relationship between human rights and social security legislation, and on the issue of judicial activism in these areas. Before an analysis of the decision can be made, discussion must be made of the historical relationship between the ECHR and UK welfare legislation, and the nature of the legislative benefit cap. The article will then attempt to draw conclusions on the future interplay between UK social security legislation, which contains ever greater degrees of conditionality, and the provisions of the ECHR and subsequent ECtHR decisions.

Socio-economic rights and the ECHR

Neither the ECHR nor the HRA 1998 deal directly with rights to social security benefits, or, indeed, the right to any basic material necessity of life. The original framers of the Convention of the later 1940s did not place a premium on social

[4] Fredman, "Human rights transformed: positive duties and positive rights" [2006] P.L. 498.

[5] This European Social Charter was adopted in 1961.

[6] The 1961 European Social Charter was understood to be very much an inter-state treaty, which had implications for states from the point of view of imposing obligations under public international law, but not necessarily creating rights for individuals within those states.

[7] *Hansard*, HL Vol.582, col.1234 (3 November 1997). See also K.D. Ewing, "The Human Rights Act and parliamentary democracy" (1999) 62 M.L.R. 79.

[8] For example, *Stec v United Kingdom* (65731/01) (2006) 43 E.H.R.R. 47; 20 B.H.R.C. 348 ECtHR.

[9] Lord Sumption, *The Limits of Law* (20 November 2013), the 27th Sultan Azlan Shah Lecture.

[10] *R. (on the application of SG (previously JS)) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 W.L.R. 1449 (*SG*).

rights: in the Preamble to the Statute of the Council of Europe, signed in May 1949, the parties declared that they were:

> "Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy."

One might have expected the protection of the basic material means of life to receive primacy of place in any post-war human rights treaty. Indeed, the Preamble to the Universal Declaration of Human Rights mentions "freedom from fear and want", while cl.1 of art.25 declares that everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services

> "and the right to security in the event of unemployment, sickness, disability widowhood, old age or other lack of livelihood in circumstances beyond their control."[11]

However, these rights are merely declaratory in nature, and given the parlous state of most continental European economies at that time, it was unlikely that any government would make unrealistic guarantees of socio-economic rights that ultimately could not be met. There were other political considerations to be taken into account in both the UK and continental Europe: not only were there great variations in social policy between the signatory nations to the ECHR, but also the labour of the working populations would be required to rebuild ruined national economies. The granting of unconditional social and economic rights to citizens was viewed as counterproductive to this aim, since it might have acted as a disincentive for them to enter the labour market.[12] Despite the role played by British jurists in the creation of the ECHR, it was not to be incorporated in the UK for almost 50 years; and a major factor behind this was the scepticism among some leading figures in the legal world about the introduction of a common European body of human rights. For example, Sir Ivor Jennings observed that "Generally speaking … fundamental liberties are protected not by law but by public opinion".[13] For a Labour Government dedicated to the creation of a comprehensive welfare state and the nationalisation of key sectors of the economy, the prospect of conservative national judges using provisions protecting private property in the ECHR[14] to undermine their legislative plans was not one that they were prepared to countenance. As Bogdanor asserts, it was ironic that a Labour Government finally incorporated the ECHR into UK domestic law, given the historical antipathy by the Labour Party to increasing the powers of the judiciary. However, by the 1980s, the Left, faced with the determination of the Thatcher Governments to use the power of the state to its utmost extent, were more favourably disposed to the

[11] Article 17 of the Universal Declaration of Human Rights also provides for the right to own property and provides that no-one should be arbitrarily deprived of this right. This would also be an important right in the ECHR. See below for a discussion of this.

[12] This also at least partially explains why the contributory principle was given primacy of place in the UK post-war welfare state, in the National Insurance Act 1946.

[13] A. Lester, "Fundamental rights: the United Kingdom isolated?" [1984] P.L. 46, 50–51. These sentiments echo in judicial pronouncements today. See below.

[14] For example, art.1 of Protocol 1 to the ECHR (A1P1).

notion of constitutional limits on government, limits which would be set by the judiciary.[15] By the late twentieth century, the political Left in the UK had also come to regard the judiciary as a more "trustworthy" bulwark against the actions of a reactionary government.[16] Given some of the rulings in *SG*, it would appear that some judges have gone even further in their defence of socio-economic rights than New Labour Governments would have countenanced. With increasing conditionality in UK social security legislation,[17] and the more contractarian nature of British citizenship,[18] a judiciary over-assertive in the protection of the material means of sustenance through human rights provisions could have resulted in deadlock between the judiciary and the legislature.[19]

Despite the reality that the ECHR is not primarily concerned with socio-economic rights, and the fact that the European Social Charter of 1961 (to which the UK is a signatory) is merely declaratory in nature,[20] some links were forged between international human rights law, including the ECHR, and entitlement to social security benefits, both in the UK and in other signatory states.[21] Even before the enactment of the HRA 1998, the UK judiciary had shown itself willing to challenge statutory instruments on the basis of human rights jurisprudence: in *R. v Secretary of State for Social Security Ex p. Joint Council for the Welfare of Immigrants*,[22] where the Court of Appeal, by a majority, ruled that Parliament by enacting the Asylum and Immigration Appeals Act 1993 had intended to make a commitment to the UK's obligations under the UN Convention on the Status of Refugees 1953. Simon Brown LJ held that the Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996,[23] which effectively removed all entitlement to income-related benefit from two classes of asylum seeker,[24] were ultra vires the parent Act, partly because these regulations would have rendered nugatory for at least some asylum seekers the rights under the 1993 legislation and, by implication, the 1953 UN Convention. The ECtHR forged a link between contributory benefits and rights to property under art.1 of Protocol 1 of the ECHR (A1P1) in *Gaygusuz v Austria*,[25] in which it was held that a Turkish national who had paid the relevant social insurance contributions was entitled to an advance on his retirement pension in the form of emergency assistance when his unemployment benefit payments expired. The Court held that since entitlement to the social benefit of emergency assistance was linked to the payment of a number of contributions to the

[15] V. Bogdanor, *The New British Constitution* (Oxford: Hart, 2009), pp.43–44.

[16] Bogdanor, *The New British Constitution* (2009), p.44.

[17] P. Larkin, "The 'criminalization' of social security law: towards a punitive welfare state" (2007) 34 J. Law & Soc. 295.

[18] P. Larkin, "The new Puritanism: the resurgence of contractarian citizenship in common law welfare states (2014) 41 J. Law & Soc. 227.

[19] For instance, had the higher courts issued declarations of incompatibility under s.4 of the HRA 1998 against social security legislative provisions too frequently, it would have been difficult for governments to enact the degree of welfare reform they have over recent decades.

[20] Churchill and Khaliq, commenting upon the operation of the compliance mechanism for the European Social Charter, noted that, without a major change in the practice in the Committee of Ministers, the system was unlikely to achieve its objectives. See R. Churchill and U. Khaliq, "The collective complaints system of the European Social Charter: an effective mechanism for ensuring compliance with economic and social rights?" (2004) 15 E.J.I.L. 417.

[21] This link between the ECHR and welfare benefits was forged by both UK courts and the ECtHR.

[22] *R v Secretary of State for Social Security Ex p. Joint Council for the Welfare of Immigrants* [1997] 1 W.L.R. 275; [1996] 4 All E.R. 385 CA (Civ Div).

[23] Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996 (SI 1996/30).

[24] Those who submitted their claims for asylum otherwise than immediately on arrival in the UK, and those whose claims had been rejected by the Home Secretary but who then appealed to the independent appellate authorities.

[25] *Gaygusuz v Austria* (17371/90) (1997) 23 E.H.R.R. 364 ECtHR.

unemployment insurance fund, the right to this assistance was a pecuniary right for the purpose of A1P1, and as such Mr Gaygusuz had been denied a valid property right. As Rook has stated, no guidance was given in A1P1 as to what "possessions" consist of, so the scope of the definition was left to the interpretation of the Strasbourg institutions.[26] This flexibility possibly made it easier for a link to be created between rights to social security benefits and property rights under the ECHR. However, the concept of protecting certain state benefits as property rights through a form of higher law is not new. During the 1960s the American jurist Reich marked out the emergence of government largesse as a major source of wealth as one of the most important post-war developments in the US.[27] In Reich's view, this "new property", including social security benefits, was steadily taking the place of those forms of wealth traditionally held as private property.[28] He advocated that relations between individual citizens and government in matters of this new property should be "constitutionalised", by bringing them within the ambit of the Fifth and Fourteenth Amendments' protection of property in the Bill of Rights.[29] With the ruling in *Gaygusuz*, the ECtHR was in some sense moving towards providing a form of higher law protection to Reich's "new property", bringing it within the scope of human rights jurisprudence.

This nascent nexus between A1P1 of the ECHR and social security benefits was further strengthened in *Stec v United Kingdom*,[30] where it was held that although the differences between the sexes in the payment of reduced earnings allowance did not amount to discrimination under art.14 of the ECHR, the prohibition of discrimination extends beyond rights and freedoms which the Convention and Protocols require each contracting state to guarantee. Instead, it also applies to those additional rights, falling within the general scope of the Convention, which states have voluntarily decided to provide. Equally significantly, the ECtHR also held that non-contributory benefits could be regarded as "possessions" and receive protection accordingly under A1P1 of the ECHR.[31]

However, the interplay between the ECHR and entitlement to social security in the UK has not been uniformly progressive. This was demonstrated in *R. (on the application of Reilly and Wilson) v Secretary of State for Work and Pensions*,[32] where both the Court of Appeal and Supreme Court held that the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011,[33] which, amongst other developments, obliged jobseeker's allowance (JSA) claimants to engage in unpaid back-to-work schemes, did not constitute a form of slavery, and were therefore permissible under the ECHR. They based this decision on the ECtHR ruling in *Van der Mussele v Belgium*,[34] where the Court decided that unpaid work could be regarded as a benefit if it acts as a means of allowing the benefit

[26] D. Rook, *Property Law and Human Rights* (London: Blackstone Press Ltd, 2001), pp.96–104.

[27] C. Reich, "The new property" (1964) 73 Yale L.J. 733.

[28] For example, private pensions and insurance policies. Reich believed that social insurance was becoming a substitute for savings. See Reich, "The new property" (1964) 73 Yale L.J. 733, 733.

[29] Reich, "The new property" (1964) 73 Yale L.J. 733, 747. See also J. Waldron, "What is private property?" (1985) 5 O.J.L.S. 313.

[30] *Stec v United Kingdom* (65731/01) (2006) 43 E.H.R.R. 47; 20 B.H.R.C. 348.

[31] N. Harris, "Conditional rights, benefit reform, and drug users: reducing dependency? (2010) 37 J. Law & Soc. 233.

[32] *R. (on the application of Reilly and Wilson) v Secretary of State for Work and Pensions* [2013] EWCA Civ 66; [2013] 1 W.L.R. 2239.

[33] Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (SI 2011/917).

[34] *Van der Mussele v Belgium* (8919/80) (1984) 6 E.H.R.R. 163 ECtHR.

claimant employment experience that could lead to more permanent paid employment. Although the 2011 Regulations were declared illegal on other grounds,[35] the practical effect of the ruling in *Reilly and Wilson* was, inter alia, to state that obliging a university graduate who aspired to be a museum curator to undertake unpaid work in a discount store was not incompatible with the ECHR, since it did not meet the high threshold required for a breach of human rights.

The ruling in *Reilly and Wilson* demonstrates just how wide the margin of appreciation permitted to contracting states under the ECHR is when it comes to matters of social policy, reinforcing the argument that the Convention is not really concerned with the fundamental resources necessary to sustain life.[36] On the other hand, the Secretary of State's attempt to retrospectively validate the 2011 Regulations (in order to avoid having to make back-payments of JSA to claimants sanctioned under them) by the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 was declared incompatible with the ECHR under s.4 of the HRA 1998 in *R. (on the application of Reilly (No.2) and Hewstone) v Secretary of State for Work and Pensions*.[37] However, this declaration of incompatibility was made on the grounds that retrospective legislation of this nature was in violation of art.6 of the Convention, due to the fact that the imposition of the 2013 Regulations would affect the judicial determination of ongoing cases brought against the DWP involving the 2011 Regulations. Significantly, the argument advanced by the Secretary of State, that it would not be in the "public interest"[38] to repay previous benefit sanctions to those claimants who had failed to take part in employment schemes, was rejected by Lang J, who stated that that if financial loss was indeed a "compelling reason in the public interest", such retrospective legislation would be commonplace. On the other hand, the issue of whether the 2013 Regulations had deprived one of the claimants of his property rights under A1P1 was dealt with much more swiftly: Lang J stated that while the Secretary of State could not contend that income-based benefits such as JSA did not constitute a "possession", the conditions necessary for eligibility to this benefit[39] had applied throughout the relevant period, beyond the date of initial application and approval. One of the claimants, Mr Hewstone, had failed, without sufficient reason, to engage in the Work Programme and therefore did not qualify for JSA payments for a specified period in the future, so he was not deprived of an existing possession. This was the somewhat confused position of the relationship between the ECHR and social security entitlement in the UK. However, *Reilly (No.2)* demonstrated that the judiciary is prepared in certain circumstances to set limits to the power of Parliament not only to introduce retrospective legislation but also what actions governments may carry out in the

[35] They were held to be ultra vires the parent legislation.

[36] An alternative view is that the ruling demonstrates the requirement for human rights jurisprudence to balance critical and fundamental concerns of human rights with those that are less fundamental. *Reilly and Wilson*, after all, involved no absolute breach of sustainable resources.

[37] *R. (on the application of Reilly (No.2) and Hewstone) v Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin); [2015] Q.B. 573.

[38] See *Reilly (No.2)* [2014] EWHC 2182 (Admin); [2015] Q.B. 573. See also P. Larkin, "Engaging with the human rights angle: Reilly (No.2) v Secretary of State for Work and Pensions (2015) 22 J.S.S.L. 85.

[39] *Reilly (No.2)* [2014] EWHC 2182 (Admin); [2015] Q.B. 573. See also, Larkin, "Engaging with the human rights angle: Reilly (No.2) v Secretary of State for Work and Pensions (2015) 22 J.S.S.L. 85.

name of "compelling reasons in the public interest".[40] In *SG* the central question would be whether the legislative benefit cap was compatible with the ECHR and other international human rights treaties and their attendant jurisprudence.

The *SG* benefit cap

The legislative underpinnings of the benefit cap are contained in s.96 of the Welfare Reform Act 2012 (WRA 2012) and the Benefit Cap (Housing Benefit) Regulations 2012.[41] Prior to the introduction of the WRA 2012, the Coalition Government had first suggested the idea of a legislative limit on household benefit amount in the consultation document *21st Century Welfare*,[42] and the intention was announced in the *Spending Review 2010*[43] to cap non-working household benefits at around £500 per week for couples and single parent households, and around £350 weekly for single adult households. The legislation and attendant regulations have enshrined these proposals in law by setting a maximum limit to the amount of benefit that any single household can receive in one year to £26,000, whatever the number of people in the household, and the "relevant amount" (or cap) is based on estimated average net household earnings. Essentially, the benefit cap was designed to reintroduce an element of the principle of "less eligibility" into the social security system, setting the maximum benefit at no more than the level of the average national salary, in an attempt to ensure that benefit receipt cannot be more lucrative than engagement in the labour market. This was the foundation upon which the Poor Law Amendment Act 1834 and the workhouse system was based, and formed a central core of the Coalition Government's plans for welfare reform. The current Conservative Government has declared its intention to reduce the benefit cap further.[44] The social evils promoted by benefit dependency were set out in the *Spending Review 2010*:

> "The UK's existing system of support can trap the poorest families and children in welfare dependency. For many poor families the current system of support delivers little practical change in their long term economic prospects. Many born into the very poorest families will typically spend their entire lives in poverty. The Government wants to fundamentally change the prospects of these children."[45]

The introduction of the cap has been credited with encouraging a strong rise in the levels of benefit recipients returning to the labour market, ostensibly because of the realisation that the state would no longer sustain them in unemployment.[46] In addition, given the apparent hardening of public attitudes towards benefit recipients

[40] Larkin, "Engaging with the human rights angle: Reilly (No.2) v Secretary of State for Work and Pensions" (2015) 22 J.S.S.L. 85.
[41] Benefit Cap (Housing Benefit) Regulations 2012 (SI 2012/2994).
[42] DWP, *21st Century Welfare* (TSO, 2010), Cm.7913.
[43] HM Treasury, *Spending Review 2010* (TSO, 2010), Cm.7942.
[44] A. Grice, "Benefits cap to be reduced to £20,000 for families outside London", *Independent*, 6 July 2015.
[45] HM Treasury, *Spending Review 2010* (2010), Cm.7942, para.1(54).
[46] This is certainly the opinion of the current Secretary of State for Work and Pensions, Iain Duncan Smith MP, who has described the operation of the benefit cap as "social justice in action". See J. Stone, "The Tories' benefit cap is 'social justice in action', says Iain Duncan Smith", *Independent*, 28 May 2015. By August 2015, 66, 900 households had their Housing Benefit capped, with 45 per cent of households so affected by the cap being in London. See *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473759/benefit-cap-statistics-aug-2015.pdf* [Accessed 27 January 2016].

in general, the idea of some form of limit on levels of social security payments appears to have found favour among the UK public, the majority of whom resented the fact that, in some instances, welfare clients had a higher household income than low-paid employed households.[47] The cap represents the coercive element of welfare reform, while the gradual introduction of Universal Credit (UC) is the more positive facet. The aim behind UC is to ensure that employment will always be more lucrative than benefit receipt, since the level at which credit begins to be "clawed back" by the state is considerably higher than under previous tax credit, and it is hoped that this will make the passage back into full-time work easier for unemployed citizens.[48] The introduction of UC[49] is presently being carried out incrementally, and in order to ensure that employers make a sufficient contribution to this new "work-wage" bargain, the current Government has announced the development of a "National Living Wage" throughout the UK, which is set to surpass £9 per hour by 2020.[50]

Background to the case

While the legislative benefit cap gained high levels of support among the general public, it would inevitably have its detractors. Legal opposition to the cap on human rights grounds formed the basis of *SG*, which forms the background to this article. The case itself involved four appellants (the lone mother and her youngest child in two families), one of whom had left the family home in Belgium due to her husband's abusive behaviour. They relocated to a relatively expensive area of North London, living near her family in a two-bedroom flat rented from a private landlord. The imposition of the benefit cap (coupled with a rent raise) left the woman and her daughter only £80 per week to live on. The Secretary of State argued that there were cheaper flats in the area, an assertion disputed by the appellant, who, in any event, had personal reasons for wishing to remain in the area. Although she did have part-time work for 16 hours weekly, she was unable to sustain this due to the demands of the court proceedings concerning her children. The second adult appellant was the lone mother of three daughters aged 12 and under who had also left the family home due to domestic violence and who also rented a two-bedroom flat from a private landlord, and had suffered from a substantial cut in her weekly benefit entitlement due to the benefit cap. She was therefore worried about falling into arrears with her rent. Speaking very little English, she had not worked outside the home since her marriage ended.

[47] The hardening public attitudes towards certain categories of benefit recipients led the Prime Minister to suggest that those claimants who fail to find work despite "intensive" mentoring for two years should be obliged to undertake 30 hours of community service a week for up to 26 weeks a year. See C. Hope, "Jobless to be Forced into Community Work", *Daily Telegraph*, 9 November 2011.

[48] K. Puttick, "'21st century welfare' and the wage-work-welfare bargain Pt 1" (2012) 41 I.L.J. 122, and See J. Mesher et al., *Universal Credit: Volume V Social Security Legislation 2013/14* (London: Sweet and Maxwell, 2014).

[49] The introduction of UC in the WRA 2012 was preceded by a number of key policy documents, including DWP, *21st Century Welfare* (2010), Cm.7913; and DWP, *Universal Credit: welfare that works* (TSO, 2010), Cm.7957.

[50] C. D'Arcy and G. Kelly, *Analysing the National Living Wage: Impact and Implications for Britain's Low Pay Challenge* (London: The Resolution Foundation, 2015).

The Supreme Court ruling

In summary, the Supreme Court dismissed the appeal by a three to two majority, with Lord Reed giving the lead judgment, with which Lord Hughes agreed, while Lord Carnworth concurred for different reasons. Lady Hale and Lord Kerr each gave dissenting judgments. Before any analysis of the decision can be made, some of the central points in the various judgments have to be set out. It was not argued in the proceedings that s.96 of the WRA 2012 was incompatible with the ECHR, and neither was there any legal challenge to the fixing of one "relevant amount" (the cap) for single claimants and another for households, rather than the relevant amount being tailored to individual circumstances.[51] Nor was there any challenge made to the fixing of the "relevant amount" by reference to the average net household earnings, rather than by reference to estimated average net household earnings inclusive of benefits. Rather, the challenge was primarily to the compatibility of the Benefit Cap (Housing Benefit) Regulations 2012[52] ("the BC Regulations") and the Housing Benefit and Universal Credit (Supported Accommodation) (Amendment) Regulations 2014[53] ("the HB/UC Regulations") with art.14 of the ECHR read in conjunction with A1P1. The effect of both these sets of Regulations was to provide the detailed foundation for the benefit cap, which began to be implemented between April and September 2013 on an incremental basis throughout the UK. The core question facing the Supreme Court, set out by Lord Reed, was whether the subordinate legislation outlined above discriminated unjustifiably between men and women, contrary to art.14 and A1P1. The discrimination was alleged to arise indirectly since, legally, the cap affects all non-working households that would otherwise receive benefits in excess of the cap. In particular, households with several children, and which were in high-rent housing areas (necessitating a large housing benefit (HB) allowance) would be very adversely affected. Lord Reed gave probably one of the more substantial judgments in the case, and noted that the vast majority of single parent households, some 92 per cent, are headed by women,[54] and a statistically higher number of women are therefore affected by the cap. It was also argued that the cap affects victims of domestic violence, also predominantly women, since they may temporarily be housed in relatively expensive accommodation, and would thus be entitled, in the absence of the cap, to high amounts of HB. That would also be the position if they are entitled to HB in respect of both the temporary accommodation and the other accommodation to which they hope to return.

Lord Reed summarised the rationale for the cap into three headings: first, to set a reasonable limit to the extent to which the state will support non-working households from public funds; secondly to provide members of such households with the incentive to work; and thirdly, to achieve savings in public expenditure at a time of necessary financial retrenchment.[55] He then examined art.14 and A1P1 in some detail, noting that the general approach followed by the ECtHR was explained in *Carson v United Kingdom*[56]:

[51] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 per Lord Reed at [59].
[52] Benefit Cap (Housing Benefit) Regulations 2012 (SI 2012/2994).
[53] Housing Benefit and Universal Credit (Supported Accommodation) (Amendment) Regulations 2014 (SI 2014/771).
[54] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [2].
[55] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [4].
[56] *Carson v United Kingdom* CE:ECHR:2010:0316JUD004218405; (2010) 51 E.H.R.R. 13; 29 B.H.R.C. 22.

> "In order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relatively similar, situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between means employed and the aim sought to be realised."[57]

The focus of the European Court is usually upon the question of whether differential treatment is justified, reflecting the fact that an assessment of whether situations are "relevantly" similar is generally linked to the aims of the measure in question, as in *Rasmussen v Denmark*.[58] The third element of when a violation of art.14 occurs is when the legislative measure does not pursue a legitimate aim. However, in relation to this element, Lord Reed stated that the ECtHR had treated aims that are legitimate in the public interest in the context of A1P1, such as securing social justice and protecting the state's economic well-being, as legitimate aims when art.14 has been read in conjunction with that article, as in *Hoogendijk v The Netherlands*[59] and *Andrejeva v Latvia*.[60] *Carson* was also significant because it demonstrated just how wide a margin of appreciation the Court is prepared to allow national authorities in assessing whether, and to what extent, differences in treatment are justified:

> "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."[61]

This approach was followed by the Supreme Court in *Humphreys v Revenue and Customs Commissioners*,[62] where Lady Hale held that the usually strict test for the justification of sex discrimination in the enjoyment of the Convention rights gives way to the "manifestly without legal foundation" test in the context of welfare benefits.[63] Lord Reed also acknowledged that the ECtHR accepts that a difference in treatment may be inferred from the effects of a measure which is prima facie neutral, as in *DH v Czech Republic*,[64] where it was stated:

> "The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group."[65]

In cases like this, it would again be necessary for the court to consider whether the difference in treatment has an objective and reasonable justification, in the light of the aim of the measure and its proportionality as a means of achieving that aim. This, essentially, was the core question that had to be addressed in *SG*: the

[57] *Carson v United Kingdom* (2010) 51 E.H.R.R. 13; 29 B.H.R.C. 22 at [61].
[58] *Rasmussen v Denmark* (A/87) (1985) 7 E.H.R.R. 371 ECtHR.
[59] *Hoogendijk v The Netherlands* (58641/00) (2005) 40 E.H.R.R. SE22 ECtHR.
[60] *Andrejeva v Latvia* CE:ECHR:2009:0218JUD005570700; (2010) 51 E.H.R.R. 28.
[61] *Carson v United Kingdom* (2010) 51 E.H.R.R. 13; 29 B.H.R.C. 22.
[62] *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 W.L.R. 1545.
[63] *Humphreys* [2012] UKSC 18; [2012] 1 W.L.R. 1545 at [22].
[64] *DH v Czech Republic* (57325/00) (2008) 47 E.H.R.R. 3; 23 B.H.R.C. 526; [2008] E.L.R. 17.
[65] *DH* (57325/00) (2008) 47 E.H.R.R. 3; 23 B.H.R.C. 526; [2008] E.L.R. 17 at [175].

cap, in the form in which it was established, affects a higher number of women than men due to the differences in the extent to which the sexes take responsibility for children following the ending of relationships. Whether that differential effect had an objective and reasonable justification depends on whether the legislation governing the cap had a legitimate aim and was a proportionate means of realising that aim. However, the European Court in *Carson*, as pointed out by Lord Reed, recognises the need for national rules to be framed in broad terms, which may result in hardship in individual cases, and in *Carson* the Grand Chamber asserted that it was concerned with the compatibility of art.14 with the *system*, and not with the individual facts or circumstances of particular applicants who might be affected by the legislation.[66]

In order to decide whether the legislation unlawfully discriminates between men and women, Lord Reed provided a detailed history of the passage of the WRA 2012 through Parliament and the policy background to the legislation in order to identify the aims pursued by the Act, and extrapolated information relevant to the issue that the Supreme Court had to determine. However, although Lord Reed emphasized that the aim of this analysis was not to assess the quality of the reasons advanced in support of the legislation by Ministers or MPs, it is significant that a senior judge would carry out such a detailed examination of both aspects of social policy and the Parliamentary passage of legislation, perhaps demonstrating the extent to which the judiciary have been empowered by the enactment of the HRA 1998 and the attendant ECtHR jurisprudence.[67] Mention was even made in Lord Reed's judgment of the March 2011 DWP document *Household Benefit Cap Equality Impact Assessment*,[68] which estimated that around 60 per cent of claimants who would have their benefits cut would be single females, whereas 3 per cent would be single men. The reason for this was that around 60 per cent of households affected would comprise single parents living with children, predominantly women. However, the then Government's hope was that the effects of the benefit cap would be mitigated by the provision of support to assist single parents back into work, and single parents would be exempt from the cap if they worked only 16 hours per week.[69]

There had been much discussion at the various stages of the Bill on the impact that the cap would have on children, especially those in single parent families, and it was registered by Lord Reed in his judgment that an amendment was tabled in the Standing Committee to require that the cap reflect net average earnings plus "in-work benefits which an average earner might expect to receive".[70] However, this amendment was defeated, mainly due to the determination of the Minister of State for Work and Pensions to ensure that the social security system remained credible to the UK working population, and retained their confidence and support, something which could not be achieved if a household on benefits had a higher income than a household with one or even two parents in employment.[71] The Minister observed that there was a divide in philosophical view between those

[66] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [62] (emphasis added).

[67] It is almost unthinkable that such a legislative analysis would have been carried out on social security legislation at any time before October 2000, when the HRA 1998 came into force.

[68] DWP, *Household Benefit Cap Equality Impact Assessment* (2012). Lord Reed cited this document at [26].

[69] DWP, *Household Benefit Cap Equality Impact Assessment* (2012), para.26.

[70] *Hansard*, HC Vol.XXX, col.970 (17 May 2011).

[71] *Hansard*, HC Vol.XXX, cols 50–52 (17 May 2011).

who thought that the cap should vary according to household size and those who believed that that there should be some limit on the overall benefits that the state should provide.[72] His next observation, that working people on low incomes had to cope with difficult circumstances and live within their means, provided a strong indication that the then Government was determined to ensure that the cap remained at the intended level.[73] In relation to those living in temporary accommodation due to issues such as domestic violence, the Minister stated that local authorities had a legal duty to provide accommodation that was suitable for homeless applicants, and the suitability criteria included affordability, an observation consistent with the decision in *R. (on the application of Best) v Oxford City Council*,[74] a decision approved by the Divisional Court in *SG*.[75]

Lord Reed also registered that in the course of discussion of the Welfare Rights Bill in the House of Lords, the Minister of State gave an assurance that he had considered the requirements of the HRA 1998 and ECHR in respect of the benefit cap, and was satisfied that the way in which the Government would implement the clauses in question would meet those requirements.[76] The Bill was also scrutinised by the House of Lords and House of Commons Joint Committee on Human Rights.[77] In written evidence to this Committee the Secretary of State stated that it was the then Government's view that, if A1P1 was engaged, the measures in the Bill were proportionate to the entirely legitimate aim of securing the economic well-being of the UK. He also argued that the greater employment of single parents would have a positive impact on child poverty, and emphasised that there now existed a wide range of state support available to single parents seeking employment.[78] He also asserted that claimants would be notified of the cap and given time to adjust their spending to accommodate new levels of benefits, and in any event the cap would affect relatively few households.[79] Thus the Secretary of State was attempting to ensure that the Bill came with the margin of appreciation permitted to national authorities under the ECHR.

In terms of deciding whether the BC Regulations were compatible with art.14 in conjunction with A1P1, the first question to be addressed was whether there was any interference with possessions. However, Lord Reed affirmed that it was unnecessary to resolve that question in the present appeal, since the applicability of A1P1 was not contested on behalf of the Secretary of State. The second question to be addressed was whether these Regulations result in differential treatment of men and women, a point also conceded by the Secretary of State, since it is axiomatic that more single households are headed by women, and that the children of such households may be affected by the benefit cap. That consequence could only be circumvented by defining "welfare benefits" so as to exclude benefits that

[72] *Hansard*, HC Vol.XXX, col.984 (17 May 2011).
[73] *Hansard*, HC Vol.XXX, col.984 (17 May 2011).
[74] *R. (on the application of Best) v Oxford City Council* [2009] EWHC 608 (Admin).
[75] *R. (on the application of JS) v Secretary of State for Work and Pensions* [2013] EWHC 3350 (QB); [2014] P.T.S.R. 23.
[76] *Hansard*, HL Vol.XXX, col.GC415 (21 November 2011). See also DWP, *Household Benefit Cap Equality Impact Assessment* (2012), para.38.
[77] House of Lords, House of Commons Joint Committee on Human Rights, *Legislative Scrutiny: Welfare Reform Bill, Twenty-First Report of Session 2010–2012* (TSO, 2011), HL Paper No.233, HC Paper No.1704.
[78] House of Lords, House of Commons Joint Committee on Human Rights, *Legislative Scrutiny: Welfare Reform Bill, Twenty-First Report of Session 2010–2012*.
[79] House of Lords, House of Commons Joint Committee on Human Rights, *Legislative Scrutiny: Welfare Reform Bill, Twenty-First Report of Session 2010–2012*.

are directly or indirectly linked to responsibility for children.[80] However, Lord Reed held that the argument that the BC Regulations also result in differential treatment because of their effect on the victims of domestic violence had not, in his opinion, been established: the amendments effected by the HB/UC Regulations were designed to address the problem, and it was not argued in the present case that they had failed to do so.[81] In terms of whether the BC Regulations pursue a "legitimate aim", Lord Reed held that there could be no doubt that they did, since they aimed, in his view, to secure the economic well-being of the UK, and were well in line with the clearly proclaimed policy of reducing public expenditure on benefits, which was first announced in June 2010.[82] While the appellants contended that savings in public expenditure could never constitute a legitimate aim of measures that had a discriminatory effect, Lord Reed countered by stating that this submission was inconsistent with the approach adopted by the ECtHR in the cases cited above.[83] In addition, the submission was held to be inconsistent with the acceptance of the economic well-being of the country as a legitimate aim of interferences with Convention rights under the second paragraphs of arts 8 to 11 and under A1P1.[84] The second rationale behind the legislation and Regulations, that of incentivising work,[85] and the third aim of imposing a reasonable limit on the total amount that a household can receive in welfare benefits, were held to be equally legitimate; since, in Lord Reed's view, they are aspects of securing the economic well-being of the country, and they also have the broader aspect of reflecting a political view as to the nature of a "fair and healthy society".[86] It still appears, therefore, that in matters of social policy the courts are prepared to defer to the elected legislature.

On the crucial question of whether the BC Regulations maintain a reasonable relationship of proportionality between the means employed and the aims to be realised, a more complex answer was required. The appellants argued that the aim of setting a reasonable household benefit limit could have been achieved by using a benchmark of the average income inclusive of benefits, since, in their view this would correspond more closely to the adjective "fair", used by Ministers during the Parliamentary debates, since it would achieve parity between the maximum income received by non-working households.[87] The legal validity of this submission was scotched by Lord Reed for three reasons: the first being that since the compatibility of s.96 of the WRA 2012 with the ECHR was not challenged, the BC Regulations cannot be unlawful in so far as they require the cap to be set by reference to "earnings", as set out in the section, and would be ultra vires if they failed to do so.[88] Secondly, and perhaps more significantly, the assessment of the level at which a cap would represent a fair balance between the interests of working and non-working households is a matter of *political judgment*.[89] Thirdly, the Government had made a judgment, endorsed by Parliament, that a cap set at the

[80] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [61].
[81] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [62].
[82] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [63].
[83] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449.
[84] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449.
[85] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [65].
[86] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [66].
[87] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [68].
[88] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [69].
[89] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 (emphasis added).

level of average income of working households would be less effective in achieving its aims, a judgment, in Lord Reid's opinion, which was not unreasonable.[90] The submission was also made by the appellants that the fiscal savings achieved by the benefit cap would be marginal at best, a point which was accepted by Lord Reed, but he held that such savings nevertheless contribute towards the ultimate objective of reducing the fiscal deficit.[91]

It was evident from the ruling that the Supreme Court was not prepared to challenge the BC Regulations on any ground that could be construed as political. Since the lower courts had rejected criticism that children in households affected by the cap are deprived of the basic necessities of life, Lord Reed saw no reason to reach a different conclusion.[92] In relation to the difficulties of finding work, Lord Reed cited data from the Office for National Statistics which indicates that 63.4 per cent of single parents with dependent children were in work during the second quarter of 2014, noting that even single parents on low incomes are capable of making childcare arrangements with family members and friends, and the contention that single parents with children under the age of five have experienced greater difficulty in obtaining employment than any other claimants affected by the cap was not, in his opinion, supported by the evidence.[93] Fundamentally, as Lord Reed reiterated, the main question to be examined by the Court was whether the legislation unlawfully discriminates between men and women, rather than the hardship which might result from the benefit cap, and he concluded:

> "In that regard, it is highly significant that no credible means was suggested in the argument by which the legitimate aims of the Regulations might have been achieved without affecting a greater number of women than men. Put shortly, since women head most of the households at which those aims are directed, it appears that a disparity between the numbers of men and women affected was inevitable if the legitimate aims were to be achieved."[94]

He also alluded to the fact that Lady Hale had raised the question in her judgment whether taking child-related benefits out of the cap as it applies to single parents only would have an emasculating effect. He considered that the information available did at least enable the question to be considered, but concluded that the exclusion of child-related benefits, even if confined to single parent households, would have compromised the achievement of the legitimate aims of the BC Regulations.[95]

An argument of a different nature was put forward by the appellant on the basis of art.3(1) of the United Nations Convention on the Rights of the Child (UNCRC), which provides that "in all actions concerning children … the best interests of the child shall be a primary consideration". The initial contention was that the Secretary

[90] In Lord Reed's view, the alternative would mean that fiscal savings would be less and the financial incentive to find work would be reduced. See *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 .

[91] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [70].

[92] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [73].

[93] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [74]. Lord Reed also dismissed the argument that households with children cannot reasonably be expected to move house due to the impact on the children, since millions of parents throughout the UK have moved house with their children for a variety of reasons, including economic reasons. See *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [75].

[94] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [76].

[95] Lord Reed, however, did not consider the question himself. See *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [77].

of State was obliged by s.6 of the HRA 1998 to treat the best interests of children as a primary consideration in accordance with art.3(1), since the cap had an impact upon the private and family lives of children in affected households. Article 8(1) of the ECHR was therefore applicable, since as the ECtHR would have regard to the UNCRC when applying art.8 in relation to children, it followed that the Secretary of State was also obliged to comply with art.3(1) of the UNCRC, but had failed to do so.[96] This argument raised a number of questions, in particular whether general legislation limiting welfare benefits, by reason of the impact on those affected, constitutes an interference with their right to respect to their private and family life. If this is the case, stated Lord Reed, the scope of art.8 would be enlarged beyond current understanding, to bring legislation imposing increases in taxation or reductions in social security benefits within its remit. Should this indeed be the legal position, art.8(2) permits an interference with the right to respect for family life to be justified as being necessary in a democratic society in the interests of the economic well-being of the country.[97] The argument that the justification on that ground is impossible unless the legislation itself is in reality in the best interests of the children affected by it has, in the opinion of Lord Reed, major implications for the effect of the ECHR in relation to legislation in the field of taxation and social security.[98] This would certainly involve the judiciary to a much higher degree in matters of fiscal and social policy, not a development that many UK judges would seek to encourage. However, it was held that this contention had not been made out, and a more closely reasoned argument was developed in the submissions lodged after the hearing, which treated art.3(1) as forming part of the proportionality assessment under art.14 of the ECHR read with A1P1.[99]

Consequently, a test of compliance with art.3(1) is substituted for the "manifestly without reasonable foundation" test, which all parties agreed to be applicable in the present case. On that basis, art.3(1) was argued to be decisive of the appeals, causing Lord Reed to consider how this article interacted, if at all, with the issues in the appeals.[100] He stated that the UNCRC is not part of UK law and, although its spirit lies at the foundation of some UK legislative provisions,[101] these do not affect the present case. While it was recognised that the UNCRC could be relevant, the case in hand was concerned with alleged discrimination between men and women in the enjoyment of their property rights guaranteed by A1P1. Lord Reed struggled to find answers in the submission on the UNCRC as to whether the legislation in question unjustifiably discriminates between men and women. He reasoned that in cases where the cap results in a reduction in the resources available to parents to provide for children in their care, the impact of that reduction on a child living with a single father is just the same as the impact on a child living with a single mother in similar circumstances. The fact that children are statistically more likely to be living with a single mother was, in Lord Reed's view, quite unrelated to the question whether the children's rights under art.3(1) of the UNCRC

[96] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [78].
[97] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [79].
[98] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449.
[99] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [81].
[100] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449.
[101] For example, s.11(2) of the Children Act 2004; and s.55 of the Borders, Citizenship and Immigration Act 2009. See *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [82].

have been violated.[102] It is firmly established that the UK courts have no jurisdiction to interpret or apply unincorporated treaties,[103] and it was deemed inappropriate for the courts to purport to decide whether or not the executive had correctly understood an unincorporated treaty obligation.[104] Remaining at a level of high constitutional law, Lord Reed reiterated the established position that the HRA 1998, while entailing some adjustment of the respective roles of the courts, the executive and the legislature, does not eliminate the differences between them; the determination of issues of social and economic policy is pre-eminently the function of democratically elected institutions.[105] To support this judgment, he cited Lord Sumption in *Bank Mellat v HM Treasury (No.2)*[106]:

> "When a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on considerations of general policy."[107]

Lord Reed also cited an even more emphatic warning against judicial activism and the damage that it may incur, given by Lord Bingham in *R. (on the application of Countryside Alliance) v Attorney General*[108]:

> "The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament."[109]

Given the overwhelming weight of legal authority, and his finding that the fact that there were many more single households headed by women than men was an irrelevant consideration, Lord Reed duly dismissed the appeals.

Lord Carnwarth affirmed that the boundaries between the various heads of claim had not been clearly delineated, although, broadly speaking, he supported Lord Reed's decision to dismiss the appeal, after an examination of the central issues. Lord Hughes emphasised that although art.3(1) UNCRC was not incorporated, its precepts could be relevant in English law in a number of ways, none of which, however, were applicable to the present case.[110] Lady Hale also held that the benefit cap is quintessentially a matter of social and economic policy but, unlike her fellow judges, she stated that the Supreme Court should concern itself with the decisions of the Government in working out the details of the scheme.[111] She also cited Lord Hope, who stated that protection against discrimination, even in an area of social and economic policy, falls within the constitutional responsibility of the courts:

[102] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [89].
[103] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [90].
[104] This was set out in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418; [1989] 3 W.L.R. 969 HL; and *R. v Lyons (Isidore Jack) (No.3)* [2002] UKHL 44; [2003] 1 A.C. 976.
[105] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [93].
[106] *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 38; [2014] A.C. 700 at [44]. See also *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449.
[107] *Bank Mellat* [2013] UKSC 38; [2014] A.C. 700.
[108] *R. (on the application of Countryside Alliance) v Attorney General* [2007] UKHL 52; [2008] 1 A.C. 719.
[109] *Countryside Alliance* [2007] UKHL 52; [2008] 1 A.C. 719 at [45]. See also *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [95].
[110] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [137].
[111] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [159].

> "Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen."[112]

It is evident in Lady Hale's judgment, even before any of the details of the BC Regulations were analysed, that she was adopting an approach markedly different from that of Lord Reed on the subject of how proactive the judiciary should be when confronted with questions of socio-economic policy. Lady Hale was stating that even in the area of welfare benefits, in which the courts normally defer to Parliament, if that decision results in unjustified discrimination then it is the duty of the courts to say so.[113] She did note that the cap does not apply at all where the claimant is, or the claimant and her partner are jointly, entitled to working tax credit,[114] which effectively exempts most working households from the cap.[115]

On the question of whether the cap was discriminatory or not, Lady Hale examined the appellant's argument that it violated art.14 indirectly. The Divisional Court in the present case had conceded that the cap does have a disproportionate adverse impact on women, and this concept of indirect discrimination had been recognised by the ECtHR in *DH v Czech Republic*.[116] Lady Hale termed the prejudicial effect of the cap as "obvious and stark", breaking the link between benefit and need, and asserted that the new scheme has a disproportionately prejudicial effect upon lone parents, the great majority of whom are women.[117] She described the socio-economic reasons that make it difficult for lone parents to move into employment, and the negative impact that the cap had upon single parents and, in particular, victims of domestic violence, stating that the effect of the scheme is "to undermine the humane treatment given to victims of domestic violence both by the homelessness regime and by the housing benefit scheme".[118] Lady Hale categorised victims of domestic violence as a subset of lone parents who may be more vulnerable to the effects of the benefit cap.[119]

The applicable principles relating to discrimination are set out in *Stec v UK*,[120] which stated that a difference in treatment is discriminatory if it has no objective and reasonable justification[121]; and, as Lady Hale noted, what is needed to justify indirect discrimination is different from that for direct discrimination.[122] She noted the aims behind the cap, namely, to introduce greater fairness in the welfare system, to make financial savings and to increase incentives to work, and examined the criticisms of each of these headings. In relation to fairness, she cited the criticisms

[112] Lord Hope in *In re G (Adoption: Unmarried Couple); sub nom. Re P (A Child) (Adoption: Unmarried Couples)* [2008] UKHL 38; [2009] 1 A.C. 173 at [48]. See also *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [60].
[113] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449. Lady Hale did say, however, that in many cases the result will be to leave it to the legislature to decide how the matter is to be put right.
[114] BC Regulations reg.75E(1), (2).
[115] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [164].
[116] *DH v Czech Republic* (57325/00) (2008) 47 E.H.R.R. 3; 23 B.H.R.C. 526; [2008] E.L.R. 17.
[117] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [180].
[118] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [186].
[119] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [187].
[120] *Stec v United Kingdom* (65731/01) (2006) 43 E.H.R.R. 47; 20 B.H.R.C. 348.
[121] *Stec* (65731/01) (2006) 43 E.H.R.R. 47; 20 B.H.R.C. 348.
[122] *Stec v United Kingdom* (65731/01) (2006) 43 E.H.R.R. 47; 20 B.H.R.C. 348 at [51].

made by the Child Poverty Action Group, and concluded that there was no need to introduce the cap in order to ensure that families on benefit have to make the same difficult choices that working families have to make: they already have to make these choices.[123] As far as saving public money is concerned, Lady Hale stated that the anticipated savings are a mere "drop in the ocean" compared to the total benefit bill.[124] While in *Andrejeva v Latvia*[125] the ECtHR accepted that the protection of a country's economic system is a legitimate aim that is broadly compatible with the objectives of the ECHR, the Court looked to see whether there existed a reasonable relationship of proportionality between the aim itself and the means employed.[126] In this latter case the discrimination alleged was on the grounds of nationality, for which "very weighty reasons" would be required for compatibility with the ECHR; Lady Hale held that the same principle would apply to sex discrimination,[127] casting doubt on the justifiability of the measure on the grounds of costs saving.[128] Accepting that the aims of incentivising work and promoting long-term behavioural change are legitimate aims, she did acknowledge the appellants' arguments that the Government's expectations were unrealistic in the case of families of lone parents and victims of domestic violence; it was incorrect to assume that parents would always be able to find acceptable solutions without prejudice to their children's welfare:

> "We should not accept that their children's welfare should be put at risk by their having to make unsatisfactory child care arrangements or ... to rely upon assistance from a violent partner."[129]

Neither, held Lady Hale, was it realistic to assume that single parents will eventually be able to move to cheaper accommodation, since many private landlords are unwilling to take tenants who are dependent on HB.[130] It had also been recognised by the Court of Appeal in *Burnip v Birmingham City Council*[131] that discretionary housing payments are not an answer to the problems occasioned by the cap. In addition, there are other reasons why it may be unreasonable to expect lone parents to move to another area, amongst which is the problem of finding schools for children in an unfamiliar area.[132]

Lady Hale concluded that although in this case the complaint was of discrimination in interfering with the peaceful enjoyment of possessions, the cap does come close to a deprivation of possessions, since it removes benefit to which the claimants would otherwise be entitled by reason of their children's needs.[133] Lady Hale adopted a somewhat different approach towards art.3(1) of the UNCRC, citing *Burnip*[134] (which was concerned with discrimination against disabled people) to demonstrate that the ECtHR has shown an increased willingness to deploy other

[123] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [193].
[124] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [195].
[125] *Andrejeva v Latvia* (2010) 51 E.H.R.R. 28.
[126] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [197].
[127] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449.
[128] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [198].
[129] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [202].
[130] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [203].
[131] *Burnip v Birmingham City Council* [2012] EWCA Civ 629; [2013] P.T.S.R. 117.
[132] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [206].
[133] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [209].
[134] *Burnip v Birmingham City Council* [2012] EWCA Civ 629; [2013] P.T.S.R. 117 at [21].

international instruments as aids to the construction of the ECHR, and asserted that this idea could be useful in the present case.[135] The ruling of the Grand Chamber in *Neulinger v Switzerland* provided an example of utilising other provisions of international law to gain new angles on the ECHR:

> "The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken ... of any relevant rules of international law applicable in the relations between the parties, and in particular the rules concerning the international protection of human rights."[136]

Although the Supreme Court had held that the interests of children should take primacy of place in government decisions and actions in *ZH (Tanzania) v Secretary of State for the Home Department*,[137] and this had become binding domestic law in s.11 of the Children Act 2004, Lady Hale recognised that this duty had not been extended to all government departments, including the DWP, with which the present case is concerned.[138] However, she did note that the Joint Committee on Human Rights had regretted that the Government had failed to carry out any detailed analysis of the compatibility of the Welfare Reform Bill with the UNCRC.[139] She also stated that the UK's international legal obligations should inform and illuminate the interpretation of the Convention right to the enjoyment of the substantive Convention rights without discrimination just as much as they inform the interpretation of the substantive Convention rights.[140]

Relevance of the UNCRC

The Supreme Court took it as common ground that art.3(1) of the UNCRC was relevant to the discrimination issue, but the question was whether it had been complied with. Lady Hale held that the Secretary of State's argument that art.3(1) should not be taken into account in deciding whether the discrimination can be justified was clearly negated by the ECtHR decision in *X v Austria*.[141] There, it was stated that the existing authorities seemed to weigh in favour of allowing courts to carry out an examination of each individual case, which, it was held, would be more in keeping with the best interests of the child. Lady Hale dismissed the Secretary of State's argument that the discrimination was not against the children but their mothers.[142] In relation to Lord Reed's point that children living with lone fathers suffer just as much those who live with lone mothers, Lady Hale asserted that this point did not arise when the discrimination complained of is indirect rather than direct.[143] She also questioned the Government's plans to effect long-term behavioural trends in terms of welfare dependency, holding that these

[135] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [213].
[136] *Neulinger v Switzerland* CE:ECHR:2010:0706JUD004161507; [2011] 1 F.L.R. 122; [2011] 2 F.C.R. 110; (2010) 54 E.H.R.R. 1087 at [131].
[137] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 A.C. 166.
[138] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [215].
[139] House of Lords, House of Commons Joint Committee on Human Rights, *Legislative Scrutiny: Welfare Reform Bill, Twenty-First Report of Session 2010–2012*, para.1.35. See also *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [216].
[140] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [217].
[141] *X v Austria* CE:ECHR:2013:0219JUD001901007; [2013] 1 F.C.R. 387; (2013) 57 E.H.R.R. 405.
[142] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [223].
[143] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [224].

declared aims betrayed a misunderstanding of what art.3(1) of the UNCRC requires, which is to oblige government to give first consideration to the best interests, not only of children in general, but also of the particular child or children directly affected by the decision in question:

> "It cannot possibly be in the best interests of the children affected by the cap to deprive them of the means to provide them adequate food, clothing, warmth and housing, the basic necessities of life. It is not enough that children in general, now or in the future, may benefit by a shift in welfare culture."[144]

Insofar as the Secretary of State relied upon the notion of long-term behavioural change as an answer to art.3(1), he had, in Lady Hale's view, misdirected himself.[145] Effectively, Lady Hale held that the UNCRC imposed specific obligations on government, and underscored this point by noting that the UNCRC does contain some specific obligations that go beyond treating children's interests as a primary consideration when making decisions concerning them, including art.27(1), which provides that "States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, moral and social development". Ultimately, she concluded, the benefit cap deprives some children, principally those in larger families living in high-cost accommodation, of provision for their basic needs in order to incentivise their parents to seek work, but discriminates against those parents who are acknowledged to be least likely to be able to do so.[146] Taken altogether, in light of the primary consideration of the best interests of the children affected, the indirect discrimination against women inherent in the way in which the cap had been implemented could not be seen as a proportionate means of achieving a legitimate aim.[147] Lady Hale therefore held that the appropriate relief in this case would be to make a declaration that Pt 8A of the Housing Benefit Regulations is incompatible with the Convention, since its application to lone parents is indirectly discriminatory on grounds of sex, contrary to art.14 of the ECHR read with A1P1.[148] Lord Kerr completely agreed with Lady Hale that the appeal should be allowed for all the reasons she gave.

Analysis

Despite the fact that the appeals were dismissed on a majority decision, this case is highly significant primarily due to the great divergence in approach towards the central issues between Lord Reed and Lady Hale, both of whose judgments provide almost textbook examples of different approaches to linking established human rights jurisprudence to social security provision in the UK. Lord Reed, in his deference to the will of Parliament and the executive, stayed quite rigidly faithful to the strictures of Lord Sumption, who argued against the expansion of Dworkin's "Law's Empire" of judicial law making. While the ECHR secures rights that would almost universally be regarded as the foundation of any functioning civil society, its scope should not be extended into areas of social and economic policy, which

[144] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [226].
[145] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449.
[146] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [227].
[147] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [229].
[148] *SG* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [232].

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was more correctly the province of the elected legislature.[149] Lord Sumption recognised the impatience showed by commentators such as Dworkin and Rawls towards what they regarded as the illogicality, intellectual dishonesty and the irrational prejudice of party politics when reaching decisions in these policy areas; Dworkin certainly would have believed that the judiciary could have made more rational decisions.[150] Nevertheless, for Lord Sumption the arena of democratic politics is by far the best forum in which to decide matters of socio-economic policy, since there is more scope for necessary compromise in this forum, and MPs have a much wider range of information, expertise and resources at their disposal than judges trying a case based on one narrow set of facts.[151] However, even allowing for his deference to the will of Parliament and the legalism of his judgment, Lord Reed carried out an extremely thorough examination of the background and detail of both the relevant legislation and regulations, leading him to consider central matters of social and economic policy, something that it is difficult to envisage happening in decisions on social security matters in the latter part of the 20th Century.

One might contrast both Lord Reed's and Lady Hale's analysis of the benefit cap and accompanying legislation and regulations with Lord Bridge's dismissal of the arguments about the interpretation of the criteria for attendance allowance in *Re Woodling* with the statement that "[i]t is largely a matter of impression and does not admit to elaborate argument in analysis".[152] Comparing this approach to social security issues to the House of Lords' ruling in the joined appeals of *Cockburn v Chief Adjudication Officer*; *Secretary of State for Social Security v Fairey (also known as Halliday)*,[153] Wikeley asserted that by the later 1990s the senior judiciary had abandoned its traditional policy of non-intervention in social security law matters.[154] However, he also stated that the new "activist" approach contained difficulties, since in *Cockburn* and *Fairey* the House of Lords offered five different opinions from which a ratio decidendi had to be extracted.[155] A similar result occurred in *SG*, which, although decided by a majority, produced at least three different opinions. Although *Cockburn* demonstrated a level of judicial interest in examining issues of social security law, arguably the level of judicial analysis of the social policy underpinning welfare legislation has been taken to a much higher level in the present case. It is possible that the instrument that has permitted this approach in the Supreme Court is the HRA 1998, along with a heightened awareness of other international human rights provisions that may impinge upon UK social security legislation.

Lord Reed's ruling was ultimately to prevail and form the basis for the majority decision in the case. Lady Hale's judgment, and to a lesser extent that of Lord Kerr, on the other hand, was characterised by a willingness to push the limits of judicial power by using provisions of international human rights law to illuminate

[149] Lord Sumption, *The Limits of Law* (20 November 2013), the 27th Sultan Azlan Shah Lecture.
[150] Lord Sumption, *The Limits of Law* (20 November 2013), the 27th Sultan Azlan Shah Lecture.
[151] Lord Sumption, *The Limits of Law* (20 November 2013), the 27th Sultan Azlan Shah Lecture.
[152] *Re Woodling*; sub nom. *Woodling v Secretary of State for Social Services* [1984] 1 W.L.R. 348; [1984] 1 All E.R. 593 HL at [352].
[153] *Cockburn v Chief Adjudication Officer; Secretary of State for Social Security v Fairey (also known as Halliday)* [1997] 1 W.L.R. 799; [1997] 3 All E.R. 844 HL.
[154] N. Wikeley, "Benefits, bodily functions and living with disability" (1998) 61 M.L.R. 551, 557.
[155] Wikeley, "Benefits, bodily functions and living with disability" (1998) 61 M.L.R. 551.

the scope of ECHR provisions so as to link these to government regulations on social security provision. She went far beyond narrow issues of legality and examined the impact that the benefit cap would have on UK society; and concluded that, in reality, more women than men would be adversely affected by it, thus raising the issue of discrimination under art.14 and A1P1. In a sense, the activism inherent in her judgment runs against the approach towards the ECHR recommended by Lord Sumption, and it is significant that another Supreme Court judge was inclined to concur with her decision. It is also likely that Lady Hale's approach would not find favour with Finnis, who stated that the institutional design of legislatures is broadly superior to the design and procedure of even the most sophisticated appellate courts when it comes to the business of making law.[156]

Conclusion

Since the majority of the Supreme Court held that the benefit cap is not incompatible with the ECHR, it is unlikely that the course of the government welfare reforms will be altered to any degree. This appears to be demonstrated by the contents of the Welfare Reform and Work Bill, which received its first reading in Parliament on 9 July 2015, and has now reached the House of Lords. Clause 7 of this Bill amends s.96 of the WRA 2012, reducing the benefit cap even further to £23,000 for couples and £15,410 for single households in the Greater London area, and £20,000 and £13,400 respectively for households outside this area. If this Bill passes successfully into law, it could lead to a further deterioration of the condition of those social groups outlined by Lady Hale in her judgment. Although there was some link made to the cap and art.3(1) of the UNCRC in *SG*, the latter ultimately does not provide enforceable rights to individual citizens, so the existence of this provision is also unlikely to alter the nature of the cap in any way. To that extent, there still remains a gulf between human rights jurisprudence and legislation relating to social security entitlement in the UK. The true significance of the case lies in the almost diametrically opposing judgments of Lord Reed and Lady Hale on the legal issues at hand; and the very fact that the final decision was based on a majority has raised the possibility of judges in future cases being emboldened to adopt the reasoning of the minority judgment, perhaps ensuring that the "rights revolution" finally filters down to the poorer sectors of the UK population. Until then, the principle of less-eligibility looks set to remain a feature of the welfare system.

[156] J. Finnis, "Judicial Power: Past, Present, and Future" (21 October 2015), available at: *http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/* [Accessed 30 January 2016].