The Trials of Welfare Reform

This article looks briefly at recent legal challenges to welfare reform, in which the EHRC has intervened.

The relevant legal principles

The European Convention on Human Rights (ECHR) is incorporated into domestic law by the Human Rights Act 1998 (HRA). Under this law, the state has an obligation not to act incompatibly with convention rights. This involves both negative obligations not to interfere with the rights except in permissible circumstances outlined in the convention, and positive obligations to enforce and protect those rights, for example by bringing in legislation. Courts are required to interpret legislation in a way that is compatible with convention rights, secondary legislation can be struck down as incompatible but courts must give effect to the will of parliament in primary legislation, and may instead issue a declaration of incompatibility, following which the Government would be expected (but not required) to review the law.

The rights discussed in the cases below are: Article 8 (Right to privacy for home, family and correspondence); Article 1 of the first Protocol or A1P1 (protection of property rights); Article 12 (right to marry and found a family); Article 9 (right to freedom of thought, conscience and religion); and Article 14 (right to enjoy convention rights without discrimination on any ground including ‘other status’).

Article 14 is not a free-standing right and can only be pleaded together with one of the other rights. The ground of ‘other status’ is much wider than the right not to be discriminated against because of one of the 9 protected characteristics under the Equality Act 2010, and can apply for example, to lone parents.
Although international treaties ratified by the UK Government are not part of UK law, nor directly enforceable in UK courts, they can be used to interpret convention rights in domestic law. For example, Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) provides: “In all actions concerning children, whether undertaken by...courts of law...or legislative bodies, the best interests of the child shall be a primary consideration.”

ECHR case law tells us that states enjoy a margin of appreciation (discretion) when deciding whether differences in similar situations justify different treatment. The margin is very wide when general measures of economic or social strategy are under consideration because of the states' direct knowledge of their society and its needs. The court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'. (Carson v UK (2010) 51 E.H.R.R 13 and Stec v UK (2006) 43 E.H.R.R. 47)

In the application of a general rule or policy, people whose situations are materially different to others' should be treated differently. In Thlimmenos v Greece, a conscientious objector was denied access to the accountancy profession because of a conviction for refusing to wear military uniform. The court found there was no objective and reasonable justification for not treating the applicant differently from persons convicted of other types of crime.

**Welfare Reform**

The benefit cap limits the amount of welfare benefits households can receive. To escape the cap, a single claimant must work at least 16 hours per week, and a couple must work 24 hours per week between them, with one partner working at least 16 hours per week. Any benefits in excess of the cap are taken from the claimant's housing benefit.

Universal credit (UC) is a single payment replacing multiple benefits for people of working age. Some claimants might receive lower payments under UC than they received under the old scheme.

As the welfare reforms came into force, legal challenges were mounted against the Secretary of State for Work and Pensions (SSWP).

**Recent Developments in Caselaw**

SG (previously JS) v SSWP – [2015] UKSC 16 - March 2015
In this case a group of lone parents challenged the application of the benefit cap to them. They claimed the benefit cap discriminates against them in the enjoyment of their rights under A1P1 (possessions), and A8 (right to privacy for home, family and correspondence). Also, the government had made the decision to introduce the cap without giving primary consideration to the rights of their children, as required by Article 3 of the UNCRC. Their children would be more harshly affected by the cap because it is harder for lone parents to take up work due to the cost and availability of childcare. They are in a different situation from couples and should therefore be treated differently.

All parties agreed the cap indirectly discriminated against lone parents, the overwhelming majority of whom are women. The only question for the court was whether the discrimination was justified; that is, was it a proportionate means of achieving a legitimate aim?

The court found the three aims of the cap - fiscal savings, incentivising work, and making the system fairer across working and non-working households - were all legitimate, and found by a slim majority of three to two that the cap was also a proportionate means of achieving those aims. To exempt lone parents, large families and those in areas with higher accommodation costs would defeat the aim of the scheme. A less discriminatory means of achieving the aims had not been suggested.

In respect of A3 UNCRC, that could not be used to aid interpretation as to whether there was gender discrimination between men and women in the enjoyment of their A1P1 rights. The court made clear that it hoped the Secretary of State (SS) would consider the best interests of the child when the scheme was reviewed.

**DA & and Others and DS and others v SSWP**

**UKSC 2018/0061 and 2018/0074**

**July 2018 - Supreme Court hearing**

In 2016 the government revised the cap down, on the basis that it had encouraged people to move into work. The new cap is £23,000 for families in London and £20,000 for families outside London.

In DA, single mothers and their children aged under two each challenged the revised cap on the grounds that it discriminates against them, contrary to A14, in relation to their Article 8 and A1P1 rights, and discriminates against the children in the enjoyment of their A8 rights in
the light of UNCRC Article 3. It was claimed that it was much harder for these parents to move into work and escape the cap, partly because of the cost and availability of childcare for children under two. They argued that they should be treated differently to others to whom the cap applies in accordance with the principle in *Thlimmenos* above. Additionally, parents with children under three are not even required to be available for work to receive benefits. It was therefore, ‘manifestly without reasonable foundation’ to apply the cap to them.

Having won at first instance, the claimants lost on appeal. The Court of Appeal, by a majority of two to one, ruled that the revised cap pursued legitimate aims (as in *SG*) and did not unlawfully discriminate against lone parents with children under two in the enjoyment of their A8 and A1P1 rights; they had not shown that their situation was so much worse than others that it required different treatment, in the *Thlimmenos* sense. The children’s A8 rights were so intertwined they could not sensibly be considered separately from their parents, and it was not necessary for the court to rule on whether the SSWP complied with A3 UNCRC when revising the cap.

The case is joined with DS and Others, who made similar arguments about lone parents in different circumstances. Importantly, they also challenged the revised cap itself, as it was no longer linked to average earnings and was arbitrary. At the time of writing, the Commission is intervening in the Supreme Court on the correct application of the law and advocating that both appeals are allowed.

**SC and others and 11 children v SSWP EWHC 684 (Admin) - April 2018**

Three families with children born after 6 April 2017 challenged the limit on child benefits payable for a third child (‘the two child rule’) on the grounds that it variably breached their rights under articles 8, 9 (freedom of thought conscience and religion), 12 (right to marry and found a family), A1P1 and A14. Controversially, victims of rape are required to complete a form disclosing the circumstances of the conception to be exempt from the rule. The High Court ruled that A8 was not engaged - the jurisprudence on whether social security fell within the ambit of A8 was not clear. The purpose of the two child rule was not to stop families from growing but to limit state support to sustainable levels, therefore A12 was not breached. Those with religious or moral objections would be constrained by other factors, and A9 was not
engaged. A14 was not engaged. The law had changed only in respect of future claims and a potential future claim for a benefit wasn’t sufficient to be a ‘possession’ for the purposes of A1P1. There had not been discrimination, but if there had, it would have been justified because the rule was not ‘manifestly without reasonable foundation’. Finally a ‘child with multiple siblings’ was not an ‘other status’ under A14, so the child’s rights were not infringed. A3 of the UNCRC was only to be used to interpret convention rights and to judge any justification provided.

However, the non-parental ordering rule – applying the two child limit to the second natural child of a family, born after the arrival of a kinship care child – was struck down as irrational.

At the time of writing, this case is also under appeal.

**Hurley, TP, RF and MA**

There have been some successful challenges to the reforms. The courts have found all of these measures discriminatory and have struck them down:

- Not exempting carer’s allowance from the benefit cap where the carer does not live with the disabled person *(R (Hurley v SSWP) [2015] EWHC 3382 (Admin))*
- Excluding people who cannot travel independently ‘for reasons of physiological distress’ from the mobility element of Personal Independence Payment *(R. (on the application of RF) v Secretary of State for Work and Pensions) [2017] EWHC 3375 (Admin))*
- No transitional protection against loss of disability premiums on claim for universal credit triggered by moving into a different local authority *(R v (TP and AR) v SSWP [2018] EWHC 1474 (Admin))*
- Not exempting additional bedroom for child’s overnight carer and for adults who cannot share with spouse from reduction in housing benefit (‘bedroom tax’) *(R (Carmichael and others) v SSWP [2016] UKSC 58)*

*The courts’ approach to welfare reform cases:*
The courts will strike down secondary legislation that is clearly
discriminatory and unjustified (Hurley, TP, RF, MA). However, where the
justification arguments are finely balanced, claimants often face an uphill
struggle to persuade the courts that the particular measure is unlawful.

The final decisions in SC and DA are eagerly awaited, and offer some
hope to those worst affected by welfare reform.

The impact of welfare reform on protected groups

The Equality and Human Rights Commission (EHRC) recently published
its cumulative impact assessment of welfare reform on protected groups.
(Research report 94 at
https://www.equalityhumanrights.com/sites/default/files/research-report-
94-cumulative-impact-assessment.pdf )

The changes made between 2010 and 2015 were modelled forward for
their impact in 2021-22, when they will be fully implemented. The
assessment took account of tax, VAT, the new living wage and all
benefit changes. Households that include a disabled adult will lose
£2,500 per year, while those with a disabled child and a disabled adult
will lose around £5,500 per year; lone parents will lose 15% of their
income, black families will lose around 5% and Bangladeshi and
Pakistani families are particularly affected.

The EHRC’s key recommendations are that the Government uses a
cumulative impact assessment for all fiscal events and especially for the
spending review in 2019, and that it incorporates the impact on
protected groups into its analysis.

The effects of poverty on life chances are well documented and
generally result in worse outcomes in every area of life.

Using the Equality Act 2010 and the Human Rights Act 1998 in your
casework

The DWP and its agents are service providers for the purposes of the
Equality Act 2010. This means that they must comply with the duties not
to discriminate against, harass or victimise individuals and to make
reasonable adjustments for disabled people to access their services.
This duty applies at every stage of the process from application. The
DWP also carries out public functions, and must comply with the Public
Sector Equality Duty.

Advisers can contact EHRC Adviser Support for help identifying and tackling discrimination and human rights issues in their casework, to talk through cases or to notify us about emerging issues and trends you think we should know about.

**EHRC Scotland Adviser Support:** 0141 228 5990

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