Welfare Reform and the Commission

Unless people have the basics of food, clothing and shelter they cannot enjoy any of their other fundamental rights and freedoms.

For this reason, the UK Government’s current Welfare Reform program is an area of strategic importance to the Commission, particularly where it is not clear that changes to tax, welfare and public spending have taken into account the disproportionate impact of these policies on people with a protected characteristic.

One of the ways in which we encourage governments to comply with Equality and Human Rights law is to intervene in legal proceedings which raise important questions of how this law is interpreted. The cases discussed in this article are recent examples of interventions of this type. Each case involved arguments that the welfare policy concerned discriminated against a group of people.

The Human Rights framework

The arguments in these cases were based on the European Convention of Human Rights (ECHR), specifically Article 14 ECHR, which provides protection from discrimination in relation to the other rights and freedoms set out in the Convention. Article 14 doesn’t ‘stand alone’, but only comes into play when another of the rights and freedoms of the Convention is threatened. This is an important restriction on the application of Article 14 compared to domestic Equality law.

Whereas the UK legislation prohibiting discrimination sets out a closed list of nine protected characteristics, Article 14 prohibits discrimination based on a similar list of characteristics or ‘any other status’. In this respect, the scope of Article 14 is wider than domestic equality law.

In dealing with an Article 14 argument, a court must first be satisfied that the claim falls within the scope of one of the Articles of the Convention (or its associated Protocols). If it does, then the court looks for discriminatory treatment of individuals who are in the same or very similar situations. Discriminatory treatment might mean treating people in similar situations differently (where they should be treated the

1 Equality Act 2010
2 These are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation (Equality Act 2010, Ss. 5-12)
same) or it might mean failing to treat people differently where their circumstances require different treatment.

If a difference of treatment relating to a protected status is found, then the court considers whether there is an objective or reasonable justification for the difference. The justification test is a particularly problem for those claiming discrimination in relation to social security, where they must show that the policy concerned is "manifestly without reasonable foundation" in order for the claim to succeed.

**R. (on the application of RF) v Secretary of State for Work and Pensions**

(21 December 2017)

This decision concerned the rules for qualifying for Personal Independence Payments (PIP), which is a benefit that helps claimants meet the extra costs of a long-term health condition or disability. PIP was introduced by the Welfare Reform Act 2012 and began to replace Disability Living Allowance (DLA) for new claims from 8 April 2013. Like DLA, PIP is comprised of 2 components, one which reflects care (or living) costs and another which reflects mobility costs. Claimants can receive either or both component depending on their needs.

The challenge in *R* was concerned with changes to the rules in 2017. These changes required decision-makers to disregard certain mobility problems if these were caused by the claimant’s “psychological distress”. This change made it much harder for claimants to receive the mobility component in relation to mental health conditions.

It was accepted that entitlement to welfare payments fell within the scope of the Convention. It was also obvious that these rules had a discriminatory effect by treating people with mental ill health differently from people with physical conditions. The argument was then whether that difference in treatment could be justified.

Part of the SSWP’s argument was that those claiming PIP mobility component on grounds of mental ill-health generally had less difficulty with getting around than those claiming PIP mobility on grounds of physical ill-health. The Judge was unimpressed by the evidence offered in support of this argument and found that the policy was ‘manifestly without reasonable justification’. The Order was quashed as being *ultra vires*.

Although this was only a High Court decision the Department of Work and Pensions confirmed they would not appeal. Instead, they have undertaken to review approximately 1.6 million existing PIP claims. Around 220,000 disabled claimants are expected to receive more money as a result of this decision.

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3 *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545
4 [2017] EWHC 3375 (Admin)
5 Social Security (Personal Independence Payment) (Amendment) Regulations 2017 reg.2(4)
6 Right to peaceful enjoyment of property; Protocol 1, Article 1 ECHR
7 i.e. those disabled people with mobility problems arising from mental ill-health and those disabled people with mobility arising from physical ill-health.
8 [http://www.bbc.co.uk/news/uk-42862904](http://www.bbc.co.uk/news/uk-42862904)
This case concerns the ‘benefit cap’, the name given to a set of provisions which limit the total amount of benefits an unemployed family receives so that it doesn’t exceed the net median earnings of households in work.

First introduced by the Welfare Reform Act 2012 (which imposed a cap of £26,000 per annum), the policy survived an earlier court challenge on grounds of Article 14 discrimination. This case reached the Supreme Court where a bare majority decided that the policy was discriminatory but had been justified.

The present case was brought in response to changes to the benefit cap introduced via the Welfare Reform and Work Act 2016, which restricted the net amount of benefits payable to unemployed households again, with the effect that more households had their benefits reduced and those already capped had their benefits reduced even more.

This case related particularly to lone parents with children under 2 years old. It was argued that the main purpose of the policy (encouraging parents to take up paid employment) could not be achieved in respect of this group because of the particular barriers to employment they faced due to their family commitments.

Campaign groups were delighted by the resounding victory in the High Court, with Collins J concluding that the policy caused claimants “real misery … to no good purpose.”

But the Court of Appeal were not satisfied that the claimants in this case were in a significantly different situation to that of lone parents with older children. If it couldn’t be shown that the policy impacted these different groups differently, then a failure to treat these groups differently could not amount to a breach of Article 14.

The Appeal Judge also made clear the judiciary’s traditional reluctance to interfere with Government policy, suggesting that “there are sound institutional and constitutional principles why the courts should be reticent in setting aside decisions which Parliament has expressly reviewed and approved.”

The claimants in this case have been given permission to appeal to the Supreme Court.

9 [2018] EWCA Civ 504
10 R (SG and others) v Secretary of State for Work and Pensions [2015] UKSC 16
11 Under these rules, benefits are capped at £23,000 for non-working families living in London and £20,000 for those living outside London
12 [2017] EWHC 1446 (Admin)
13 supra note 9
This case concerns the “two-child rule”, also introduced by the Welfare Reform and Work Act 2016. This provision means that child tax credits are not payable in respect of the third or subsequent child in the family.

As is common in such test cases, there were several claimants and, although their circumstances differed, they relied on similar arguments in relation to the policy.

Two of the claimants were lone mothers, who each already had more than one child. They gave birth to an ‘additional’ child after the rules came into effect, meaning that they could not receive child tax credits for the youngest child. It was argued that both claimants had, for various reasons, limited choice in relation to family planning.

The claim also included a household who would have been exempt from the policy had they not been looking after a grandchild under a child arrangement order. As the two-child rule didn’t distinguish between parents caring for their natural children and those who, like these claimants, were providing kinship care, the couple concerned lost out on Child Tax Credits when they went on to have their second natural child, who was treated as being the family’s third.

Among several grounds of challenge, the claimants argued that the ‘two-child rule’ is discriminatory in its impact on children with multiple siblings as a child with no siblings or only one sibling has their subsistence needs met through the social security system, while a child with 2 or more siblings does not.

Although the Court accepted that the application of the policy to the third claimant (the kinship care scenario) was perverse and therefore unlawful, the other claimants failed in their Article 14 claim because the Court wasn’t satisfied that any other Convention right existed in relation to the policy.

Unlike the PIP case discussed above, the Court in this case held that entitlement to welfare payments wasn’t a possession, which would have meant it was protected by Article 1, Protocol 1 (A1P1). This conclusion was based on a narrow distinction between welfare reform policies which entail the removal of an existing benefit (which do fall under A1P1 and come within the scope of the convention) and those which relate to future claims.

All three claimants were represented by the Child Poverty Action Group, who will look to appeal the case further in relation to the two unsuccessful claimants.  

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14 [2018] EWHC 864 (Admin)
16 http://cpag.org.uk/content/high-court-finds-two-child-rule-exception-perverse
Conclusion

The mixed success of these cases reflects the tensions which invariably emerge when courts are asked to balance personal rights with political and economic policy decisions. The different approaches adopted by judges in determining these cases might reflect judges’ uncertainty in how much leeway to give the Government to set policies which are, as one appeal judge said, by their very nature discriminatory.

The Government’s continued commitment to austerity-driven public service cuts and welfare reform means that we are likely to see more cases around these issues and the Commission will consider intervening again where we can add value or help to develop the law in this area.