



18 March 2015

## PRESS SUMMARY

**R (on the application of SG and others (previously JS and others)) (Appellants) v Secretary of State for Work and Pensions (Respondent) [2015] UKSC 16**  
*On appeal from [2014] EWCA Civ 156*

**JUSTICES:** Lady Hale (Deputy President), Lord Kerr, Lord Reed, Lord Carnwath, Lord Hughes

### BACKGROUND TO THE APPEAL

The benefit cap was introduced in the Welfare Reform Act 2012 and implemented by the Benefit Cap (Housing Benefit) Regulations 2012 (“the Regulations”). The main issue in this appeal is whether the Regulations are unlawful under the Human Rights Act 1998. It is argued that the cap has an unjustifiably discriminatory impact on women in relation to their right to the peaceful enjoyment of their possessions, contrary to article 14 of the European Convention on Human Rights taken with article 1 of the First Protocol to the ECHR (“A1P1”).

The cap applies where the total entitlement of a single person or couple to specified welfare benefits exceeds an amount which represents the average weekly earnings of a working household in Great Britain, net of tax and national insurance contributions. The Regulations fix the cap at £350 a week for a single claimant without dependent children, and £500 for all other claimants. Benefits taken into account include housing benefit, child benefit and child tax credit. The Government’s justification for the scheme is that it is necessary (i) to set a reasonable limit on the extent to which the state will support non-working families from public funds; (ii) provide members of households of working age with a greater incentive to work and (iii) achieve savings in public expenditure. The cap does not apply to persons or families entitled to working tax credit. Receipt of this benefit requires a lone parent responsible for a child to work at least 16 hours a week, and a couple with a child to work a total of 24 hours a week, with one of them working at least 16 hours.

The cap affects a higher number of women than men. That is because the majority of non-working households receiving the highest levels of benefits are single parent households, and most single parents are women. The appellants are two lone mothers and their youngest children. The application of the cap reduced SG’s weekly income from the specified benefits by £75, and NS’s by £55.

The courts below held that the indirectly discriminatory impact of the scheme upon lone parents, and therefore women, could be justified and that the scheme was therefore lawful.

### JUDGMENT

The Supreme Court dismisses the appeal by a majority of 3-2. Lord Reed gives the lead judgment, with which Lord Hughes agrees. Lord Carnwath concurs with the result but for different reasons. Lady Hale and Lord Kerr each give dissenting judgments.

### REASONS FOR THE JUDGMENT

Lord Reed notes that it was conceded that the Regulations result, indirectly, in differential treatment of men and women in relation to welfare benefits, and that the benefits constitute “possessions” falling within A1P1. [60-61] The question is whether the cap is a proportionate means of meeting legitimate aims. Lord Reed accepts that the aims of the cap are legitimate. [63-66] In relation to proportionality, the appellants argued that the aim of setting a reasonable limit to benefits could be achieved by setting the cap at the average income of working households inclusive of in-work benefits, rather than their average earnings exclusive of benefits. Lord Reed notes, however, that the Act requires the cap to be set by reference to “earnings”. [67-69]

The appellants also argued that the savings in public expenditure were marginal. Lord Reed notes that, although the short-term savings are a small proportion of the total welfare budget, they nevertheless contribute towards deficit reduction. The cap is also intended to change behaviour over the longer term. Other arguments focused on the impact of the cap on the families affected. Lord Reed notes that the cap for households with children is equivalent to

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a gross annual salary of £35,000, which is higher than the earnings of half of the UK's working households. Whether the cap should be higher is a political question. It is not the function of the courts to determine how much public expenditure should be devoted to welfare benefits. Importantly, affected households were given advance notice and assistance to enable them to adjust. [70-75] The differential impact results from including child-related benefits in the cap. Excluding these would reduce savings by 80-90% and compromise the achievement of the cap's legitimate aims. No credible means were suggested by which those aims might be achieved without affecting more women than men. [76-77]

Other arguments relied on the United Nations Convention on the Rights of the Child ("UNCRC"), which has not been incorporated by Parliament into UK law, but which can be relevant to the application of the ECHR. Strasbourg cases do not support the argument that the cap impinges on the article 8 ECHR rights of children, and that therefore article 3(1) UNCRC obliged the Government to treat the best interests of children as a primary consideration. [78-80] Although the UNCRC can be relevant to questions concerning the rights of children under the ECHR, the present context is one of alleged discrimination against women in the enjoyment of their A1P1 property rights. [86-89] The argument that the Regulations were vitiated by the Government's misinterpretation of article 3(1) was no stronger. It is firmly established that UK courts cannot interpret or apply treaties to which Parliament has not given effect. [90]

Lord Reed further reasons that the question of proportionality involves controversial issues of social and economic policy, with major implications for public spending. It is therefore necessary for the court to give due weight to the considered assessment of democratically-elected institutions. Unless manifestly without reasonable foundation, their assessment should be respected by the court. Many of the issues in the appeal were considered by Parliament before it approved the Regulations. The Government's view, endorsed by Parliament, that achieving its aims was sufficiently important to justify making the Regulations, despite the differential impact on men and women, was not manifestly without reasonable foundation. [92-96]

Lord Hughes adds that Strasbourg's case-law is a long way from saying that article 3(1) is relevant to justification of any kind of discrimination, whether or not the rights, upbringing, or family life of a child are affected. [144]

Lord Carnwath agrees that article 3(1) UNCRC has no role in justifying discrimination against women: the treatment of the child does not depend on the sex of their parent. [129] It is trite law that unincorporated treaties like the UNCRC have no direct effect in domestic law unless and until incorporated by statute. [115] On compliance with article 3(1), he reasons that the Government's reliance on limiting expenditure and the need for a "clear upper limit" on benefits ignores the distinctive statutory purpose of child-related benefits: to meet the needs of children as individuals. The cap means children lose these benefits for reasons unrelated to their own needs. If excluding those benefits emasculates the scheme, this raises questions about the viability of a scheme so dependent on child-related benefits. However, though the Secretary of State failed to show how the Regulations comply with article 3(1), it is in the political, rather than the legal, arena that the consequences should be played out. [123-127, 133]

Lady Hale, in her dissenting judgment, reasons that the question is whether the legitimate aims of the cap justify the discrimination involved in its implementation. [189] The "manifestly without reasonable foundation" test applies to both the aims of the interference with property rights, and the proportionality of the discriminatory means employed. [209] The UNCRC has not yet been generally translated into domestic law, but Strasbourg case-law shows that article 3(1) UNCRC is relevant to proportionality and discrimination as well as informing the substantive content of Convention rights, even in cases where the discrimination is not against the children but their mothers. [215-222] What has to be considered is whether the benefit cap as it applies to lone parents can be justified independently of its discriminatory effects. In considering that, it is necessary to ask whether proper account has been taken of the best interests of the children affected, i.e. whether the Government complied with article 3(1). It is clear to Lady Hale that it did not. The cap deprives some children of provision for their basic needs, which cannot be in their best interests. It does so in order to incentivise their parents to seek work, but discriminates against lone parents, who are least likely to be able to do so. [223-226] In light of article 3(1), the indirect sex discrimination inherent in the cap's implementation is not a proportionate way of achieving its aims. [228]

Lord Kerr, in his dissenting judgment, considers that the UNCRC can be directly enforceable in domestic law. [255-256] He further reasons that a mother's personality is defined not simply by her gender but by her role as carer for her children, so that justification of a discriminatory measure must directly address the impact on the children of lone mothers. [264-265]

*References in square brackets are to paragraphs in the judgment*

#### **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.shtml>**