Lone parents deliver successful blow to the 'Benefit Cap'

R (DA and others) v Secretary of State for Work and Pensions

Shelter intervening

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References to paragraph numbers are references to the *DA* judgment.

Overview

On 22 June 2017, the High Court (Collins J) ruled that the application of the 'Benefit Cap' to lone parents with children under two years old is unlawful because it discriminates, without justification, against both those parents and their children.

Four lone parents, and three of their children aged under two, brought this judicial review challenge to the reduced Benefit Cap introduced by the Welfare Reform and Work Act 2016. The reduced Benefit Cap significantly reduced the existing "cap" on total household benefits, causing what Collins J called "*real damage*" to the Claimants and families like them across the country, resulting in "*real misery […] to no good purpose*" **[43]**. The Defendant's failure to take the specific difficulties faced by lone parents and their children under two into account when making regulations which brought the reduced Benefit Cap into effect constituted a breach of the claimants' non-discrimination rights under Article 14 of the European Convention on Human Rights ("ECHR") (considered in conjunction Article 8 ECHR, A1P1 ECHR and Article 3.1 of the United Nations Convention on the Rights of the Child ("UNCRC")).

The Original Benefit Cap

The Benefit Cap was originally imposed by sections 96 and 97 of the Welfare Reform Act 2012 (the "2012 Act") as part of the coalition government's austerity agenda. It set an annual limit for the receipt of welfare benefits at £26,000 per household (the "Original Benefit Cap"). The means whereby the cap is effected is by the reduction of housing benefit 'by the amount by which the total amount of welfare benefits exceeds the relevant amount' (Housing Benefit

Regulations 2006/2013, Regulation 75D). Part of the rationale behind the cap is to incentivise working and to 'make work pay': the cap requires (among other exemptions) a lone parent to work at least 16 hours per week in order to avoid the imposition of the Cap. The Original Benefit Cap was said to be set at a level equivalent to the net median earnings of working households (although, notably, the calculation of median earnings in this context did not take account of any "in-work benefits" received by working households, such as working tax credits).

Challenge to the Original Benefit Cap

In 2013 a claim was brought against the imposition of the original Benefit Cap. This went to the Supreme Court as *R (SG and others) v SSWP* [2015] 1 WLR 1449. The claim in SG failed, but the Supreme Court's decision-making was highly relevant to Collins J's reasoning in *DA*. The Supreme Court dismissed SG's claim by a majority of three to two, but Lord Carnwarth did not entirely follow the reasoning of the other two who decided that the claim should be dismissed.

The claimants were the mothers and youngest children of three lone parent families. The grounds of their claim were that the Benefit Cap:

- Indirectly and unjustifiably discriminated against women, contrary to Article 14 ECHR read with A1P1;

- *breached Article 3.1 UNCRC which provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration";* and

- there had been a failure to obtain sufficient information about the impact of the Benefit Cap on lone parents escaping domestic violence and those in temporary accommodation.

It was conceded on behalf of the Secretary of State that there had been differential treatment of men and women, since many more women than men were lone parents and since lone parents were disproportionately affected by the Original Benefit Cap. However, by a majority of three to two, the Supreme Court ruled that this treatment was justified and hence not unlawful, since it was a proportionate means of achieving what were – as all of the Bench agreed - legitimate aims. These aims were (1) securing the economic well-being of the country; (2) incentivising work; and (3) imposing a reasonable limit on the amount a household could receive in welfare benefits. The majority agreed that excluding child-related benefits from the cap in the case of single parents would compromise the achievement of the legitimate aims.

Importantly, however, by a different three to two majority, the Supreme Court held that the cap breached the UK's obligations under Article 3.1 UNHCR and that this could be relevant to questions concerning children's ECHR rights. The reason why this was not determinative in the claimants' favour in *SG* was that Lord Carnwath held that the requisite nexus was missing between the discrimination (on grounds of sex) and the breach of Article 3.1 of the UNCRC (see eg **[131]** of the judgment in *SG*). Accordingly, Lord Carnwath acted as the "swing vote", resulting in the claim failing by the narrowest of margins. It was clear from Lord Carnwath's judgment, however, that if the requisite nexus between the discrimination and the breach of the UNCRC had existed, then the discrimination would not have been justified, and would therefore have been contrary to Article 14 ECHR.

The Reduced Benefit Cap

Sections 96 and 97 of the Welfare Reform Act 2012 have now been amended by the Welfare and Work Act 2016 (the "2016 Act"). The effect of the amendments was to reduce the annual limit for the receipt of welfare benefits from £26,000 to £20,000 for those living outside of Greater London and £23,000 for those living within it (collectively the "Reduced Benefit Cap"). These reductions were brought into effect on 7 November 2016 by the Benefit Cap (Housing Benefit and Universal Credit) (Amendment) Regulations 2016 which amended the Housing Benefit Regulations 2006. Whereas the effects of the Original Benefit Cap were felt largely in London, due to higher living costs, the effects of the Reduced Benefit Cap affected more people over a more diverse geographical area.

Collins J included at **[9]** of his judgment an illustration of the Reduced Cap's effects. The example was a non-London household, entitled to £600 per week by way of benefits of which £200 is housing benefit. The Reduced Benefit Cap would mean that the sum of £600 would be reduced to £385 (being £20,000 divided by 52 weeks). After payment of rent through the £200 of housing benefit, this would leave just £185 available for all other expenditure.

The Reduced Benefit Cap challenge in *DA*

The claimants in *DA* did not challenge the primary legislation setting out the annual limit of the Reduced Benefit Cap: it was not argued that the relevant provisions of the 2016 Act are incompatible with ECHR. The claimants instead challenged the failure, when the regulations reducing the Benefit Cap were made, to take into account "*the position of lone parents with children under the age of two since they are particularly badly affected by the cap because they are not reasonably able to work and thus escape the cap*" **[13]**.

The central ground of challenge was that this failure constitutes a breach

of Article 14 ECHR. Article 14 deals with the need to ensure that rights and freedoms are enjoyed without discrimination. It can only be considered in conjunction with one or more of the substantive ECHR rights. In the case of the parent claimants, it was argued that Article 14 was to be considered in conjunction with Article 1, Protocol 1 ("A1P1") (the right to peaceful enjoyment of possessions) and Article 8 (the right to respect for private and family life). On behalf of the child claimants it was argued that Article 14 was to be considered in conjunction with Article 8, read with Article 3.1 UNCRC.

The High Court accepted the claimants' argument as to discrimination against the parent claimants as follows. A welfare benefit is a possession within the meaning of A1P1 (a point which was conceded in *SG* and *DA*). Any deprivation of welfare benefits must accordingly be "*subject to the conditions provided for by law and by the general principles of international law*" pursuant to A1P1 [5]. Since the relevant regulations engage the parents' A1P1 rights, Article 14 applies to ensure that the claimant parents enjoy their A1P1 rights without discrimination (at [37]).

In relation to all claimants, Collins J accepted that Article 8 was engaged by a reduction in benefits, following the unanimous view to this effect in relation to the 'bedroom tax' in *R (MA and others) v SSWP* [2016] 1 WLR 4550. He expressed surprise that Article 8 arguments had not been pursued in SG. Since Article 8 is engaged, Article 14 then applies to give non-discrimination rights in relation to the enjoyment of those Article 8 rights.

In the case of all claimants, the discrimination, contrary to Article 14, was to be found in the fact that the requirement for lone parents to work 16 hours per week disproportionately affects women as compared to men (since single parents were, generally, women) and the children under 2 of such lone parents. Collins J explains that "*the important consideration for the purposes of these claims is the difficulty and often the impossibility of lone parents with children under two being able to work because of the need to have some means of caring for the child.*" **[16]**.

The main focus for argument in the High Court was whether this discrimination was justified (although consideration of the effects of the cap was not always expressly framed in such terms in the judgment, on which see further below). Collins J accepted the Secretary of State's argument that the applicable test is "*whether the difference in treatment is manifestly without reasonable foundation*" **[38]**. The majority of the judgment, in which Collins J sets out his findings in relation to the effects of the Reduced Benefit Cap on the claimants, demonstrates a heartfelt concern for those in the claimants' position.

The child claimants were able to rely on the majority view of the Supreme Court in *SG* that the Original Benefit Cap constituted a breach of Article 3.1 UNCRC

which could be relevant to questions concerning children's ECHR rights. As the Reduced Benefit Cap was set at an even lower level, the reasoning in relation to the Original Benefit Cap would apply a *fortiori*. Whilst it is not explained in detail in the judgment, Collins J appears to have accepted the argument made on behalf of the child claimants that the discrimination against them could not be justified taking into account the breach of Article 3.1 UNCRC. The fact that the discrimination alleged in *DA* was against the child claimants themselves (in respect of their enjoyment of their Article 8 ECHR rights) provided the 'nexus' between the breach of Article 3.1 UNCRC and the alleged discrimination which Lord Carnwath had found to be missing in *SG*.

The Secretary of State advanced the existence of Discretionary Housing Payments ("DHP") as a way of safeguarding against the effects of the Benefit Cap. These are available when a local authority considers that a claimant who is in receipt of housing benefit or universal credit requires financial assistance towards housing costs. There is no overall limit on the amounts available to local authorities and no limit, in theory, to the length of time over which a DHP can be made. Collins J described DHP as "*not by any means satisfactory*" **[28]** as a safeguard, since in practice no authority is known to have made a permanent DHP award, nor to have made an award before a tenancy commenced, and since local authorities know that sums available are, in practice, finite and must be shared with those affected by the 'bedroom tax'.

Overall, Collins J felt able to be satisfied that the claims must succeed, since the deleterious effect of the Reduced Benefit Cap on the claimants was such as to mean the discrimination against them was not justified. The final Order declared that:

> *The Housing Benefit Regulations 2006, as amended by the Benefit Cap (Housing Benefit and Universal Credit) (Amendment) Regulations 2016, are unlawful insofar as they apply to lone parents with a child or children under the age of two, in that:*
>
> > *a. They involve unjustified discrimination against lone parents of children under the age of two, contrary to Article 14 ECHR read with (i) Article 1 of the First Protocol and (ii) Article 8 ECHR;*
> >
> > *b. They involve unjustified discrimination against children under the age of two with lone parents, contrary to Article 14 ECHR read with Article 8 ECHR in light of Article 3 of the United Nations Convention on the Rights of the Child.*

Comments

At hand down of the judgment, Collins J took the relatively infrequently taken

step of granting permission to appeal his own judgment to the Court of Appeal. He did so on public interest grounds, reflecting the importance of the issue of capping benefits, both economically and socially. A number of noteworthy aspects of Collins J's reasoning emerge from the judgment, some of which are posited below as areas of focus for the Court of Appeal.

Standard of Review

The High Court considered the standard of review applicable in judicial review of regulations which have been subjected to detailed Parliamentary consideration. The Secretary of State argued that, whilst the court does have jurisdiction, judicial review will involve considerable caution where a regulation has already survived Parliamentary review. The judgment records that *Bank Mellat v HM Treasury (No 2)* 2014 AC 700 at [44] and *Countryside Alliance v AG* [2008] AC 719 at [45] and *SG* at [95] support this approach **[32]**.

The Secretary of State argued that an amendment to exempt responsible parents of children under two, including lone parents, had been tabled in the Commons but was not passed **[33]**. Various arguments against exempting parents of children under two from the requirement to work 16 hours per week, from both the Commons and the Lords, were brought to the High Court's attention, including the idea that work is the best route out of poverty for all households.

Collins J's conclusion, that in "*judicial review of regulations which have been subjected to detailed Parliamentary consideration, it is necessary to act with circumspection*", is dealt with only briefly in the judgment **[32]**. He nevertheless felt able to be "*satisfied that the claims must succeed*" **[42]**, dealing with the Parliamentary debate simply with the observation that it did not "*really engag[e] with the problems facing lone parents with children under two*" **[35]**. This manner of dealing with the process of Parliamentary scrutiny, as well as the standard of review itself, may receive further consideration on appeal.

Test for justification of discrimination

The parties differed in relation to the applicable test when determining whether the alleged indirect discrimination is justified. Collins J accepted the Secretary of State's submission that the test is whether the difference in treatment is manifestly without reasonable foundation ("MWRF"). This is evidently a high bar for claimants, but Collins J held that "*application of the MWRF test does not save the discrimination by showing justification*" **[38]**. The Claimants argued that this was not the correct test, since the test had been revisited by the Supreme Court in In *re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3. Collins J did not apply the *Wales* test on the grounds that that case had been concerned with very different considerations. However, he did

not feel the need to go into detail on the point, given his conclusion that even the Secretary of State's higher test for lack of justification was met.

The applicable test is likely to be revisited in the Court of Appeal, not least in the light of the recent Supreme Court judgment in *R(A&B) v SS Health* [2017] UKSC 41. At [35] of his leading judgment, Lord Wilson held that in relation to the "four well-known questions posed, for example, by Baroness Hale of Richmond in *R (Tigiere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820, at para 33" which must be answered in the affirmative to establish justification, while the criterion MWRF "*may sometimes be apt to the process of answering the first question, and perhaps also the second and third questions, it is irrelevance to the question of fair balance, which, while free to attached weight to the fact that the measure is the product of legislative choice, the court must answer for itself*".

While the precise test for justification was not decisive at first instance (since Collins J considered that the MWRF standard was satisfied on the facts), it may well assume greater importance in the Court of Appeal.

Article 14

Article 14 provides that "*[t]he enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*". Although not expressly articulated in the judgment, it is apparent that Collins J considered that 'being a child of under two of a lone parent' must be an 'other status' for the purposes of Article 14, since he held that this group's Article 14 non-discrimination rights were infringed. This could be a focus for further argument in the Court of Appeal.

Common law principles

The claimants advanced a further ground of appeal in the High Court that the failure to take lone parents of children under two into account when producing the regulations providing for exemptions to the Benefit Cap was unreasonable on common law grounds. Collins J considered that it was not necessary to go into those arguments since he had found in the claimants favour on the Article 14 ground. The common law argument may be explored in more detail in the Court of Appeal.

***Ian Wise QC** and **Michael Armitage** were instructed (along with Caoilfhionn Gallagher QC of Doughty Street Chambers) by Hopkin Murray Beskine for the Claimants.*

The judgment is available here*.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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