Neutral Citation Number: [2019] EWCA Civ 615

Case No: C1/2018/1323

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
OUSELEY J: [2018] EWHC 864 (ADMIN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2019

Before:

LORD JUSTICE PATTEN
LORD JUSTICE LEGGATT
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

THE QUEEN on the application of **(1) SC and 3 children** **(2) CB and 5 children**	**Appellants**
- and -	
(1) THE SECRETARY OF STATE FOR WORK AND PENSIONS **(2) THE LORDS COMMISSIONERS OF HM TREASURY** **(3) THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS**	**Respondents**
- and -	
EQUALITY AND HUMAN RIGHTS COMMISSION INTERVENTION	**Intervener**

- -

Richard Drabble QC and **Tom Royston** (instructed by the **Child Poverty Action Group**) for the **Appellants**
James Eadie QC and **Galina Ward** (instructed by the **Government Legal Department**) for the **Respondents**
Helen Mountfield QC and **Raj Desai** (instructed by the **Equality and Human Rights Commission**) for the **Intervener**

Hearing dates: 19 and 20 December 2018

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Approved Judgment

Lord Justice Leggatt:

Introduction

1. The Welfare Reform and Work Act 2016, among other changes to the law, imposed a limit of two on the number of children in respect of whom child tax credit (and its replacement, universal credit) is payable. The limit applies, with a few exceptions, to all children born after 6 April 2017, when the new law came into force.

2. In this action the claimants, who are members of families affected by this two child limit, seek a declaration under section 4 of the Human Rights Act 1998 that the primary legislation which introduced the measure is incompatible with rights guaranteed by the European Convention on Human Rights (the "Convention"). More particularly, they claim that the relevant legislative provisions are incompatible with: (1) their rights under article 8 of the Convention to respect for private and family life and under article 12 to marry and to found a family; and/or (2) article 14, which prohibits discrimination in the enjoyment of Convention rights. The claimants' case in relation to article 14 is supported by the Equality and Human Rights Commission (the "Commission"), which appears as an intervener.

3. The judge, Ouseley J, dismissed the claims for reasons given in a judgment dated 20 April 2018: see [2018] EWHC 864 (Admin); [2018] 1 WLR 5425. He refused an application under section 12 of the Administration of Justice Act 1969 for a 'leapfrog' certificate to enable an appeal to proceed directly to the Supreme Court, but granted the claimants permission to appeal to this court.

4. In this judgment I will first outline the relevant background – by describing the system of child tax credit, the legislation which introduced the two child limit, the policy reasons given for introducing the measure and the facts of the two claims which are the subject of this appeal – before considering the grounds on which the claimants contend that the legislation is incompatible with their Convention rights.

Child tax credit

5. Although the claim applies to universal credit as well as child tax credit, it is sufficient to focus – as the parties and the judge have done – on child tax credit, as it is common ground that the relevant considerations are the same in each case and that, as Ouseley J put it, what goes for one, goes for the other.

6. Child tax credit, along with working tax credit, was introduced by the Tax Credits Act 2002. It replaced the financial support for families with children previously available through tax relief and separately through social security benefits. As explained by Baroness Hale of Richmond in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 WLR 1545, para 4:

> "Previously, people in work (or otherwise liable to pay income tax) might claim the children's tax credit to set off against their income. This was administered by tax authorities. People out of work (or otherwise claiming means-tested benefits) might claim additions to their income support or income-based jobseeker's

> allowance to meet their children's needs. This was administered by the benefits authorities. Under the new system, a single tax credit is payable in respect of each child, irrespective of whether the claimant is in or out of work, and is administered by Her Majesty's Revenue and Customs. Child tax credit is like income support and jobseeker's allowance, in that it is a benefit rather than a disregard and it is means-tested, so that the higher one's income the less the benefit, until eventually it tapers out altogether. But in several other respects … it is like a tax allowance."

7. To be eligible for child tax credit, a person or couple must be responsible for one or more children or "qualifying young persons". The latter category comprises young persons aged 16 to 19 who are in "advanced education" or "approved training". Like the parties and the judge, I will for simplicity use the terms "child" and "children" in this judgment to include qualifying young persons as well as persons aged under 16 who are children as defined in the legislation.

8. Child tax credit has three elements: a single "family" element which does not depend upon family size; an "individual" element, originally payable in respect of each child for whom the person claiming the benefit is responsible; and a "disability" element, payable in respect of any disabled child. The maximum amount of the family element is currently £545 a year, and the maximum amount of the individual element is currently £2,780 a year. A lone parent or couple with no income from work or whose income is below a threshold level (currently £16,105 a year) is entitled to the maximum amount of child tax credit. If the lone parent or couple is earning income above that level, the amount of their child tax credit reduces by a proportion (currently 41%) of their income in excess of the threshold. Accordingly, the level of income at which child tax credit ceases to be payable depends upon the maximum amount of child tax credit which the individual or couple would be entitled to claim. The calculation is further complicated by the fact that parents who are working may also qualify for working tax credit (which is itself made up of a variety of elements) and the tapering which occurs when income rises reduces working tax credit first and then child tax credit.

The relevant legislative provisions

9. The two child limit on child tax credit was introduced by section 13 of the 2016 Act. This provision amended section 9(2)(a) of the 2002 Act so as to abolish the family element of child tax credit for claimants who were not already entitled to it before 6 April 2017 and to limit the individual element by inserting into section 9 of the 2002 Act new subsections (3A) and (3B) as follows:

> "(3A) Subsection (3B) applies in the case of a person or persons entitled to child tax credit where the person is, or either or both of them is or are, responsible for a child or qualifying young person born on or after 6 April 2017.
>
> (3B) The prescribed manner of determination in relation to the person or persons must not include an individual element of child tax credit in respect of the child or qualifying young person unless –

> (a) he is (or they are) claiming the individual element of child tax credit for no more than one other child or qualifying young person, or
>
> (b) a prescribed exception applies."

10. The effect of these provisions is that, subject to prescribed exceptions, no individual element of child tax credit is payable in respect of any child born on or after 6 April 2017 who is the third or subsequent child for whom the claimant is responsible. (The "disability" element, payable in respect of any disabled child, is unaffected.)

11. The prescribed exceptions are contained in the Child Tax Credit (Amendment) Regulations 2017/387. These allow a person (or couple) to claim an additional individual element of child tax credit for a third or subsequent child for whom they are responsible in the following cases:

    (i) Multiple births (apart from one child in that birth) – regulation 10;

    (ii) Adoption (where the adopted child was, or would otherwise be, in local authority care) – regulation 11;

    (iii) Non-parental caring arrangements (where the claimant is a friend or family carer responsible for a child or where a child is born to a child aged under 16 for whom the claimant is responsible) – regulation 12; and

    (iv) Non-consensual conception (including where the child was conceived in the context of a controlling or coercive relationship) – regulation 13.

12. In these proceedings the defendants (whom I will refer to as "the government") have emphasised that other child-related benefits to which people with more than two children may be entitled are unaffected by the two child limit. Such benefits include housing benefit (in so far as a larger family may need a larger property), child benefit (a non-means tested benefit payable at a flat rate of £20.70 a week for the first child and £13.70 a week for each further child) and assistance with child care costs. For their part, the claimants emphasise that child tax credit is the only benefit which is designed to meet the subsistence needs (other than housing) of children living in families which have no income from work to support them.

The individual claimants

13. The individual circumstances of the first two adult claimants and appellants, referred to as SC and CB to preserve their anonymity, are summarised at paras 15 and 16 of the judgment of Ouseley J. In short, SC lives with her three youngest children, for whom she is solely responsible. She has various long-term health conditions and is not currently working. Her youngest child was born on 11 July 2017 (and therefore after the two child limit took effect). Before that, SC's income consisted of £69.05 a week in income support, £115.19 weekly in child tax credit and £34.40 in child benefit, giving a weekly total of £218.64. Her rent is paid in full by housing benefit. Following the birth of her youngest child, her income has increased by £13.70 a week in additional child benefit but she receives no additional child tax credit. In a witness statement made

in these proceedings SC states that, with some support from her youngest child's father, she is "making ends meet" and that she "manages but it is not easy".

14. CB has five children, the youngest of whom was born on 19 April 2017 (just after the new legislation came into force). She was in an abusive relationship with the father of her first four children but eventually managed to end it. Before the birth of her youngest child, she was earning an average of £25 a week working from home. She was also receiving working tax credit and child tax credit totalling £300 a week (of which approximately £225 was child tax credit) and £61.80 in child benefit per week, making a total weekly income of £386.80. When she made her witness statement in September 2017, CB was receiving maternity allowance of £140.98 a week in place of her previous earnings. She was receiving an additional £13.70 a week in child benefit but no additional tax credit. Her total weekly income at that time before housing costs was therefore £516.48, from which she had to pay £68.82 towards her rent (her income being too high to receive full housing benefit, as she did previously). Her income after housing costs was thus £447.66 per week. CB stated that she is "budgeting to the best of my ability" but that her children are aware of the tight financial situation and lose out by not being able to go on any holidays or have birthday parties at external venues or their choice of food.

15. The judge found that it was irrational that the prescribed exception for non-parental caring arrangements should apply only where any children covered by such arrangements are the third or subsequent children to join the family, and not where any children join a family that already has two or more children at least one of whom is subject to non-parental caring arrangements. The government has not sought to challenge that finding and has announced that the exceptions for non-parental caring arrangements and for adopted children are to be amended so that they apply regardless of the order in which children have joined the family. In these circumstances the third and fourth adult claimants and their children, who were affected by this anomaly, have not pursued an appeal.

The policy reasons for the measure

16. The proposal to introduce the two child limit was announced on 8 July 2015 in the summer Budget as one of a number of measures intended to deliver a commitment made in the Conservative Party manifesto for the 2015 General Election to find a further £12 billion from welfare savings. In announcing the proposal in the House of Commons, the Chancellor of the Exchequer said:

> "The Budget will also reform tax credits to make them fairer and more affordable. On top of child benefit for every child, an out of work family of 5 children can currently claim over £14,000 a year in tax credits alone. The government believes that those in receipt of tax credits should face the same financial choices about having children as those supporting themselves solely through work.
>
> The Budget will therefore limit support provided to families through tax credits to 2 children so that any subsequent children born after April 2017 will not be eligible for further support."

17. The same rationale for the proposed measure was stated in an Impact Assessment dated July 2015 produced by the Treasury and Department for Work and Pensions. The Impact Assessment identified the problem and rationale for government intervention in this way:

> "The government has made clear its objective of tackling the deficit and rebalancing the welfare state. Welfare expenditure is a significant driver of public spending and the government is committed to delivering a more sustainable welfare system, including the changes to tax credits, to put the system on a more sustainable footing.
>
> The current benefits structure, adjusting automatically to family size, removes the need for families supported by benefits to consider whether they can afford to support additional children. This is not fair to families who are not eligible for state support or to the taxpayer."

18. The Impact Assessment noted that tax credit expenditure had "more than trebled in real terms between 1999-00 and 2010-11, with total expenditure in 2014-15 estimated to be around £30 billion – an increase of almost £10 billion in real terms over the last 10 years." The proposed two child limit was said to be "part of a package which will deliver a more sustainable welfare system and return expenditure on tax credits to 2007-08 levels in real terms." The option of doing nothing was rejected on the grounds that it was unfair to families not eligible for state support and to the taxpayer, and would not return welfare spending to what the government considered to be a sustainable level. The Impact Assessment further stated that delivering welfare savings was "a vital part of the government's deficit reduction plan. Had the budget not announced such significant welfare savings, steep reductions in public service spending would have been required – or higher borrowing and debt or higher taxes." It was estimated that the measure would result in annual savings of £1.365 billion by 2020-21 and that those savings would continue to rise thereafter.

19. In accordance with section 19(1)(a) of the Human Rights Act 1998, a Minister in charge of the Bill made a statement that in his view its provisions were compatible with Convention rights. A memorandum to the Joint Committee on Human Rights explaining the reasons for this view anticipated arguments made in these proceedings that I will consider later in this judgment that the two child limit is incompatible with article 14 of the Convention. It rejected those arguments on the basis that any differential treatment resulting from the measure was justified. The stated justification was that:

> "The changes are part of the wider reforms to the welfare system aimed to bring about savings on the UK's welfare spend and reduce the economic deficit. Taking into account the wide margin of appreciation for the State's administration of social security benefits, the policy is based on a number of political, economic and social considerations. These include a desire to ensure families in receipt of benefits are encouraged to make the same financial decisions as families supporting themselves

> solely through work, to ensure fairness for the taxpayer and to secure the economic recovery of the country."

20. As described at paras 40–50 of the judgment of Ouseley J, the proposal was the subject of considerable scrutiny and debate during the passage of the Welfare Reform and Work Bill through Parliament. This included, at the committee stage in the House of Commons, a sitting of the Bill Committee which focused solely on the two child limit. Amendments to the Bill moved by the opposition in committee to retain the individual element of child tax credit (and the child element of universal credit) for each child in families with more than two children, and at the report stage in the House of Commons to leave the current arrangements for child tax credit in place, were defeated. The Bill received Royal Assent on 16 March 2016.

21. The prescribed exceptions to the two child limit were extensively debated by the House of Lords in committee and were the subject of public consultation. The draft regulations implementing the exceptions were referred to the independent Social Security Advisory Committee, which commented on them and expressed some concerns about, in particular, the scope of the exception for "non-consensual conception". As mentioned, the legislation came into force on 6 April 2017.

22. During the legislative process the policy rationale for the introduction of the two child limit was explained, in similar terms, many times. In a witness statement made for the purpose of these proceedings, Mr David Higlett, an official in the Department for Work and Pensions, has summarised the "key aims" of the measure as:

    (i) Ensuring that spending on welfare is sustainable and fair to the taxpayer whilst protecting the most vulnerable;

    (ii) Ensuring that people in receipt of benefits should face the same choices as those who support themselves solely through work and are not in receipt of income related benefits; and

    (iii) Ensuring that the benefits system incentivises work and progression in work, recognising that work is the best route out of poverty.

23. In these proceedings the claimants have asserted that the measure had a further aim of influencing behaviour by creating an incentive for people on benefits to have smaller families. In support of this contention, counsel for the claimants highlighted statements in the July 2015 Impact Assessment that "encouraging parents to reflect carefully on their readiness to support an additional child could have a positive effect on overall family stability" and that "in practice people may respond to the incentives that this policy provides and may have fewer children". The judge found that it was clearly anticipated that an effect of the measure might be that some people would decide not to have a child when they might otherwise have done so. But he rejected the contention that discouraging larger families can properly be described as an aim of the legislation. The judge also found that there is, at least so far, no evidence from which it can be inferred that the legislative change is having an effect on decisions made about family size.

24. I see no basis for challenging these findings. In particular, there is no reason to attribute to the government or to Parliament any aims in introducing the two child limit other

than those which were repeatedly stated during the legislative process. Those aims included encouraging people in receipt of tax credits to consider, before having additional children, whether they can afford to support them. But the aims of the measure did not include any goal of reducing the size of families. The purpose was not to discourage people on low incomes from having larger families, but to reduce expenditure by limiting welfare benefits and to leave choices about family size to individuals in the knowledge of what state support would be available.

The issues on this appeal

25. On this appeal, as in the court below, the claimants' case is put in two ways. First, they argue that the imposition of the two child limit on child tax credit is incompatible with their rights under articles 8 and 12 of the Convention. Article 8 guarantees the right to respect for a person's private and family life and article 12 guarantees the right of men and women of marriageable age "to marry and to found a family". Second, the claimants argue that the measure involves discrimination prohibited by article 14 of the Convention.

26. Although the claimants put the second of these arguments at the forefront of their case, it is logical to deal first with the contention that the measure violates their rights under articles 8 and 12. Those two provisions can be considered together, as the claimants contend that article 12 is engaged for the same reasons that article 8 is said to be engaged and it is not suggested that they can succeed under article 12 if they cannot establish a breach of article 8.

Articles 8 and 12

27. The right protected by article 8 is a qualified right: that is to say, the Convention permits interference with it in certain prescribed circumstances. To determine whether there has been a violation of article 8, two questions therefore need to be asked. The first is whether there has been interference by a public authority with the exercise of the claimant's right to respect for their private and family life (or their home or correspondence). This is often expressed by asking whether article 8 is "engaged". If it is, the second question arises of whether the interference with the exercise of the claimant's right is justified by one of the exceptions set out in article 8(2). This provision permits such interference as is:

> "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

28. The judge held that the claimants' case on this issue fails at the first stage, as the legislation imposing the two child limit on child tax credit does not engage article 8 (or article 12). In my view, he was plainly correct so to conclude.

29. The root difficulty facing the claimants' case is that the Convention is not aimed at securing social and economic rights. The rights defined in the Convention are predominantly civil and political in nature. This reflects the original purpose of the Convention, conceived and developed as it was in the aftermath of the Second World

War as a bulwark for protecting the peoples of Europe against tyranny and oppression. As stated in its Preamble, the Convention is a collective enterprise of European countries which are "like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law", and is designed to maintain "those fundamental freedoms which are the foundation of justice and peace in the world." Within the legal framework established by the Council of Europe, social and economic rights are protected by a separate treaty, the European Social Charter, adopted by the Council in 1961.

30. In accordance with article 31(1) of the Vienna Convention on the Law of Treaties, the Convention is to be interpreted in the light of its object and purpose. Consistently with the general purpose of the Convention, the European Court of Human Rights has identified the "essential object" of article 8 as being to protect the individual against arbitrary interference by the state: see e.g. the *Belgian Linguistic* case (1979-80) 1 EHRR 252, para 7; *Kroon v Netherlands* (1994) 19 EHRR 263, para 31. The Court has not interpreted article 8 in wholly negative terms and has indicated that there may be positive obligations inherent in respect for private or family life: see e.g. *Marckx v Belgium* (1979) 2 EHRR 330, para 31. But article 8 has never been held to impose an obligation on the state to have in place any positive programme of financial support for private or family life.

31. Attempts to argue that article 8 imposes an obligation to provide financial support for family life have met with short shrift. For example, in *Petrovic v Austria* (2001) 33 EHRR 14 the Commission declared inadmissible a complaint that the absence of any financial assistance from the state to enable a man who took leave from work to look after a child constituted an interference with the right to respect for family life protected by article 8. In dealing with the applicant's separate discrimination complaint, the Court (at para 26 of its judgment) agreed with the Commission that the refusal to grant him a parental leave allowance "cannot amount to a failure to respect family life, since article 8 does not impose any positive obligation on states to provide the financial assistance in question."

32. Where the European Court of Human Rights has held that the Convention imposes obligations on the state to make socio-economic provision for basic material needs, it has done so by reference to article 3, which prohibits inhuman or degrading treatment. Thus, in the leading case of *MSS v Belgium and Greece* (2011) 53 EHRR 2 the Court held that Greece was in breach of article 3 in failing to provide for the most basic needs for food, hygiene and shelter of an asylum-seeker ("a member of a particularly underprivileged and vulnerable population group in need of special protection") who had spent several months living on the street in a state of extreme poverty (see paras 249-264). It is clear that the test for a breach of article 3 is a demanding one and it is not suggested that there has been a breach of article 3 in the present case.

33. UK domestic case law is to similar effect. Thus, in *R (TG) v Lambeth LBC* [2011] EWCA Civ 526; [2012] PTSR 354, a Court of Appeal (which, as Ouseley J observed, could have been a Supreme Court majority) dismissed as unarguable a claim that alleged failures of a local authority to discharge statutory duties to provide financial and other support to the claimant as a child in need infringed his right to respect for his private life under article 8. Wilson LJ, with whom Lord Neuberger MR and Toulson LJ agreed, said (at para 45):

> "The truth is that these various duties cast by Parliament upon the state to aid the personal development of a person who is or has been an adolescent in need … are the creature of statute and enforceable on that basis. A failure to discharge the duties might lead to an infringement of that person's right under article 3; but otherwise the consequences of failure are likely to be – as in this case they certainly are – far too nebulous, far too speculative and, insofar as discernible, far too slight to lead to a conclusion that the failure infringes his right to respect for his private life under article 8. The duties are not manifestations of the state's obligation to satisfy the rights of its citizens under article 8; or, to put the same point in another way, a member state of the Council of Europe which failed to make analogous provisions would not thereby infringe the rights of its citizens thereunder."

34. In the face of this consistent body of authority, counsel for the claimants did not seek to argue directly on this appeal that article 8 imposes a positive obligation on the state to provide welfare benefits to families unable to support themselves which include an individual element payable in respect of each child without any limit on number. However, they invited this court, as they did the judge, to infer that it is an aim of the two child limit on child tax credit to influence the intimate behaviour of such families by discouraging them from having more than two children. Counsel for the claimants submitted, citing *Botta v Italy* (1998) 26 EHRR 241, para 32, that the right to respect for private life protected by article 8 "is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings". They argued that a legislative provision which is intended to discourage large low income families constitutes such "outside interference" which engages article 8.

35. Even if the factual premise of this argument had been made out, it would not in my view have justified the claimants' conclusion. I see no reason why a measure which was aimed at encouraging people to have smaller families by structuring financial support in a way designed to make it financially advantageous for parents to have no more than two children should, on that account, be regarded as impermissible "outside interference" by the state with the right to choose how many children to have. In any event, I have already concluded (at paras 23 and 24 above) that the factual premise of the claimants' argument is unfounded, and that it was not an aim of the legislation, albeit that it was envisaged as a possible effect, to discourage large low income families.

36. Nor does *Botta v Italy* provide any support for the claimants' argument. The Court in that case recognised that, in principle, article 8 may in some circumstances require the adoption of positive measures designed to secure respect for private or family life, but held that the state was not obliged to provide facilities which would enable a disabled person to gain access to a public beach. Indeed, the failure to provide such facilities was held not even to fall "within the ambit" of article 8 for the purpose of founding a complaint of discrimination under article 14. There is nothing in this authority, nor in any other authority to which reference has been made, which provides any basis for arguing that a decision by the state not to provide additional financial support for low income families with more than two children constitutes an interference with the rights of individuals protected by article 8 to develop intimate personal relationships.

37. The claimants' case is not improved by relying on article 12, which has been narrowly interpreted as guaranteeing a right to found a family only within marriage and, even then, has not been taken to impose any positive obligation on the state to provide financial assistance to families.

38. I conclude that the judge was right to reject the claimants' contention that limiting the entitlement to child tax credit to two children interferes with their rights under articles 8 and/or 12 of the Convention.

Article 14

39. I turn to the main way in which the claimants put their case, which is that the two child limit on child tax credit is incompatible with article 14 of the Convention, which prohibits discrimination in the enjoyment of Convention rights. The claimants contend that the two child limit infringes article 14 by treating children with multiple siblings less favourably than other children, or alternatively by discriminating against children generally. Although not alleged in the claimants' statement of grounds for bringing the claim, it has also been suggested in argument that the measure discriminates indirectly against women and/or that it discriminates against women with a conscientious objection to birth control or abortion, who are particularly likely to be affected because they cannot control family size other than by complete sexual abstinence. I will not address further the last of these allegations which is not only unpleaded but does not arise on the facts of these claims, as on the evidence and the judge's findings neither SC nor CB has any objection to birth control (indeed both use contraception).

40. Article 14 states:

> "*Prohibition of discrimination*
>
> The 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."

41. To determine whether the relevant legislation is incompatible with article 14, four questions need to be answered. First, does the alleged discrimination concern the enjoyment of a right set forth in the Convention – the test for this purpose being whether the facts of the case fall "within the ambit" of a Convention right? Second, is the alleged ground of discrimination a "status" listed or falling within article 14? Third, has the claimant been treated less favourably than a class of persons whose situation is relevantly similar? Fourth, if so, is there an objective and reasonable justification for the difference in treatment? The answers to the third and fourth questions determine whether there is "discrimination" within the meaning of article 14.

42. Each of these questions is in issue on this appeal. A further major issue raised is whether the question of justification is affected by the provisions of the United Nations Convention on the Rights of the Child and, if so, how.

The test of ambit

43. Unlike, for example, the equal protection clause of the Fourteenth Amendment to the United States Constitution or section 15 of the Canadian Charter, article 14 of the Convention is not a freestanding guarantee of equal treatment, but applies only in the context of securing the Convention rights. Given this limitation, it is not immediately obvious how there can be a breach of article 14 if there has not in any case been a breach of another Convention right. One explanation would be that article 14 operates in the area where the Convention qualifies the rights it guarantees. So, for example, as already mentioned, article 8(2) permits interference with the exercise of the right to respect for family and private life where such interference is in accordance with the law and is necessary in a democratic society in pursuit of certain interests. Article 14 requires that, when states rely on these interests – for example, "the economic well-being of the country" or "the protection of morals" – to restrict article 8 rights, they must do so without discrimination on any prohibited ground such as sex, race, nationality etc.

44. The European Court of Human Rights has, however, interpreted article 14 as having broader reach than this and as applying even where there has been no interference with the exercise of a Convention right, provided that the discrimination has occurred within the general subject area, or "ambit", of such a right. This approach treats each of the Convention rights as surrounded by a penumbral area in which, although the right itself is not engaged, action by the state must not violate article 14. This approach was first adopted in the *Belgian Linguistic* case (1979-80) 1 EHRR 252, where the Court held that, although the right to education protected by article 2 of Protocol 1 did not place an obligation on the state to set up a publicly funded school of any particular kind, where the state had set up such a school, it could not impose entrance requirements which were discriminatory. The principle has since been generalised. So, for example, in *EB v France* (2008) 47 EHRR 21 the Court held that, although the provisions of article 8 do not guarantee a right to adopt a child, where a state grants such a right of adoption, it falls within the ambit of article 8 so that article 14 prohibits discrimination against an applicant for adoption on the ground of her sexual orientation. As the Court explained, at para 48:

> "The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the State has voluntarily decided to provide."

45. In the present case the claimants contend that, even if the imposition of the two child limit on child tax credit does not interfere with the rights protected by article 8, the measure falls within the ambit of article 8 so that article 14 is applicable. In addition and in the alternative, they contend that the measure falls within the ambit of article 1 of Protocol 1 ("A1P1"), which states:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. …"

46. The judge rejected both contentions but, in my opinion, he was wrong to do so. Although the claimants put most emphasis on article 8 because an important part of their case is the impact of the measure on children and family life, I will deal first with their contention that the two child limit comes within the ambit of A1P1.

The ambit of A1P1

47. The term "possessions" in A1P1 has been interpreted broadly as encompassing not just tangible property but various intangible rights and legitimate expectations to payments or assets of various kinds. In *Stec v United Kingdom* (2005) 41 EHRR SE 295 the Grand Chamber of the European Court held that, although A1P1 places no restriction on a state's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme, where a contracting state has in force legislation providing for the payment as of right of a welfare benefit, then "that legislation must be regarded as generating a proprietary interest falling within the ambit of [A1P1] for persons satisfying its requirements" (para 54). The Court formulated, at para 55, the following test:

> "In cases, such as the present, concerning a complaint under article 14 in conjunction with [A1P1] that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question…"

48. This test has been reiterated by the European Court of Human Rights in later cases: see *Carson v United Kingdom* (2010) 51 EHRR 13, para 61; *Andrejeva v Latvia* (2010) 51 EHRR 28, para 81; *Stummer v Austria* (2012) 54 EHRR 11, paras 81-83; *Vrontou v Cyprus* (2017) 65 EHRR 31, paras 62-64. It was adopted by the House of Lords in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311 and has since been treated as part of UK law.

49. The judge considered that the two child limit does not fall within the ambit of A1P1. His reasoning was that no existing benefit entitlement has been removed: there has simply been a change in the law which affects future entitlements. Moreover, the new law is the same for all: subject to the prescribed exceptions, no one can now make a new claim for child tax credit for a third child born on or after 6 April 2017. There could be no legitimate expectation that Parliament would not legislate to alter benefits to which no one had yet become entitled. In these circumstances it cannot be said that, but for the two child limit, the claimants had any right to receive a benefit which amounted to a proprietary interest or possession falling within the ambit of A1P1.

50. In my view, this reasoning is based on a misapprehension of the claimants' case. Their relevant complaint is not that the law was changed to deny them a right they would have had if the law had stayed the same. Nor is it that they are being treated unfavourably in comparison with how other families with more than two children all born before 6 April 2017 are treated. The claimants' complaint would arise even if the system of child tax credit had always contained the two child limit. It is that, under the system now in force, persons claiming a benefit are denied it on the discriminatory ground that they are responsible for two (or more) other children. The relevant benefit

is the individual element of child tax credit payable in respect of a child and the condition of entitlement about which the claimants complain is the requirement that the person claiming the benefit is not claiming it in respect of more than one other child. Accordingly, applying the test of whether, but for that condition, SC and CB would have had a right, enforceable under domestic law, to receive the benefit in question, the answer is plainly "yes".

51. I also cannot accept the argument made by counsel for the government, relying on a distinction noted by Lord Reed in *R (SG and JS) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449 at para 60, that the two child limit is not a provision denying some an entitlement that exists for others but merely an alteration of the manner in which the amount of child tax credit is calculated and thus a rule which prevents anyone from having any entitlement or possession in relation to any sum above the limit. Unlike an overall cap on the amount of a benefit, which is capable of being characterised in that way, the two child limit is structured so as to deny to persons caught by the provision a discrete individual element of benefit which is otherwise payable in respect of each child for whom the person claiming the benefit is responsible. It seems to me that such a measure falls squarely within the principle established by the *Stec* case and therefore within the ambit of A1P1.

52. As counsel for the claimants recognised, however, relying on article 14 in conjunction with A1P1 focuses on the proprietary interest, or "possession", of the person entitled to claim child tax credit – that is, the parent – rather than on the rights of the child in respect of whom the benefit is claimed. That focus is potentially relevant to whether there is an objective and reasonable justification for the difference in treatment of which the claimants complain. It therefore may be important to the claimants' case, which emphasises the rights and interests of the children affected by the measure, to establish that the two child limit also falls within the ambit of article 8.

The ambit of article 8

53. Again, the judge considered that it does not. He agreed with the government that the mere fact that the grant or refusal of a welfare benefit affects the amount of income available to a family, which in turn has the potential to affect choices made within the family, does not bring the relevant legislation within the ambit of article 8. It is not sufficient to point in such a general way to a link between a benefit, family income and family life. For a welfare benefit to fall within the ambit of article 8 for the purpose of article 14, the judge thought it necessary to show that the allegedly discriminatory refusal of the benefit has a "direct and real" effect on family life. On this basis he distinguished *R (MA/Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 WLR 4550, where the Supreme Court held that a reduction in housing benefit made on the footing that a couple was occupying accommodation with more bedrooms than they were deemed to need fell within the ambit of article 8. Mrs Carmichael, who was severely disabled, succeeded in her challenge based on article 14 because her disabilities meant that she could not share a bedroom with her husband and there was no reasonable justification in these circumstances for treating her separate bedroom as unnecessary. Although the link with article 8 was not spelt out in the judgment of Lord Toulson (with whom all the other Justices agreed), Ouseley J took the link to be that, without the element of housing benefit referable to the second bedroom, the Carmichaels "would have had to pay for a room they needed, in order each to have a room to sleep in to remain as the one family in a household": see para

101 of his judgment. By contrast, no such direct effect of the legislative change on family life has been shown in the present case.

54. I do not accept the judge's explanation of the *MA/Carmichael* case because, on the facts, the deduction made to the Carmichaels' housing benefit had not affected their accommodation or sleeping arrangements nor left them financially any worse off, as the shortfall was made good by discretionary housing payments: see para 2 of the Annex to the judgment of the Divisional Court at [2013] EWHC 2213 (QB); [2013] PTSR 1521. There was thus no evidence that the measure complained of had had (or that it would in future have) a "direct and real" effect on their family life. More generally, an approach which focuses on the economic impact of the measure on family life rather than on the nature and purpose of the benefit in question is not consistent with the case law.

55. In *Petrovic v Austria* (1998) 33 EHRR 33, at para 28, the European Court of Human Rights, citing previous decisions, said that article 14 comes into play whenever "the subject-matter of the disadvantage constitutes one of the modalities of the exercise of a right guaranteed" or the measures complained of are "linked to the exercise of a right guaranteed". Although these formulations are less than transparent, the way in which the test was applied in the *Petrovic* case is instructive. The applicant complained that a parental leave allowance was only available to mothers and not to fathers. Neither the European Court nor the European Commission of Human Rights (which had previously considered the case) examined the economic impact of the relevant legislation. Rather, the Court emphasised the fact that the allowance was "intended to promote family life", as its purpose was to enable a parent to stay at home to look after the children (para 27). The Court concluded, at para 29, that such an allowance came within the scope of article 8 because, by granting it, "states are able to demonstrate their respect for family life within the meaning of article 8 of the Convention."

56. This decision was followed and its reasoning applied in *Okpisz v Germany* (2006) 42 EHRR 32, where the Court held that child benefits which were available only to permanent residents of Germany and not to foreign nationals such as the applicants who had only a limited right of residence came within the ambit of article 8. Ouseley J sought to distinguish this decision on the ground that the applicants had been receiving child benefits for several years before the law was changed in a way which removed their entitlement. In the Court's reasoning, however, this was not treated as a material fact. Nor was this a feature of the *Petrovic* case. Furthermore, in *Niedzwiecki v Germany* (2005) 42 EHRR 679, a case decided at the same time as the *Okpisz* case and on the same basis, the applicant's daughter for whom child benefit was claimed was born after the change in the law. It was therefore not a case in which a previous entitlement had been removed. Nor in these cases was there any examination of what actual effect, if any, the denial of child benefit had had, or could be expected to have, on the organisation of the applicant's family life. Rather, I think it clear that in this line of cases the requisite link with the exercise of the right to respect for family life was established by the nature and purpose of the benefit in question, which was in each case specifically aimed at providing financial assistance for the care of children and could therefore be seen as a means by which the state expressed its support for family life.

57. This interpretation is confirmed by the decision of the Supreme Court in *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250, in which judgment was given after the judgment of Ouseley J in the present case. In the *McLaughlin* case a woman was

refused widowed parent's allowance following the death of her partner, with whom she had lived for 23 years and had four children, because they had not been married and the benefit was payable only to a spouse. In reaching the conclusion that this restriction was incompatible with article 14, the Supreme Court held that the facts fell within the ambit of article 8, as well as within the ambit of A1P1. Widowed parent's allowance is conditional on the survivor receiving child benefit and being a primary carer for a child for whom one or both members of the couple were responsible. But it is not means-tested and there was no finding in the *McLaughlin* case that the denial of the benefit had any direct or real impact on the claimant's family life. Nonetheless, all the members of the Supreme Court (including Lord Hodge, who dissented in the overall result) held, applying the reasoning of the European Court in the *Petrovic* case, that widowed parent's allowance is a "modality of the exercise of the right" guaranteed by article 8, because it is a way in which the state shows respect for children and the life of the family of which they are a part in circumstances where securing the family life of children is among the principal values protected by article 8: see paras 17-19, 22, 66-70. Baroness Hale (with whom three of the other four justices agreed) stated in terms, at para 22:

> "There is no need for any adverse impact other than the denial of the benefit in question."

See also to similar effect Lord Hodge at para 68, citing *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2018] 3 WLR 415, para 18; and *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916; [2018] QB 804, para 55.

58. This reasoning is directly applicable in the present case. Child tax credit is payable only to a person who is responsible for a child and its purpose is to provide financial support for families with children. The benefit therefore represents a measure by which the state shows respect for children and for family life. Indeed, as a means-tested benefit, it has a more important role and a closer connection with the value of securing the life of children within their families than the widowed parent's allowance. As noted earlier, in families with no income from work the individual element of the benefit is intended to meet the subsistence needs (other than housing) of the child in respect of whom it is payable, while the taper which operates as income increases is designed to enable parents to work without losing an equivalent amount of financial support from the state for their child.

59. In these circumstances, I think it clear that, although the imposition of the two child limit on child tax credit does not amount to interference with the right to respect for family life protected by article 8, it falls within the ambit of article 8 for the purpose of article 14.

Status

60. The next question is whether the difference in treatment of which the claimants complain is on the ground of a "status" covered by article 14.

61. Article 14 contains a list of prohibited grounds of discrimination. However, the list is introduced by the words "on any ground such as" (in French, "fondée notamment sur") and ends with the words "or other status" ("ou toute autre situation" in the French text).

These words make it plain that the list is intended to be illustrative and not exhaustive. At the same time the very fact that certain grounds are specifically mentioned indicates that some limitation on the forms of discrimination prohibited by article 14 is intended. A natural interpretation would be to read the words "or other status" as encompassing grounds of the same general kind as those specified. But it is difficult to identify any characteristic which the listed grounds all have in common. Some, such as the first three (sex, race and colour), are grounds which have historically been, and often still are, associated with unfavourable treatment based on social stigma or prejudice. Yet not all the listed grounds are of this 'suspect' nature. Another potential explanation would be that the list gives examples of characteristics which are either innate (such as the three just mentioned) or very strongly connected to an individual's personality (such as religion and political opinion). However, the presence in the list of "property" does not fit with this rationale.

62. In the face of these difficulties, no clear or coherent test of what constitutes a "status" for the purpose of article 14 has emerged in the case law of the European Court of Human Rights. The term "status" has often been said by the Court to refer to a "personal characteristic", but differences of treatment based on grounds which are more a matter of choice or circumstance than personality have been held to fall within article 14 – such as an individual's country of residence (see *Carson v United Kingdom* (2010) 51 EHRR 13) or immigration status (see *Bah v United Kingdom* (2012) 54 EHRR 21). In recent judgments the European Court has tended to prefer the description "identifiable characteristic" – a phrase which assumes rather than provides a criterion for telling whether a ground of discrimination should be regarded as an "other status". No further illumination is provided by the statement endorsed by the Grand Chamber in *Clift v United Kingdom* (Application No 7205/07) 13 July 2010, para 60, that:

> "The question whether there is a difference of treatment based on a personal or identifiable characteristic in any given case is a matter to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective …"

63. In the *Clift* case the European Court – taking a different view on this question from the House of Lords – held that a prisoner who was serving a determinate sentence of 15 years or more (but not a life sentence) had a status for the purpose of article 14. The Court's reasoning appears to have been based on the fundamental importance of the interest potentially affected by treating different categories of prisoner differently, namely the avoidance of arbitrary detention.

64. A rare recent example of a case where the applicant was held not to have a status covered by article 14 is *Minter v United Kingdom* (2017) 65 EHRR SE6, where the European Court, distinguishing the case of *Clift*, held that article 14 did not apply to a difference in treatment which resulted from the application of a different sentencing regime introduced by new legislation to offenders sentenced after a particular date.

65. The same tendency to take an increasingly generous view of what is capable of amounting to a relevant status has been followed by the UK's highest court. Characteristics which have been accepted by the Supreme Court as a status falling within the scope of article 14 include place of residence (see *R (Carson) v Secretary of*

State for Work and Pensions [2005] UKHL 37; [2006] 1 AC 173 and *R (A) v Secretary of State for Health (Alliance for Choice and other intervening)* [2017] UKSC 41; [2017] 1 WLR 2492), "homelessness" (see *R* (*RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311), a person's immigration status (see *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820), and being a co-habitee (see *In Re Brewster* [2017] UKSC 8; [2017] 1 WLR 519). On the other hand, in *Sanneh v Secretary of State for Work and Pensions* [2017] UKSC 73; [2017] 3 WLR 1486 the Supreme Court held that being a "*Zambrano*" carer (that is, a non-European citizen who is the primary carer of a European citizen) was not a status covered by article 14.

66. In the *RJM* case, at para 5, Lord Walker depicted the grounds covered by article 14 as falling within a series of concentric circles, with those characteristics which are innate or most closely connected with an individual's personality at the core. (He gave the examples of gender, sexual orientation, pigmentation of the skin and congenital disability.) A wider circle would include characteristics such as nationality, language, religion and politics, which are regarded as important to the development of an individual's personality and reflect important values protected by the Convention. Further out in the concentric circles are characteristics that are "more concerned with what people do, or with what happens to them, than with who they are" but which may still come within article 14 – homelessness being one of these. The corollary of this scheme is that:

> "The more peripheral or debatable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."

This approach was endorsed by Lord Wilson, giving the lead judgment of the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250, at para 21.

67. In *R (Stott) v Secretary of State for Justice* [2018] UKSC 59; [2018] 3 WLR 1831, the Supreme Court has decided (by a majority of four to one) that it should depart from the previous decision of the House of Lords in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54; [2007] 1 AC 484, and follow the decision of the European Court in *Clift v United Kingdom* (Application No 7205/07) 13 July 2010 in holding that being a prisoner serving a determinate sentence of imprisonment of more than 15 years amounts to a status. The judgments of Lady Black, Lady Hale and Lord Mance include valuable discussion of whether a status must exist independently of the difference in treatment of which the claimant complains. As Lady Black observed (at para 74), such a requirement is not at all easy to grasp. Clearly, as Lady Hale pointed out, the words "on any ground such as … or other status" are intended to add something to the requirement of discrimination in article 14. It follows that the status cannot be defined solely by the difference in treatment complained of: it must be possible to identify a ground for the difference in treatment in terms of a characteristic or classification which is not merely a description of the difference in treatment itself (see paras 209-212). On the other hand, there seems no reason to impose a requirement that the status should exist independently in the sense of having social or legal importance for other purposes or in other contexts than the difference in treatment complained of. As Lord Mance put it, at para 231:

> "There is no reason why a person may not be identified as having a particular status when the or an aim is to discriminate against him in some respect on the ground of that status."

68. The latter point is illustrated by *Paulík v Slovakia* (2006) 46 EHRR 10. In that case the applicant had been found in paternity proceedings to be the father of a child. Many years later it was proved by DNA testing that he was not in fact the father. Under Slovakian law there was no means by which paternity determined by a court, as opposed to paternity that was presumed without judicial determination, could be reviewed. The European Court found that this difference in treatment constituted discrimination on a ground prohibited by article 14. In *Clift v United Kingdom*, at para 60, the Court identified this case as one where the distinction complained of had no "relevance outside the applicant's complaint". In other words, as Lord Mance noted in the *Stott* case at para 233, the only significance of the applicant's status as a person whose paternity had been determined judicially and not otherwise was his inability to have it reviewed on the basis of a DNA test.

69. A domestic case which illustrates the same point is *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250. There the treatment which was held to violate article 14 was the suspension of payments of disability living allowance to the claimant, a child who at the time was three years old, on the ground that he had been an in-patient in an NHS hospital for more than 84 days. There was no suggestion that the 84 day criterion had any significance apart from the fact that it was the ground for the difference in treatment complained of (between the entitlement to disability living allowance of a disabled person in the claimant's situation and that of a disabled person who is an in-patient in an NHS hospital for 84 days or less). Yet despite observing that at first sight the claimant's contention appeared contrived (para 20), Lord Wilson (with whom Baroness Hale, Lord Clarke and Lord Reed agreed) reached the "confident conclusion" that the claimant had a status falling within the grounds of discrimination prohibited by article 14 (para 23).

Status in this case

70. In so far as the claimants allege that the two child limit on child tax credit discriminates indirectly against women, the relevant ground is of course a ground (indeed the first one) expressly listed in article 14. I also do not understand it to be disputed that being a child is an "other status" for the purpose of article 14. But the government argues, and the judge held, that being a child with multiple siblings is not.

71. In considering this issue, Ouseley J accepted that the concept of "other status" is to be given a broad interpretation and that such a status does not have to be innate or acquired, but can be imposed, or the upshot of circumstance, as with homelessness. He also accepted that an only child might have a status, as might a child with siblings, or all dependant children living in a family or even all dependants below 21. But he did not accept that being a child who has more than one sibling or more than one child sibling can properly be treated as a status within the meaning of article 14.

72. The judge also pointed out that the application of the two child limit does not in fact depend on the number of siblings that a child has, as such, but on the number of other children (including qualifying young persons) for whom the person (or couple) responsible for the child is also responsible at any given time. Under the Child Tax

Regulations 2002/2007 that in turn depends, subject to various exceptions, on whether the child is normally living with the person concerned. There is no requirement that children living with that person should be brothers or sisters of each other, nor are siblings taken into account if someone else is responsible for them. (For example, SC has three children who are in the care of other relatives and therefore do not affect her entitlement to child tax credit.) Nor does referring to "multiple siblings" without qualification capture the age requirement in the legislation, which is itself quite complex. Any siblings over the age of 19 are never relevant, but whether a young person aged between 16 and 19 is included depends on whether he or she is in "advanced education" or "approved training" (terms which have defined meanings) at the relevant time. The judge posed the dilemma that the claimants either have to argue for a status too broad to establish a difference in treatment or, alternatively, match the suggested status to the precise contours of the legislation – in which case he considered that their case falls foul of what he called the "bootstraps argument" whereby a status cannot be defined simply by reference to the allegedly discriminatory treatment itself.

73. The judge concluded that being a "child with multiple siblings" is not a relevant status for the purpose of article 14. Alternatively, if wrong about that, he considered that the status is at best of a "peripheral and debatable type", which affects the nature of the justification required.

74. I agree with the judge that, in identifying the relevant group for the purpose of the claimants' discrimination argument, the use of the term "sibling" is not strictly apt as, in the way the legislation operates, what matters is the number of children for whom the person (or couple) claiming child tax credit is responsible and not the relationship of those children to each other. But a group which comprises one or more children living in the same household as either a single adult or a couple who, even if not their natural parent(s), has responsibility for them is a perfectly familiar social category which reflects the way in which the care of children in our society is normally organised. Such a group can naturally be described as a "household" or a "family". Indeed, those were the terms used when the two child limit was explained and debated during the passage of the Bill through Parliament. Furthermore, the basic distinction which this measure draws – and was deliberately designed to draw – is a simple one, encapsulated by referring to it as the "two child limit". It is between a household which contains one or two children and a household which contains more than two children. Whether or not the difference in treatment based on this distinction can be objectively justified, the claimants' argument that it is unfair is easy to understand.

75. Nor is it diminished by the fact that, as is necessary in legislation of this kind, the classifications for which I am using the terms "child" and "household" or "family" for short are given more detailed and elaborate legislative definitions. The judge's reliance on the "bootstraps argument" preceded the decision of the Supreme Court in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59; [2018] 3 WLR 1831, which – as I have indicated – makes it clear that, while the allegedly discriminatory treatment cannot itself be a status, there is no requirement that a status must have social or legal significance outside the context of the legislation and apart from the fact that it is the ground on which the allegedly discriminatory treatment is based. In this case the claimants are not simply complaining about the fact that they are denied a benefit to which others are entitled; they are complaining about the ground on which this difference in treatment is based. It is not an objection to their case that the relevant

status is given precise definition and significance by the legislation which uses it as a ground for treating people differently.

76. It seems to me that, once it is accepted that a status need not be innate or an inherent aspect of an individual's personality but may be a feature of a person's circumstances or living situation on which a legal consequence depends, then being a member of a household or family unit which contains more than two children, or being a child member of such a household, can without difficulty be regarded as an "other status" for the purpose of article 14. Such a status is not different in character from being homeless, or a prisoner serving a sentence of a particular type, or being resident in the UK, or being an immigrant who has been given leave to remain on particular conditions. A case which seems to me to bear a close analogy with the present case is *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 WLR 1434, where it was common ground – and regarded as obviously correct by the Supreme Court – that being a child claiming asylum in the UK who arrived in the UK without parents or not as part of a family unit was a status. Another comparable case is *R (DA) v Secretary of State for Work and Pensions* [2018] EWCA Civ 504; [2018] PTSR 1606, which I will consider in more detail later in this judgment, where being a lone parent with a child under two, or a child under two of a lone parent, was held by the Court of Appeal to be a status for the purpose of article 14.

77. I conclude that being a member (or child member) of a household which includes more than two children is a relevant status such that discrimination in the provision of child tax credit on that ground is prohibited by article 14.

78. Having said that, although membership of such a household is, at least for a child, generally not a matter which involves any element of choice, it is not a classification of a sensitive or suspect kind which requires particularly convincing or weighty reasons to justify making it a ground for treating people differently. Nor is it a status, such as being a child or even a member of a family, which may be regarded as an important aspect of an individual's personality in the sense of what makes someone the person who she or he is. The number of other children living in the same household at a particular time is a relatively incidental feature of a person's situation and considerably less significant than, for example, the fact that a person is homeless. I therefore agree with the judge's alternative conclusion that, in terms of Lord Walker's model of concentric circles, this status lies on the outer periphery.

Analogous situations

79. The next question is whether the claimants are in an analogous or relevantly similar situation to the class of persons who are said to receive more favourable treatment than them. The function of this test is to determine whether the difference in treatment complained of is attributable to the relevant ground or status covered by article 14.

80. This test is clearly met in so far as SC and CB allege that the two child limit indirectly discriminates against them on the ground of sex because women are more likely than men to be lone parents who rely on child tax credit to support their children. For the purpose of this allegation the relevant comparison is between women and men whose situation is exactly analogous apart from their gender. The test is also clearly met in so far as the claimants complain that families which include more than two children are treated less favourably than families with one or two children. Again, the comparison

is between families whose situation is similar in all respects apart from the ground of alleged discrimination.

81. In so far as the child claimants seek to argue in the alternative, however, that the measure discriminates against them on the ground of their status as children, the judge was in my view plainly right to reject their case at this stage of the analysis. As he observed, the only group in comparison with which there could be discrimination against children in general is adults in general. The two child limit on child tax credit does not disadvantage children in comparison with adults since child tax credit is a benefit that is payable solely in respect of children. There is no equivalent welfare benefit payable in respect of adults. So it cannot be said that adults are eligible for a benefit which is similar to the individual element of child tax credit but not subject to a similar limit on the number of individuals in a household for whom the benefit can be claimed.

82. Nor can I accept the claimants' argument that children are disproportionately disadvantaged by the measure because a household to which the two child limit applies is likely to contain only one or two adults but at least three children. This fact would be relevant if the individual element of child tax credit was intended to meet the needs of all the members of an eligible family. But it is not. Its function is to help parents who are either not in work or have low incomes to feed, clothe and meet other costs of raising a child. While any reduction or restriction in the benefit may in practice affect the welfare of parents themselves because the total household income will be lower, the benefit is not designed to assist adults to meet their own living expenses: other welfare benefits such as income support, jobseeker's allowance and working tax credit serve that function. In these circumstances it is impossible to say that a reduction in child tax credit puts children as a group at a disadvantage to adults as a group just by reason of the reduction. To make such a case it would, as I have indicated, be necessary to point to a comparable benefit payable to meet the needs of adults which has not been restricted in the same way. The claimants have not attempted to make such a comparison nor, as it seems to me, would such an attempt be realistic.

Justification

83. The last and critical question which determines whether the legislation imposing the two child limit is compatible with article 14 is whether there is an "objective and reasonable justification" for the differences in treatment to which the measure gives rise. In the light of the conclusions that I have reached so far, the two differences in treatment that remain relevant – because they fall within the ambit of a Convention right, are grounded on a status covered by article 14 and involve a comparison between groups in analogous situations – are, first, the fact that the measure disadvantages women in comparison with men and, second, the fact that it treats families with more than two children (and in particular the children in those families) less favourably than families with only one or two children.

The test of proportionality

84. According to settled case law of the European Court of Human Rights, the question whether there is an "objective and reasonable justification" for a difference in treatment is to be judged by whether it pursues a "legitimate aim" and there is a "reasonable relationship of proportionality" between the aim and the means employed to realise it:

see e.g. *Rasmussen v Denmark* (1985) 7 EHRR 371, para 38; *Petrovic v Austria* (2001) 33 EHRR 14, para 30; *X v Austria* (2013) 57 EHRR 14, para 98. In the domestic law of the UK it is now established that this proportionality test can be further formulated as involving four questions:

> "(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

See *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, para 74 (Lord Reed). Put more shortly, the question at step four is whether the impact of the right's infringement is disproportionate to the likely benefit of the impugned measure: ibid. Another way of framing the same question is to ask whether a fair balance has been struck between the rights of the individual and the interests of the community: see the *Bank Mellat* case at para 20 (Lord Sumption).

The margin of appreciation

85. In the case law of the European Court of Human Rights it is also well settled that states have a certain "margin of appreciation" in applying the proportionality test, the breadth of which will vary according to "the circumstances, the subject matter and the background": see e.g. *Rasmussen v Denmark* (1985) 7 EHRR 371, para 40; *Petrovic v Austria* (2001) 33 EHRR 14, para 38. In its judgment on the merits in *Stec v United Kingdom* (2006) 43 EHRR 74, para 52, the Grand Chamber said:

> "A wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. 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'." [citations omitted]

This statement has been reiterated in later cases: see e.g. *Carson v United Kingdom* (2010) 51 EHRR 13, para 61; *Andrejeva v Latvia* (2010) 51 EHRR 28, para 83; *Fábián v Hungary* [2017] ECHR 744, para 115.

86. The test stated in the *Stec* case was referring to the margin of appreciation afforded to national authorities by an international court, and not to the approach which a national court should take towards a policy choice made by its own legislature. The case law of the European Court is not directly applicable to the latter question. As Lord Hoffmann said in *R (Begum) v Denbigh High School Governors* [2006] UKHL 15; [2007] 1 AC 100, para 63:

> "In applying the Convention rights which have been reproduced as part of domestic law by the Human Rights Act 1998, the concept of the margin of appreciation has, as such, no application. It is for the courts of the United Kingdom to decide how the area of judgment allowed by that margin should be distributed between the legislative, executive and judicial branches of government."

87. Nonetheless, there are compelling reasons for according the full area of judgment allowed to the UK under the Convention in matters of social and economic policy to the legislature and the executive. Within the UK's constitutional arrangements, the democratically elected branches of government are in principle better placed than the courts to decide what is in the public interest in such matters. Those branches of government are in a position to rank and decide among competing claims to public money, which a court adjudicating on a particular claim has neither the information nor the authority to do. In making such decisions, the legislature and the executive are also able and institutionally designed to take account of and respond to the views, interests and experiences of all citizens and sections of society in a way that courts are not. Above all, precisely because decisions made by Parliament and the executive on what is in the public interest on social or economic grounds are the product of a political process in which all are able to participate, those decisions carry a democratic legitimacy which the judgment of a court on such an issue does not have. For such reasons, in judging whether a difference in treatment is justified, it is now firmly established that the courts of this country will likewise respect a choice made by the legislature or executive in a matter of social or economic policy unless it is "manifestly without reasonable foundation".

88. The "manifestly without reasonable foundation" test was adopted by the UK Supreme Court in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 WLR 1545, paras 15-20, and has been applied in many subsequent domestic cases. It was specifically affirmed by the Supreme Court in *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 WLR 4550, paras 36-38. In the present case it is common ground between the parties that it is the correct test to apply.

89. Although it is not immediately obvious how the "manifestly without reasonable foundation" test relates to the assessment of proportionality that the court must undertake, the explanation may be that the court is required to ask whether the difference in treatment is manifestly disproportionate to a legitimate aim. This would accord with the statement of the European Court in *Blečić v Croatia* (2005) 41 EHRR 13, para 65, that it will accept the judgment of the domestic authorities in socio-economic matters "unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued" (emphasis added). It also reflects how the Supreme Court applied the test in the recent case of *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250, at paras 38-39 (Baroness Hale) and para 83 (Lord Hodge).

Intensity of review

90. Nevertheless, just as in ordinary judicial review proceedings where a test of reasonableness is applied the intensity of the court's review will vary according to the context (see e.g. *Kennedy v Charity Commission* [2015] AC 455, paras 51-55), so too

it is clear that, in assessing proportionality, the intensity with which a court will scrutinise a policy justification for a difference in treatment will depend on the circumstances. Three factors, in particular, are important in this regard.

91. First, as already mentioned, the nature of the ground on which the difference in treatment is based is significant. Thus, in the case law of the European Court it is established that differences in treatment based on race, nationality, gender, religion, sexual orientation and certain other grounds require particularly convincing and weighty reasons to justify them. In the *MA* case, at para 37, Lord Toulson cited *Andrejeva v Latvia* [2009] 51 EHRR 28 as an example of a case involving state benefits where "there was, on the face of it, no reasonable foundation for … discrimination" based on grounds of nationality, and noted that "in those circumstances it was for the state to produce a good reason to justify it." In other words, the nature of the ground on which the difference in treatment is based will affect the intensity with which the court will scrutinise the proffered justification and hence the readiness with which the court will conclude that there was manifestly no reasonable foundation for the difference in treatment.

92. A second relevant consideration is whether the measure resulting in differential treatment has been approved by Parliament and, if so, with what degree of scrutiny. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, para 44, Lord Sumption observed that:

> "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."

In *R (SG and JS) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449, at para 95, Lord Reed (after citing this passage and other authorities) noted that, although the benefit cap scheme which was the subject of challenge in that case was not contained in the Bill debated in Parliament but in statutory regulations, nevertheless:

> "… the Government's proposals had been made clear, they were challenged by means of proposed amendments to the Bill, and they were the subject of full and intense democratic debate. That is an important consideration."

Plainly, the weight which should be attached to the democratic basis for the decision is even greater where the measure in question has not merely been considered and approved by Parliament but has been enacted by Parliament in primary legislation. Baroness Hale made this point in the *SG and JS* case, at para 159, when she said that the Supreme Court was there concerned with decisions of the government in working out details that were deliberately left by Parliament to be worked out in regulations rather than with the decisions of Parliament in passing the primary legislation.

93. A third important factor is whether or to what extent the values and interests relevant to the assessment of proportionality were actually considered when the policy choice was made. Thus, it is clear that, where a public authority has addressed the particular issue before the court and has taken account of the relevant human rights considerations in making its decision, a court will be slower to upset the balance which was struck. Conversely, where there is no indication that this has been done, "[t]he court's scrutiny is bound to be closer and the court may have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider": *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420, para 47 (Lord Mance); see also paras 26, 37, 91; *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820, para 32; and *In Re Brewster* [2017] UKSC 8; [2017] 1 WLR 519, paras 50-52.

The UNCRC

94. Before applying these principles to the facts of the present case, another general issue needs to be addressed. It is an issue that has given rise to much argument in this case, as it has in two other recent cases concerning reductions in welfare benefits. The issue is whether, in assessing whether the differences in treatment complained of are a proportionate means of pursuing a legitimate aim, it is relevant to take account of provisions of the United Nations Convention on the Rights of the Child (the "UNCRC") – and, if so, in what way.

95. The UNCRC was adopted by the United Nations General Assembly on 20 November 1989 and came into force in 1991. It was ratified by the UK on 16 November 1992. By article 2, state parties to the UNCRC have undertaken to "respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind." A key principle is embodied in article 3(1), which states:

> "In 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."

By article 4, state parties have agreed to implement economic, social and cultural rights recognised in the convention "to the maximum extent of their available resources." Such rights include that recognised in article 26, which provides:

> "1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.
>
> 2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child."

96. Although a treaty such as the UNCRC which the UK has ratified is binding on the UK in international law, it is not part of UK domestic law and does not give rise to any legal rights and obligations in UK law unless and until it is incorporated by legislation: see e.g. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, paras 55-56. The provisions of the UNCRC therefore have no direct application in this case. But the claimants, supported by the Commission, argue that an unincorporated international treaty can be relevant in determining whether there has been a breach of a Convention right and that, in the present case, it is relevant to consider whether the two child limit is compatible with the UK's obligations under the UNCRC. They submit that the court should treat the answer to that question as a significant factor in deciding whether the differences in treatment to which the measure gives rise are justified and hence compatible with article 14.

The general relevance of international treaties

97. It is clear that, in accordance with article 31(3) of the Vienna Convention on the Law of Treaties, any relevant rules of international law, including international conventions, should be taken into account for the purpose of interpreting the European Convention on Human Rights. As stated by the European Court in *Demir v Turkey* (2009) 48 EHRR 54, at para 85:

> "The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European states reflecting their common values. The consensus emerging from specialised international instruments and from the practice of contracting states may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases."

The Court went on to say, at para 86, that it is not necessary that the relevant international instruments should have been ratified by the state concerned but is sufficient that they "show, in a precise area, that there is common ground in modern societies".

98. In *Demir v Turkey* the question was whether civil servants are "members… of the administration of the state" within the meaning of article 11(2) of the Convention, which permits a state to impose restrictions on the exercise by such persons of rights protected by article 11 including the right to form and join trade unions. The Court took account of international instruments which recognised the right of civil servants to form and join trade unions in concluding that civil servants cannot be regarded as "members… of the administration of the state" for this purpose.

99. In other cases the European Court has emphasised the importance of interpreting the Convention in a manner that is consistent with other international instruments in order to avoid, so far as possible, conflict between different treaties. So, for example, in *Neulinger v Switzerland* (2012) 54 EHRR 31, para 132, and *X v Latvia* (2014) 59 EHRR 3, para 93, the Court has held that in matters of international child abduction the obligations imposed on states by article 8 of the Convention must be interpreted taking into account, in particular, the 1980 Hague Convention on the Civil Aspects of

International Child Abduction and the UNCRC. As the Grand Chamber explained in *X v Latvia*, at para 94:

> "This approach involves a combined and harmonious application of the international instruments …. Such consideration of international provisions should not result in conflict or opposition between the different treaties, provided that the Court is able to perform its task in full … by interpreting and applying the Convention's provisions in a manner that renders its guarantees practical and effective."

100. In these two cases the European Court went further than using international treaties as an aid to interpreting the meaning of the language of the Convention, as it did in *Demir v Turkey*. Reliance was placed on other international treaties in considering how the balance should be struck between the competing interests at stake for the purpose of deciding whether interference with the applicants' article 8 rights to respect for their family life was justified under article 8(2) on the basis that it was a proportionate means of pursuing a legitimate aim. In that regard the Court drew from article 3(1) of the UNCRC and from the Hague Convention the idea, said to be supported by "a broad consensus – including in international law", that "in all decisions concerning children, their best interests must be paramount": see *Neulinger v Switzerland*, para 135; *X v Latvia*, para 96. The Court then considered in these cases how the child's best interests should be taken into account in determining whether ordering the return of an abducted child would violate article 8.

101. The principle embodied in article 3(1) of the UNCRC that, in all actions concerning children, the best interests of the child shall be a primary consideration has been similarly recognised by the UK Supreme Court as an integral part of the proportionality assessment required under article 8 when a decision to remove, deport or extradite a person from the UK is found to interfere with that person's right to respect for her family life and the family members potentially affected by the decision include children. The applicable principles, established in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166 and subsequent cases, were summarised as follows by Lord Hodge in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74; [2013] 1 WLR 3690, at para 10:

> "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 of the Convention; (2) in making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration; (3) although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant; (4) while different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play; (5) it is important to have a clear idea of a child's circumstances and of what is in a child's best

> interests before one asks oneself whether those interests are outweighed by the force of other considerations; (6) to that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and (7) a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

102. There can accordingly be no doubt that the best interests of a child are a factor which must, when relevant, be included in the balancing exercise and given significant weight when assessing whether interference with rights protected by article 8 is justified. A question to which, as yet, however, no definitive answer has been given is in what circumstances the child's best interests principle, or other provisions of the UNCRC, should be taken into account in assessing whether a difference in treatment is justified for the purpose of deciding whether there has been a breach of article 14.

The benefit cap cases

103. The question was raised in *R (SG and JS) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449, mentioned earlier, where the claimants challenged the lawfulness of a cap imposed by statutory regulations on the total amount of welfare benefits that a single person or couple can receive. The claimants argued that the cap discriminated indirectly against women contrary to article 14, read with A1P1 and/or article 8, because those most likely to be affected were lone parents, the vast majority of whom are women. In the Supreme Court it was common ground that the scheme fell within the ambit of A1P1 and that it had a disproportionately adverse impact on women. The issue was whether the difference in treatment complained of was justified. In that context the claimants relied on article 3(1) of the UNCRC. The relevance of the UNCRC was disputed by the Secretary of State, though this issue only emerged at a late stage in submissions made after the hearing. In the result, the Supreme Court held by a majority of three to two that article 3(1) of the UNCRC was not relevant and that the differential impact of the legislation was justified.

104. The basis on which the majority concluded that article 3(1) was not relevant to the issue of justification was that, as Lord Reed put it at para 89:

> "The fact that children are statistically more likely to be living with a single mother than with a single father is unrelated to the question whether the children's rights under article 3(1) of the UNCRC have been violated. There is no factual or legal relationship between the fact that the cap affects more women than men, on the one hand, and the (assumed) failure of the legislation to give primacy to the best interests of children, on the other. The conclusion that the cap is incompatible with the UNCRC rights of the children affected therefore tells one nothing about whether the fact that it affects more women than men is unjustifiable under article 14 of the Convention read with A1P1."

Lord Carnwath agreed with this reasoning at para 131, and Lord Hughes agreed with the whole of Lord Reed's judgment at para 134, whilst also giving further reasons for

concluding, at para 146, that the "necessary connection between the Convention right under consideration and the international instrument is not present." Baroness Hale and Lord Kerr dissented on this issue and in the overall result on the basis that, when proper account was taken – as in their view it needed to be – of the best interests of the children affected by the cap, the disparate impact on women inherent in the measure could not be justified.

105. The benefit cap was revised by further legislation in 2016 which lowered the limit but included an exemption which, for a single person, applies where he or she is working for at least 16 hours per week. The new scheme has also been challenged in the courts on the ground that it is contrary to article 14, read with A1P1 and/or article 8. But this time the discrimination alleged is more narrowly defined. The claimants contend that the measure discriminates against lone parents with very young children – in particular, with a child under two – because for such parents their childcare responsibilities make it much harder for them to find work for the 16 hours per week required to exempt them from the operation of the cap. The claimants are also again arguing that, on the issue of justification, article 3(1) of the UNCRC is relevant and requires the best interests of children to be taken into account as a primary consideration.

106. In *R (DA) v Secretary of State for Work and Pensions* [2018] EWCA Civ 504; [2018] PTSR 1606, the Court of Appeal held that the facts of these claims fall within the ambit of A1P1 and article 8 and that lone parents with children under two, and those children themselves, have a relevant status for the purpose of article 14. These conclusions support those that I have reached on the corresponding issues in the present case. The challenge based on article 14 failed, however, because a majority of the court (Elias LJ and Sir Brian Leveson P, with McCombe LJ dissenting) concluded that, on the evidence, lone parents with children under two are not in a significantly different position from lone parents with older children in terms of the difficulties they face in finding work; and that the judge's conclusion that there was unjustifiable discrimination against the children themselves was wrong because it was based on a mistaken view that article 3(1) of the UNCRC was relevant. The critical reasoning of Sir Patrick Elias (with whom Sir Brian Leveson P agreed) on the latter point was as follows, at para 128:

> "The fact that the children can make their own claim which can be characterised as discrimination with respect to the right to family life does not alter the fact that what is in issue remains in substance discrimination against this particular cohort of lone parents, focusing on the difficulties they face. The case falls within the ambit of the children's article 8 rights only because those rights are inextricably intertwined with those of their parents. That is particularly so in this case where the children are so young. It is not as if this cohort of children are necessarily affected by the imposition of the cap more than other children of parents living in workless households, and particularly other children under school age. Indeed, as I have indicated earlier, the precise consequence is likely to depend more on the number of children than on their ages. There is therefore no reason why the best interests of these children under the age of two should be materially different to the best interests of other children affected by the cap."

107. There has been a further appeal to the Supreme Court in the *DA* case in which judgment has not yet been given. We must therefore decide the present case on the basis that we are bound by the *ratio* of the Court of Appeal's decision.

Reliance on the UNCRC in other article 14 cases

108. Article 3(1) of the UNCRC was also invoked in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250. As mentioned earlier, the claimant in that case was a child who, under statutory regulations, ceased to receive disability living allowance after he had been an in-patient at an NHS hospital for 84 days. The Supreme Court held that this was a violation of article 14, read with A1P1, because there was no objective justification for treating children who are so disabled that they need to remain in hospital for such a long period less favourably than children who are in hospital for shorter periods and are entitled to the allowance for their full hospital stay. Lord Wilson (with whose judgment three of the other four Justices agreed) referred to article 3(1) of the UNCRC and to the similar provision relating to children with disabilities in article 7(1) of the UN Convention of the Rights of Disabled Persons. He cited the interpretation given in General Comment No.14 issued by the UN Committee on the Rights of the Child of a child's best interests as encompassing a "substantive right" and a "rule of procedure". Lord Wilson observed (at para 41) that, on the evidence before the court, the Secretary of State had never conducted an evaluation of the possible impact on the children concerned of the decision to suspend payments after 84 days in hospital, with the result that there had been a breach of the procedural rule which in turn had generated a violation of the substantive right of disabled children to have their best interests assessed as a primary consideration.

109. Turning to the question whether this conclusion affected the claimant's rights under article 14, Lord Wilson distinguished the *SG and JS* case on the basis that the majority in that case decided only that the UNCRC was irrelevant to the justification of a difference in treatment visited on women rather than directly on children, and not that it had no role in any inquiry into justification for any difference in treatment under article 14. He then said, at para 44:

> "A conclusion, reached without reference to international Conventions, that the Secretary of State has failed to establish justification for the difference in his treatment of those severely disabled children who are required to remain in hospital for a lengthy period would harmonise with a conclusion that his different treatment of them violates their rights under two international Conventions."

Lord Wilson did not, however, address, as he did not need to in that case, the precise relevance of the UNCRC and what should happen where a conclusion reached without reference to the UNCRC is not in "harmony" with a conclusion that there has been a breach of that convention.

110. Reference was again made to the UNCRC in *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250 to "reinforce" a conclusion that there had been a breach of article 14. As mentioned earlier, the breach found in that case consisted in denying widowed parent's allowance to the surviving partner of a couple because they had not been

married. After noting that article 3(1) of the UNCRC applies "in all actions concerning children", Baroness Hale said, at para 40:

> "Given the direct link with children, there cannot be much doubt that the provision of widowed parent's allowance is an action concerning children. Article 26 [of the UNCRC] requires State parties to 'recognise for every child the right to benefit from social security, including social insurance …' Article 2 of the UNCRC requires state parties to 'respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's … birth or other status'. To like effect is article 10 of the International Covenant on Economic Social and Cultural Rights 1966. Denying children the benefit of social insurance simply because their parents were not married to one another is inconsistent with that obligation."

Relevance of the UNCRC in this case

111. Although I have no doubt that this issue will soon be further considered by the Supreme Court, on the present state of the law I would venture the following opinions.

112. First, I do not accept that it is a proper or permissible approach for a court to decide – as the claimants invite us to do – whether allegedly discriminatory legislation is consistent with the UK's obligations under an international convention and then, if the court considers that it is not, to treat this as supporting a conclusion that the difference in treatment created by the legislation is not justified and is therefore incompatible with article 14 of the Convention. There is no basis in either legal principle or precedent for treating a state's compliance or lack of compliance with its obligations under other international treaties as relevant to whether it has acted compatibly with article 14 (or any other provision of the Convention). As the cases cited at paras 97-100 above make clear, when the European Court refers to international instruments in interpreting the Convention, the purpose of doing so is not to establish whether the respondent state is in breach of its international obligations. Indeed, in *Demir v Turkey* (2009) 48 EHRR 54, at para 86, the Court expressly rejected an argument that it could not rely in interpreting the Convention in a case against Turkey on international conventions that Turkey had not ratified. The purposes for which the Court has regard to other international instruments are, first, to seek to achieve an interpretation of the Convention which is consistent with rules of international law and, second, as evidence of internationally accepted common values.

113. Second, although a distinction could be drawn between referring to other international instruments as an aid to interpreting the text of the Convention and doing so for the purpose of deciding whether an interference with a Convention right is justified because proportionate to a legitimate aim, such a line has not been drawn in the case law. To the contrary, decisions of the European Court and of the UK Supreme Court demonstrate that it may be necessary to take account of other international instruments in determining how the issue of justification should be approached. More particularly, those decisions show that, in assessing whether interference with article 8 rights to respect for family life is justified in a matter concerning a child, regard should be had

to the principle embodied in article 3(1) of the UNCRC that the best interests of the child must be a primary consideration.

114. Third, it in principle follows, and authorities such as the *Mathieson* and *McLaughlin* cases confirm, that it may also potentially be relevant to take account of international instruments such as the UNCRC in the context of making a proportionality assessment under article 14. It is important to keep in mind, however, that, even when discrimination falls within the "ambit" of article 8, the right protected by article 14 is not the right to respect for family life, which automatically implicates the interests of children in the family, but the right not to be discriminated against on a prohibited ground. Whether the UNCRC (or any other international convention) is relevant to the issue of justification under article 14 must accordingly depend, as it seems to me, on the nature of the discrimination alleged and the reasons relied on to justify it.

115. One way in which an international convention may be relevant (although it does not apply in this case) is by demonstrating an international consensus as to the importance of prohibiting discrimination on a particular ground. As noted earlier, this may affect the weight of the reasons required to justify a difference in treatment based on that ground. Although not spelt out in the judgment, this seems to me to explain why in *Burnip v Birmingham County Council* [2012] EWCA Civ 629; [2013] PTSR 117, para 22, the Court of Appeal considered that resort to the United Nations Convention on the Rights of Persons with Disabilities would have resolved in favour of the claimants any uncertainty about whether treating them less favourably as a result of their disabilities was justified. Similar reasoning explains the reliance on the UNCRC in the *McLaughlin* case to demonstrate international recognition of the right of a child not to be denied the benefit of social insurance on the ground that the child's parents were not married. Even though the widowed parent's allowance was payable to the surviving parent, in circumstances where the allowance was also intended to benefit children, their interest in being treated without discrimination was a significant factor in assessing whether article 14 was infringed.

116. A fourth general point is that, although it was regarded as having some significance by Lord Carnwath in the *SG and JS* case and by Lord Wilson in the *Mathieson* case, I find it difficult to see how the "rule of procedure" which the UN Committee on the Rights of the Child in its General Comment No.14 discerned in article 3(1) of the UNCRC can be relevant to the court's task. It is clear law that the duty of a public authority under section 6 of the Human Rights Act 1998 to act compatibly with Convention rights is one of result, not of process: *R (Begum) v Denbigh High School Governors* [2006] UKHL 15; [2007] 1 AC 100. In other words, the fact that a public authority has not taken account of a relevant consideration or followed an appropriate decision-making process is not itself a basis for concluding that it has acted incompatibly with Convention rights: it goes only to the weight that should be accorded to the judgment made by the public authority. As this legal principle applies to considerations which, under the Convention, are directly relevant to whether there has been a breach of a Convention right, it must also apply *a fortiori* to any consideration derived from another international instrument which is indirectly relevant, such as the child's best interests. If, in a case where to do so is relevant, the decision-maker has failed to take account of the child's best interests, the court's scrutiny will be closer (see para 93 above). But that is because of the principle established by *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420 and other authorities and not, I would

respectfully suggest, because of a procedural rule found in an international treaty which is not part of UK law.

117. In the present case two forms of discrimination are alleged which require justification. One is that the two child limit on child tax credit is said to discriminate indirectly against women because it has a more severe impact on women than on men. On this question the decisions of the Supreme Court in the *SG and JS* case and of this court in the *DA* case are binding authority for the conclusion that the UNCRC has no part to play in the analysis. The reason is that, as in the *SG and JS* case, determining whether the differential impact of the legislation on men and women is justified is not assisted by considering whether the impact of the legislation on children is justified, as the impact on children is unrelated to whether they are living with their mother or their father (or with both parents).

118. Nor does it make any difference in this regard whether, in the phrase used by Sir Patrick Elias in the *DA* case, the "route into" article 14 is that the facts fall within the ambit of A1P1 or within the ambit of article 8. In the *SG and JS* case the Court of Appeal held that the facts fell within the ambit of article 8 as well as A1P1 but that this made no difference to the question of justification: see [2014] EWCA Civ 156; [2014] PTSR 619, paras 82-86. In the Supreme Court it was common ground that the facts fell within the ambit of A1P1 and the argument evidently proceeded on that basis, presumably because it was not considered material to decide whether the facts also fell within the ambit of article 8. Lord Reed referred to article 8 at paras 79-80 of the judgment, but he seems there to have been rejecting any suggestion that article 8(1) was itself engaged rather than discussing whether the facts fell sufficiently within its penumbra to make article 14 applicable. Lord Carnwath observed that article 8 had been relied on in the claimants' printed case as an alternative route into article 14, but said that he had not been persuaded that it added anything of substance to the claim based on A1P1: see para 99. Lord Hughes considered that article 8 was not relevant to the discrimination in issue: see paras 145-146. Article 8 was not mentioned by the dissenting justices.

119. In the *DA* case Sir Patrick Elias took up this question and held that, although the facts fell within the ambit of article 8 as well as A1P1, this did not alter the essential nature of the discrimination alleged in the *DA* case, which was indirect discrimination against a cohort of lone parents focusing on their greater difficulties in obtaining work. Since the interests of their children were equally affected whether the lone parent was male or female, those interests did not bear upon the discrimination in issue: see paras 128-129. Applying such reasoning to the present case, the nature of the indirect discrimination claim is simply that more women than men are likely to be affected by the two child limit. Deciding whether this differential impact is justified is not assisted by consideration of the best interests of children, since their interests are the same whether the parent affected is their mother or father (or both). The UNCRC is therefore not relevant.

120. The second difference in treatment requiring justification in the present case is that the legislation treats larger families which include more than two children less favourably than smaller families which include only one or two children. I have rejected the argument that the two child limit can be said to discriminate against children as a group and do not consider that the fact that the group allegedly discriminated against <u>includes</u> children necessarily and of itself makes the UNCRC relevant to the issue of justification. In so far as children in larger families are being treated less favourably

than others, it is not on the ground that they are children but because of the number of children in their household. Adults in the household as well as children are affected (not least because it is their entitlement to financial assistance which is at stake) and children are, so to speak, on both sides of the equation as they are also included in the comparator group. Nonetheless, it seems to me that the child's best interests principle embodied in article 3(1) of the UNCRC is relevant to the issue of justification. Its relevance arises, as I see it, from the nature of the rationale relied on by the government to justify treating households with more than two children differently from households with one or two children. I will explain this further when I analyse that rationale.

Legitimate aim

121. Having set out what I believe to be the correct approach to follow, I can come at last to examine whether there is an objective justification for (a) imposing the two child limit on child tax credit notwithstanding its disproportionate impact on women and (b) treating households differently in the provision of child tax credit on the ground of the number of children in the household.

122. In each case the first question is whether the aims of the measure are legitimate. There is no doubt that they are.

123. I have identified the aims of the two child limit at paras 16-22 of this judgment. They can be summarised as: (1) reducing the budget deficit and, as part of that, reducing public expenditure on welfare benefits; (2) ensuring that the benefit system is fair to taxpayers; (3) placing those who receive benefits in a position where they face the same financial choices in deciding how many children to have as those who support themselves solely through work; and (4) incentivising people to support themselves and their families through work.

124. In so far as the selection of these aims involves decisions about what policies are necessary or desirable to secure the social and economic wellbeing of the country, such as the decision that savings are needed in the amount spent on welfare benefits, those policy choices are ones that Parliament and an elected government are clearly entitled to make. The aims pursued therefore all undoubtedly represent legitimate aims. Indeed, I do not understand this to be disputed by the claimants. Their arguments are directed to whether the two child limit is a proportionate means of pursuing one or more of the stated aims.

Is the disparate impact on women justified?

125. I take first the claimants' contention that the two child limit gives rise to unjustified indirect discrimination against women. Where the discrimination alleged is indirect – that is, where a measure, though neutral on its face, has disproportionately prejudicial effects on one group as opposed to another – the relevant question is whether the measure is independently justified as a proportionate means of pursuing a legitimate aim: see *R (SG and JS) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449, para 13 (Lord Reed) and paras 189 and 224 (Baroness Hale).

126. It is not in dispute that the two child limit has a disproportionately prejudicial effect on women. This results from the fact that, as the judge found at para 108 of his judgment, 90% of lone parents are women and one parent families make up about 33% of families

in receipt of child tax credit. So taking all female parents together, they are more likely than male parents to be affected by changes to child tax credit, and indeed by changes to any child-related benefit.

127. The fact that the two child limit affects more women than men is therefore not a feature peculiar to this particular measure. It is a consequence that any reduction in any child-related benefit would have. It would apply, for example, to a simple reduction in the amount of the individual element of child tax credit or to the abolition of the family element, which was also enacted by the 2016 Act albeit that no challenge to that legislative change is made in these proceedings. Indeed, according to the government's evidence, the two child limit is likely to disadvantage women in comparison with men less than an overall reduction in benefit levels or the cap on benefits which was unsuccessfully challenged in the *SG and JS* case. In the case of the benefit cap, those affected are mainly non-working families with children, the majority of whom are headed by female lone parents. By contrast, most of the families affected by the two child limit are couples rather than lone parents and families with at least one adult in work rather than non-working families.

128. The disproportionate impact of the two child limit on women could have been avoided, as the judge discussed, by creating an exception for lone parent households. But treating lone parents more favourably than two parent families in that way when their financial circumstances are analogous would have encountered its own obvious objections.

129. In these circumstances, once it is accepted that the aims of the measure – including, in particular, the aim of making substantial savings in expenditure on welfare benefits – are legitimate aims, there was and is no basis on which the judge or this court could conclude that those aims could as well have been achieved without affecting more women than men. Unsurprisingly, the claimants did not make any suggestion in argument that this was possible or, if so, as to how it might have been done. A policy choice of that kind, where both the options and the criteria for choosing between them are open-ended, is not one that a court is competent to make. The judge made this point clearly in terms that I would adopt, when he said (at para 149 of his judgment):

> "It is not for the court to rule that some other welfare provision, unspecified as beyond its responsibility, should be cut, or that [child tax credit] should not be cut, or should only be cut by reference to some equally unspecified criteria but not the number of children in the family. If the court makes decisions of that sort, however specific it is or is not about alternatives, it would make considerable incursions into the exclusive territory of Parliament or of the executive accountable to Parliament. The court is not concerned either with the effectiveness of the measure in reducing child poverty or increasing it. That is a political judgment."

130. Equally, there is no basis on which the court could conclude that the disproportionately prejudicial effect of the measure on women was too high a price to pay and outweighed the importance of securing the objectives which the measure was aiming to achieve.

131. The fact that women were more likely than men to be affected by the two child limit was specifically pointed out in the Impact Assessment produced by the Treasury and the Department for Work and Pensions, which analysed the likely effects of the measure. The view was nevertheless taken by the government, and endorsed by Parliament when it enacted the 2016 Act, that the aims of the two child limit on child tax credit were sufficiently important to justify its adoption, notwithstanding its acknowledged differential impact on women and men. The court is not in a position to say that this view was wrong, let alone that the disparate impact of the measure made it a manifestly disproportionate means of realising the government's legitimate aims.

132. For these reasons, the judge was in my opinion right to conclude that the indirectly discriminatory effect on women of the two child limit was justified.

Is the differential treatment of families with more than two children justified?

133. I turn to the claimants' main argument that the two child limit is discriminatory because it treats families with more than two children (and, in particular, the children in those families) less favourably than families with one or two children. As this is an allegation of direct discrimination, what has to be justified is treating members of the two groups differently on the ground of the relevant status. Not all the aims relied on by the government are, in my judgment, rationally capable of providing a justification for limiting entitlement to child tax credit on the ground of the number of children in the family.

134. Taking first the aim of reducing the fiscal deficit by reducing public expenditure on welfare benefits, this aim is obviously promoted by not paying the individual element of child tax credit for some children. But what has to be justified is not the decision to restrict payment of the benefit. It is the decision to treat families differently by not paying the benefit for some children while paying it for others. The legitimate aim of reducing spending may provide a partial justification for such a decision, in that forms of rationing which might not be justifiable if more money was available may be easier to justify when there is a perceived need to make spending cuts. But the aim of reducing spending cannot provide a complete justification for the differential treatment, as that aim would plainly be even more effectively advanced by abolishing the benefit for all. Deciding that spending on a welfare benefit (or other programme) should be reduced does not supply a reason for placing the burden of the reduction on one category of person rather than another. For that, some further rationale is needed. As discussed in *JT v First-tier Tribunal* [2018] EWCA Civ 1735; [2019] 1 WLR 1313, at para 111, it is not compatible with article 14 to allocate whatever resources are made available for a particular programme in an arbitrary way. Thus, the objective of saving money cannot be a sufficient reason to draw a distinction between larger families and smaller ones and to make entitlement to a child-related benefit depend on the number of children for whom a person or couple is responsible.

135. Similarly, the aim of incentivising people to support themselves and their families through work is a generic aim which applies equally to all recipients of child tax credit, or at least to all those who have a realistic capability of finding work which will pay them enough to reduce or remove the need to claim the benefit. I cannot see how this aim can rationally be said to provide a justification for cutting benefits payable to families with more than two children as opposed to families with one or two children. We have been shown no evidence to suggest that a couple or lone parent with more

than two children is more likely to respond or to be able to respond to incentives to find work or to earn more money from working than a couple or lone parent with one or two children. In the absence of any such evidence, it seems reasonable to expect that, at least in the case of a lone parent, the opposite is more likely to be true.

136. Accordingly, the burden of justifying the decision to limit child tax credit on the ground of family size rests on the second and third aims summarised at paragraph 123 above: that is, a general aim of ensuring that the benefit system is fair to taxpayers and the more specific aim of placing those who receive benefits in a position where they face the same financial choices in deciding how many children to have as those who support themselves solely through work.

137. To take the more specific aim first, Mr Drabble QC on behalf of the claimants argued forcefully that it is irrational to compare the choice faced by a person or couple in receipt of child tax credit when deciding whether to have another child with the choice faced by a family not eligible for child tax credit. A family not eligible for child tax credit will almost by definition, because of their income level, have sufficient means to meet the subsistence needs of a third or subsequent child, if they decide to have one. For them, the choice is between having a further child or having more surplus income. However, a family entitled to child tax credit – or at any rate a family entitled to the maximum amount of child tax credit – may only be able to afford to meet the subsistence needs of a third or subsequent child if they receive the individual element of the benefit for such a child. The choice for them, Mr Drabble argued, is therefore a completely different one.

138. It is obviously true that a well-off family who do not need financial assistance from the state have more choices available to them – including choices about whether to spend money on supporting more children – than a family dependent on state benefits, simply because they have more money to spend. To that extent the point made by Mr Drabble is undeniable. But I think it equally clear that it does not answer, or at least does not completely answer, the government's argument, which I take to be based on relative rather than absolute levels of income. A family with two children which is not entitled to child tax credit will not see their income increase if they have another child (except for an additional £13.70 a week in child benefit) and will have to fund the cost of supporting the child entirely from their own resources. By contrast, in the absence of the two child limit, a family in receipt of child tax credit would receive additional income for every additional child they have. As it was put by the Exchequer Secretary to the Treasury, in responding on behalf of the government in a debate at the Report Stage of the Bill in the House of Commons on 27 October 2015:

> "Currently, the benefit system adjusts automatically to family size, but many families who are only in receipt of income from work would not see their budgets flex in the same way when they have more children."

In this sense, the imposition of the two child limit can be said to make the situations of families in receipt of child tax credit and families who are only in receipt of income from work more alike.

139. Looked at more broadly, there is clearly a body of opinion, reflected in the government's appeal to what is "fair to the taxpayer", which regards it as unfair that a

lone parent or couple should be able to have as many children as they choose and be subsidised for each additional child, without limit, out of public expenditure. At the sitting of the Bill Committee on 13 October 2015 at which the two child limit was debated, the Exchequer Secretary explained that the limit of two on the individual element of child tax credit was set in light of the fact that the average family size in this country has decreased over recent decades and that the average number of dependent children in families in the UK in 2012 was 1.7. He expressed the government's belief that "it is fair and proportionate to limit support through tax credits and universal credit to two children per family" and that the two child limit "will ensure that there is greater fairness between those receiving benefits and those paying for them." While there is clearly a body of opinion that strongly disagrees with this view, it cannot be regarded as an illegitimate one – all the more so when it commanded the support of a majority of the Bill Committee and of both Houses of Parliament.

140. It is not a decisive answer to point out – as it is pointed out by Ms Alison Garnham, Chief Executive of the Child Poverty Action Group, in a witness statement made in support of the claimants' case – that the majority of those receiving child tax credit are also receiving working tax credit and are therefore people in work who are taxpayers themselves. The question remains as to how much additional financial support they should receive from other taxpayers. Indeed, it seems to me that the claimants' argument is at its weakest in relation to families with relatively high incomes who are nevertheless entitled to child tax credit. According to the claimants' statement of facts, a family with five children (who incur childcare costs) would need to be earning £79,900 a year in order not to be affected by the two child limit. The higher the level of family income, the stronger might be said to be the justification based on fairness to other taxpayers for limiting support through child tax credit to the first two children in the family.

141. The claimants have also criticised the government's fairness argument on the ground that a couple planning a family cannot guarantee what their circumstances will be many years in the future and that, even if they reasonably believe at the time of choosing to have a third and fourth child that they will be financially able to support these children until they are adults, the family's financial circumstances may unexpectedly change for a host of possible reasons including parental unemployment, disability or death, causing them to fall on hard times. It is argued that the benefits system exists partly to provide a safety net against such misfortunes and that to deny child tax credit for a third or subsequent child in such cases is unfair.

142. There are other welfare benefits, however, which provide at least some social insurance against the misfortunes given as examples by the claimants. In any case it is a matter of political controversy to what extent risks inherent in decisions made by individuals should be underwritten by the taxpayer and to what extent individuals should bear such risks themselves. In most cases if a person or couple undertakes a long-term financial commitment which, as a result of a later unexpected change of circumstances, they turn out to be unable to afford, the taxpayer does not come to their aid. It is a debatable question on which opinions may legitimately differ whether or to what extent the same should apply if a couple (or individual) decides to have a larger than average family.

143. Another point made on the claimants' behalf is that not all pregnancies are planned or chosen. Leaving aside conception as a result of non-consensual sex, for which there is a prescribed exception in the legislation, contraception may fail – as happened, for

example, in the case of CB. A woman cannot be expected in such circumstances necessarily to choose to have an abortion – to which many people conscientiously object. It can accordingly be said that the government's arguments based on fairness to taxpayers and making people face similar choices, even taken on their own terms, do not justify declining to pay child tax credit for such an unplanned child.

144. A policy measure is not shown to be flawed, however, just because the rationale for it does not apply to all cases covered by the rule adopted to implement the measure. Sometimes the importance attached to the general objective considered with the costs or practical difficulties involved in formulating a more flexible or nuanced rule outweigh the potential advantages of achieving more precise fairness in all individual cases. Introducing an exception for children conceived by mothers who object to birth control or whose contraceptive measures failed would seem wholly unrealistic, not least because it would be impossible to police. It is in principle legitimate for the legislature in such a situation to take the view that a bright line rule, which serves desirable general aims even if it operates harshly in some cases, is preferable to an *ad hominem* approach. As the European Court observed in *Carson v United Kingdom* (2010) 51 EHRR 13, at para 62: "Any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need."

145. Pausing here, given the wide area of judgment afforded to the executive and the legislature under the Convention in matters of social and economic policy, I consider that the aims relied on by the government – in the context of a perceived need to reduce spending on welfare benefits – of fairness to taxpayers and making people face similar choices are sufficient to justify treating parents differently in their entitlement to receive child tax credit for each child on the ground of how many children they have. Applying the relevant legal test, treating recipients of child tax credit differently on this ground is not a manifestly disproportionate means of pursuing those legitimate aims.

The child's interests

146. So far I have been considering the rights of parents to receive child tax credit because that is the focus of the government's policy rationale. However, the claimants and the Commission argue that this perspective ignores the rights and interests of the children themselves in families with more than two children.

147. The argument made, put shortly, is that children do not choose to be born. The rationale that the two child limit places recipients of child tax credit in a position where they have to make comparable financial choices to those which people who support their families solely through work have to make in deciding how many children to have has no relevance to the children affected, since a child is in no position to make any choice at all about family size. Similarly, it can be said that the argument based on fairness to taxpayers depends on the assumption that recipients of child tax credit are responsible for the size of their families. While it may be seen as unfair to require taxpayers to subsidise parents who choose to have a large number of children whom they cannot afford to support without financial assistance from the state, this argument can hardly apply to the children themselves who are not responsible for their parents' conduct.

148. I do not think that the claimants need to rely on the UNCRC in order to make this case. Here it seems to me to be material whether the claim under article 14 is made in conjunction with A1P1 or with article 8. I agree with the judge that, in so far as the

claimants allege discrimination in the enjoyment of entitlements to welfare benefits classified as "possessions" guaranteed by A1P1, the interests of children affected by whether a benefit is paid are not germane to the right protected by article 14. On this formulation of the claimants' case, the protected right is the right of the owner of the possession (i.e. the parent potentially entitled to receive the benefit) not to be discriminated against in relation to their property: see e.g. the *SG and JS* case at para 146 (Lord Hughes). The position is different, however, where the claim is one of discrimination in the enjoyment of rights that fall within the ambit of article 8 because they relate to family life and, in particular, because they concern a welfare benefit intended to provide financial support for raising children. Here it seems to me that the persons who have rights not be discriminated against in the allocation of the benefit, viewed as an expression of respect for family life, must include the children for whose support the benefit is intended as well as the parents who have the legal right to receive payment of it. The children who have these rights must at least comprise the third and any subsequent child for whom no individual element of child tax credit is payable by reason of the two child limit. But it seems to me better to reflect the reality of the matter to regard all the children in the family as having such rights, given the interdependence of their interests and the fact that parents will naturally use the payments they receive to support all their children rather than hypothecating the money to the first two children in the family.

149. I therefore consider that the interests of all the children in a family affected by the two child limit are relevant and must be taken into account in determining whether their rights under article 14 read with article 8 have been infringed.

150. Nevertheless, the need to consider the interests of the children affected by the difference in treatment is further reinforced by the internationally recognised principle, reflected in article 3(1) of the UNCRC, that the best interests of the child must be treated as a primary consideration. Furthermore, an important aspect of that principle, set out at point (7) in the passage from the *Zoumbas* case quoted at para 101 above, is that a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

151. The judge considered that the best interests of the child "were at the forefront of the debate" and were "plainly" a primary consideration, and that "the issues which the UNCRC raises were given careful consideration" before the two child limit was enacted: see paras 209 and 211 of the judgment. In so far as the judge was referring to consideration of these issues by the executive, I am unable to agree with this assessment. It is not supported by any reference to any statements made by government ministers during the debates or any policy documents, with the sole exception of the memorandum to the Joint Committee on Human Rights which the judge described as "important". The policy reasons given for proposing the measure, which I have summarised at paras 16-22 of this judgment, made no mention of the best interests of the child and focused heavily, as I have discussed, on the choices made by parents about whether to have children. There was no consideration at all of whether it was fair to impose the financial consequences of the parents' choices on their children, nor of what was in the best interests of the children affected by the two child limit.

152. The only references to the best interests of the child in any of the statements made by government ministers or policy documents discussing the two child limit put in evidence in these proceedings are references to the interests of children generally. The

principal reference is contained in the memorandum to the Joint Committee on Human Rights explaining why the provisions of the Bill were considered to be compatible with the Convention. The judge attached importance to this memorandum because it includes a section on the UNCRC. In a passage said to apply to the two child limit on child tax credit as well as to the benefit cap and other measures proposed in the Bill, the memorandum stated:

> "The savings afforded to the government by reducing spending on welfare will allow the government to protect expenditure on education, childcare and health and the improvements to the overall economic situation will have a positive impact on children and their best interests."

This assertion, however, is directed to the interests of children at large. It does not address the distinct interests of the group of children to whom the two child limit applies.

153. So far as the evidence shows, no claim was made on behalf of the government during the passage of the legislation that limiting to two the number of individual elements of child tax credit payable to a family with more than two children is in the best interests of those children themselves. Such a counterintuitive claim would have required evidence and analysis to support it and none was vouchsafed. The way in which the two child limit is detrimental to the interests of the children in such families is obvious, particularly if their parents are not in work. As counsel for the claimants pointed out (see para 12 above), child tax credit is the only benefit which is designed to meet the subsistence needs (other than housing) of children living in families which have no income from work to support them. So to take the example given by the Chancellor of the Exchequer when announcing the proposal in the House of Commons (quoted at para 16 above), an out of work family of five children to whom the two child limit applies, instead of receiving over £14,000 a year to meet the children's subsistence needs as was the case in 2015, will (at current rates) receive only £5,560 a year, which is the maximum individual element of child tax credit for two children and amounts to only £1,120 a year for each child if it has to be spread across five children. This works out at around £21.50 per child per week – substantially less (albeit without taking account of child benefit) than the allowance of £36.95 per child per week which, according to a Home Office report, is the sum necessary to meet the essential needs of asylum-seekers: see *Report on the review of cash allowance paid to asylum-seekers* (March 2017). The full impact has not been felt by families such as the claimants in these proceedings because the two child limit applies only to children born after 6 April 2017. But in the long term, for an out of work family of five children at least three of whom are born after 6 April 2017, the two child limit will have this financial effect. It is difficult to see how it could conceivably be said to be in the best interests of the five children in such a family that their parent(s) should receive only the amount of benefit considered appropriate to meet the subsistence needs of two children.

154. Although not mentioned by the government, the interests of children who would be affected by the measure were raised during the debates by members of Parliament who opposed the Bill. For example, at the sitting of the Bill Committee on 13 October 2015 at which the two child limit was debated, the argument that children are not responsible for their parents' choices was strongly made by the opposition MP, Ms Emily Thornberry, when she said:

> "The third or fourth child does not make a choice to live. The third, fourth or fifth child is not to be blamed for their existence. The sixth child is not to have no shoes because of a reckless mother who cannot keep her legs crossed. It is not the sixth child's fault that he is the sixth child. Why should he starve? How will it make a difference?"

No direct answer to this argument was offered by any government representative during the debates. It is clear, however, that the government took the view that, even if imposing the two child limit is contrary – as it seems to me that it plainly is contrary – to the interests of the children who will be affected by it, that consideration was outweighed by the government's reasons for proposing the measure. By enacting the legislation, Parliament must be taken to have endorsed that view.

Conclusion on the issue of justification

155. I have examined the extent to which relevant values and interests – and in particular, the interests of the children who will be affected by the two child limit – were considered by the government and by Parliament because, as noted earlier, where a public authority has addressed the particular issue before the court and has taken account of the relevant human rights considerations in making its decision, the court will be slower to upset the balance which was struck. The fact that the government did not confront the detriment that would be caused to the interests of the children affected by the two child limit mandates greater scrutiny than would otherwise be appropriate. On the other hand, it is important to keep in mind that what must be justified for the purpose of the discrimination claim is not the decision to reduce amounts paid in child tax credit and whatever detrimental effects this reduction will or is likely to cause; it is the decision to treat families differently in making expenditure cuts on the ground of the number of children in the family. As discussed earlier, that ground is not a sensitive characteristic or suspect ground of discrimination which can only be justified by very weighty reasons. It is a status of a peripheral kind which can properly be used as a basis for differential treatment provided there is some rationale for it and that the distinction drawn is not arbitrary.

156. Looking at the two child limit solely in terms of the interests of the children affected by it, the point that children are not responsible for their parents' conduct and have no control over the size of the family into which they are born seems to me to be a complete answer to the justifications based on fairness and parental choice. It is not, however, conclusive of the issue of justification because there is in this context, as on many social issues, a conflict between the value attached to a child's own interests and the value attached to parental choice and responsibility. This conflict is an inevitable consequence of the fact that in our society the primary responsibility for looking after and providing financially for children lies with their parents (or those *in loco parentis*) and not with the state. That means that the welfare of children inevitably depends on choices made by their parents – including choices about whether to have children and how many children to have. As parents differ widely in their financial means, the fortunes of children depend in great part on the lottery of birth. The child of a rich family may benefit from expensive holidays, private schooling and inherited wealth, while the child of a poor family will have none of those advantages. It is a matter of intense political controversy to what extent the state should seek to reduce or compensate for these inequalities, and to what extent it is fair to impose the costs of

supporting or assisting children whose parents lack the means to do so on other members of society.

157. The government's justification for the two child limit on child tax credit directly engages this controversy. The arguments that children are not responsible for their parents' conduct and that fairness to children demands that the state should provide financial support for each individual child whose parents are not in work or have low incomes from work are pitted against arguments that it is fair to taxpayers to set a limit to the number of children in a household whom the state will support and to require parents to take full financial responsibility for supporting their children beyond that limit. The arguments based on the interests of children are not a trump card that render arguments based on what is fair to other taxpayers irrelevant. They are a primary consideration but one which has to be weighed against the interests of the community as a whole in placing responsibility, including financial responsibility, for the care of children on their parents.

158. For reasons given earlier (see para 87 above), a court is not a suitable institution to decide between these competing views. There is no process of legal reasoning which can justify one view in preference to the other. Nor are courts attuned in the way that democratically elected institutions are attuned to reflect a collective sense of what is fair or where the balance of fairness lies on questions of distributive justice. In circumstances where the measure was scrutinised and debated by Parliament during the passage of the Bill, where the interests of the children affected – although given scant consideration by the executive – were considered by the legislature as part of that process of scrutiny, and where at the end of the process Parliament enacted the measure in primary legislation, a court should be very slow to displace the balance struck by Parliament on a contentious question of social and economic policy of this kind. Applying the relevant legal test, I do not consider that a court can properly conclude that the difference in treatment imposed by the two child limit is manifestly disproportionate to the legitimate aims pursued.

159. Accordingly, albeit for reasons which differ in some respects from those given by the judge, I would uphold his conclusion that the decision of Parliament to limit entitlement to the individual element of child tax credit (and the child element of universal credit) on the ground that the family includes more than two children is objectively justified.

Summary of conclusions

160. In summary, I have concluded that the judge was right to hold that the provisions of the Welfare Reform and Work Act 2016 which impose a limit of two on the number of children in respect of whom the individual element of child tax credit (and the child element of universal credit) can be claimed are not incompatible with the claimants' rights under articles 8, 12 or 14 of the Convention. In relation to the claim of discrimination under article 14, I have concluded that (a) the admittedly greater impact of the measure on women and (b) the difference in treatment between families according to whether there are more than two, or no more than two, children in the family are both differences in treatment which fall within the ambit of article 14, read with A1P1 and with article 8, and are based on grounds which in each case constitute a status covered by article 14. However, the aims of the measure are undoubtedly legitimate and, given the wide area of judgment afforded to the legislature in matters of social and economic policy, it cannot be said that either difference in treatment is

manifestly not a proportionate means of pursuing legitimate aims. That is so, even when full account is taken, as it needs to be, of the best interests of the children whose interests are prejudicially affected by treating them less favourably on the ground that there are more than two children in their family.

161. For these reasons, I would dismiss the appeal.

Lady Justice Nicola Davies:

162. I agree.

Lord Justice Patten:

163. I also agree.