

## Best Interests and relevance of art 3 UNCRC and Use of Parliamentary material



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## Topics

- Relevance of international law
- Use of UN Committee materials
- Application in SC
  
- Use of Parliamentary materials
- Application in SC

## Supreme Court composition

# Supreme Court (then and now)

*R (DA) v SSWP* [2019] UKSC 21

- Revised benefit cap

*R (SC) v SSWP* [2021] UKSC 26

- Two-child CTC rule

# Supreme Court (then and now)



May 2019



July 2021

## Relevance of international law

## Relevance of international law

- Paras 73-96
- Paragraph 73
  - “...whether it is appropriate for our domestic courts to determine whether the United Kingdom has violated its obligations under unincorporated international law when considering whether a difference in treatment is justified under the Human Rights Act.”
- Paragraph 91
  - “...for a United Kingdom court to determine whether this country is in breach of its obligations under an unincorporated international treaty, and to treat that determination as affecting the existence of rights and obligations under our domestic law, contradicts a fundamental principle of our constitutional law.”

## Relevance of international law

- Dualism: paras 76-78
  - *International Tin Council* [1990] 2 AC 418, 499
- HRA 1998 require different result? No – paras 79-84
  - ECtHR has regard to international law to avoid conflict with other treaties so far as it can
  - Evidence of European consensus or evolving principles informing interpretation of ECHR, width of margin and proportionality
  - But does not have jurisdiction to determine whether States complied with unincorporated international treaties

## Relevance of international law

- Para 85 – “a misunderstanding has appeared in some recent judgments of this court” arising from *X v Austria* (2013) 57 EHRR 14.
  - In Art 8 + 14 ECHR cases, best interests are a relevant consideration
  - *R (SG) v SSWP* [2015] 1 WLR 1449
  - *Mathieson v SSWP* [2015] 1 WLR 3250
  - *In re McLaughlin* [2018] 1 WLR 4250
  - *R (DA) v SSWP* [2019] 1 WLR 3289

## Relevance of international law

- Para 92
  - “One might add that what Lord Wilson JSC [in *Mathieson*] took from the unincorporated international treaties was that the Secretary of State had been under a duty to treat the best interests of children as a primary consideration before making the legislation. There could have been no objection if he had instead treated the best interests of children as a **relevant factor** in the court's assessment of whether the differential treatment resulting from the legislation was justified under article 14 of the Convention: an approach which could have been taken directly from article 14 taken together with article 8 as interpreted in *X v Austria* and other cases.”

## Relevance of international law – current law?

- Don't say: "Decision amounts to breach of Article 3 UNCRC and that means breach of ECHR"
- Do say: "Article 3 UNCRC a relevant consideration in considering proportionality of a decision"

## Use of UN Committee materials

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- *R (AB) v SSJ* [2021] UKSC 28
  - Whether solitary confinement of 15-year-old (for protection of himself and prison officers) was a breach of Article 3 ECHR.
  - Relied on General Comments and country reports of Committee on the Rights of the Child (who monitor observance of UNCRC).
  - Reliance on UN Convention Committees criticised by Lord Reed

## Use of UN Committee materials

- *R (AB) v SSJ* [2021] UKSC 28

Legal authority of such material is “*slight*” and should never drive a conclusion that a UN Convention has been breached: *AB*, §§60-67:

- UN Committees are comprised of members with a variety of professional backgrounds;
- UN Committees are not judicial bodies and their functions are very different to the judicial function of a court determining a specific dispute; (
- They have no power to make binding decisions on the interpretation of the relevant Convention; and,
- Reports such as General Comments have no defined status and do not contain the sort of legal analysis one would find in a judicial adjudication on the interpretation and application of an international treaty.

## Application in SC

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- Discrimination against children living in households containing more than two children, by comparison with children living in households containing one or two children:

“207. It is also argued that the legislation is not in the best interests of children living with persons whose entitlement to child tax credit is affected by the limitation. The argument was advanced on the basis that the Government had breached the UK's obligations under unincorporated international treaties. For the reasons I have explained, the court cannot entertain such an argument. But the best interests of the children affected remain relevant to the assessment of proportionality...

But Parliament was told that reducing spending on welfare benefits would allow the Government to protect other expenditure of benefit to children: on education, childcare and health (para 18 above).”

## Application in SC

“207...Furthermore, the difficult question is not so much what would be in the best interests of children, but the extent to which it is fair, economically desirable and socially acceptable to impose the cost of supporting children, whose parents lack the means to do so themselves, on other members of society. Parliament must have considered that the impact of the limitation upon the interests of the children who would be affected by it was outweighed by the reasons for introducing it.”

- No proper constitutional basis to overturn judgement made by Parliament.

## Use of Parliamentary materials

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- Paras 163-185
- Context: adequacy or inadequacy of consideration given by Parliament to matters relevant to proportionality

## Use of Parliamentary materials

- Important principles:
  1. No part of judicial function to exercise supervisory jurisdiction over internal procedures of Parliament: para 165;
  2. As Govt is separate from Parliament, reasons why Govt gives for promoting legislation cannot be treated as necessarily explaining why Parliament chose to enact it: para 166;
  3. Will of Parliament expressed solely in the legislation which it enacts: para 167
  4. Parliamentary decisions not necessarily capable of being rationalised and do not resolve disputes in same way as Courts. Legitimacy of decisions accepted because of democratic credentials of MPs not because of quality/transparency of reasoning involved: paras 168-169;

## Use of Parliamentary materials

- Important principles:
  5. So intention of Parliament an essentially legal construct rather than discovered by empirical investigation.
- So, where does that leave us?
  - Whether Parliament considered the matters relevant to compatibility with ECHR is a relevant factor;
  - BUT, courts should only conduct high-level review of whether topic raised before Parliament
  - AND, courts must not treat absence/poverty of debate in Parliament as reason for supporting incompatibility.

## Application in SC

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- “209...It was approved by Parliament, subject to amendments, after a vigorous debate at which the issues raised in these proceedings were fully canvassed, and in which the body supporting the appellants was an active participant (para 185 above).”

# Thank you for listening

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