

## R(SC) [2021] UKSC 26 – The impact on women?



**Fiona Scolding QC**

## Factual background

- Introduction of the "2 child" limit under the Welfare Reform and Work Act 2018.
- Places a limit upon the sums of money one could obtain under children's tax credit – and universal credit which replaces it - is payable. Came into effect on 6 April 2017. CTC/UC is separate to child benefit: housing benefit/element of housing and working tax credit etc do not limit the number of children for whom one can receive benefit.
- SC had 3 children living with her, for whom she was the sole carer. Her youngest child was born in July 2017.
- CB had five children – the youngest of whom was born 2 weeks after the law came into force.

## Other relevant facts

- Introduced as a proposal in 2015 to fulfil a manifesto commitment to reduce spending on welfare benefits. Tax credit expenditure had more than trebled 2000 – 2010.
- Treasury impact assessment said without such cuts (this was one of several) steep reductions in public service spending would be required.
- Said would save 1.365 billion by 2020/21
- The impact assessment presented with the bill identified that women would be more likely to be affected, as 90% of lone parents are women and more lone parents are in receipt of CTC.
- Said that families in receipt of benefits should make the same financial decisions as those in work (although many of those who receive CTC are in fact in work)

## Debate in Parliament

- Vigorous with lots of various submissions /briefing papers.
- Was scrutinised by Joint Committee on Human Rights
- Also by House of Commons Bill Committee who had a 283 page submission by CPAG
- The Equality and Human Rights Commission submitted to the Bill Committee that these changes may change the living standards of poor families with larger children.
- Amendments introduced in Parliament to defeat this part of the Bill were defeated.
- Also extensive debate in the HC and HOL
- Throughout the UNCRC and ECHR were discussed

## Scope of the legal arguments

- Was the limit compatible with Article 8 of the ECHR?
- Was it compatible with Article 12 of the ECHR?
- Was the 2 child limit discriminatory under Article 14, read with either Article 8 or Article 1 of the First Protocol?

## Indirect impact on women's psychological integrity and dignity

- There is no jurisprudence of the ECHR which imposes an obligation on a state to provide financial support for family life (*Petrovic v Austria* [1998] 33 EHRR 14 at [26]).
- First submission of the appellant: There was an indirect imposition of obligation under Article 8 because the limitation was designed to impact upon the reproductive choices of women – they had to decide whether to limit their family or to have a child for whom no support was available. If someone was pregnant, she may have to consider abortion – something which she would not have otherwise required – this impacted upon her psychological integrity (*Botta v Italy* [1998] 26 EHRR 241 at [33]).

## Decision of the courts

- The factual evidence of both women in the appeal was that it would have made no difference to their behaviour or decision to keep a child .
- Judge (and CA and SC) rejected view that discouraging larger families was not an aim of that legislation.
- No evidence that that legislative change was having an effect on family size, and that studies in the US of analogous legislation had found little or no effect of the number of children born to a family.
- Leggatt LJ in the CA : the aim of the legislation did include encouraging people to think about whether they could afford to support additional children , but not to discourage having children at all.

## Lord Reed [para 32]

*“Nothing in the legislation itself which indicates an intention to interfere with the reproductive choices of recipients of child tax credits. Nor is there the slight indication other than the other material before the court...that their reproduction rate was a problem which needed to be addressed. The most that can be said is that one of the effects of the legislation, which Parliament can be taken to have intended, is that recipients of child tax credit have to take decisions about whether or not to have more than two children in the knowledge that their income, to the extent that it is derived from child tax credit, will not increase as a consequence of the birth of a third or subsequent child, unless one of the exceptions applies.”*

## Article 12?

- Article 12 limited to the right to found a family within marriage – and neither Claimant was married or wished to be so.
- No positive obligation on the state to provide the material means to found a family (*Cannatella v Switzerland* [25928/94] – 11/4/96).

## Article 14 – ambit of Article 8 [41]

- Lord Reed had no difficulty finding that welfare benefits which are designed to facilitate or contribute to family life, likely to fall in the ambit of Article 8 (cites a number of cases eg *Okpysz v Germany* [2005] 42 EHRR 32).

## Is there differential treatment of women?

- No differential treatment on the grounds of sex obvious on the face of the legislation.
- How far does indirect discrimination apply in cases concerning article 14?
- Court explores the ECHR case law [46 – 51] in this area which is still developing and at [53] formulates the rule:  
*“ Show that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the grounds of discrimination so as to give rise to a presumption of indirect discrimination. Once a prima facie case of indirect discrimination has been established, the burden shifts to show that the indirect difference in treatment is not discriminatory. The state has to demonstrate that the measure in question has an objective and reasonable justification: i.e. pursues a legitimate aim by proportionate means”.*

## Was there indirect discrimination here? [188-199]

- Because the discrimination is on the grounds of sex, "very weighty" reasons have to be put forward before it can be seen as compatible with the convention whether direct or indirect (*De Trizio v Switzerland* (no 7186/09 at [82 , 96] )- Lord Reed suggested that this may not be correct but followed it.
- The need to address a high fiscal deficit and to save money was a legitimate aim , as was the fact that those supporting themselves solely through work would not have the benefit of claiming additional sums for additional children
- Was it proportionate, given that most single parents are women- and they make up 33% of those claiming CTC , and at least 50% of parents jointly bringing up children – so that women will be disproportionately affected.

## Indirect discrimination ?

- More women affected than men as more women bringing up children – an objective fact – “*no suggestion that it is the result of discrimination on the grounds of sex* “(????) [197].
- The differential impact on women is not a “special feature” of this measure but is inherent in any general measure which limits expenditure on child related benefits.
- And had Parliament limited spending on benefits across the board it would have had a greater differential impact on women.
- No alternative suggestion made which would have had a lesser impact on women.
- Decided that “Parliament decided that the importance of the objectives pursued by the measure justified its enactment, notwithstanding its greater impact on women.” The courts could not properly take a different view.

## Thoughts

- The limits of the law to address structural inequalities
- The absence of forensic analysis of how far the stated aim in respect of work/non work parents was justifiable given that CTC given to lots of people in low paid work
- The limits of the court's desire to interfere in spending allocation
- The balance of the courts when examining the financial position of women and their continuing fiscal inequalities.
- The absence of consideration of the welfare state and the difficulties of using the ECHR jurisprudence on this topic (given the wide varieties of benefit allocation in ECHR countries)
- Indirect discrimination – need for less weighty reasons?? (to be developed) to justify discrimination

# Thank you for listening

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