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# Welcome to Landmark Chambers' 'R (SC and others) v Secretary of State for Work and Pensions [2021] UKSC 26' webinar

The recording may be accessed here.

# Your speakers today are…

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**Fiona Scolding QC (Chair)**

**Topic:**
R(SC) [2021] UKSC 26 – The impact on women?

**Yaaser Vanderman**

**Topic:**
Best Interests and relevance of art 3 UNCRC and Use of Parliamentary material

**Richard Drabble QC**

**Topic:**
SC – a change in mood?

**Matthew Fraser**

**Topic:**
“Manifestly without reasonable foundation” and deference in socio-economic cases

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# 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

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- 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

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- 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

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- 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

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- 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]

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"*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]

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- 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 *Okpisz v Germany* [2005] 42 EHRR 32).

# Is there differential treatment of women?

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- 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

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- 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

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

**Yaaser Vanderman**

# Topics

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

- Use of Parliamentary materials
- Application in *SC*

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# Supreme Court composition

# Supreme Court (then and now)

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*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

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# 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

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- 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?

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- 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”

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# Use of UN Committee materials

# Use of UN Committee materials

- *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

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- *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:

a. UN Committees are comprised of members with a variety of professional backgrounds;
b. UN Committees are not judicial bodies and their functions are very different to the judicial function of a court determining a specific dispute; (
c. They have no power to make binding decisions on the interpretation of the relevant Convention; and,
d. 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.

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# Application in *SC*

# 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. <u>But the best interests of the children affected remain relevant to the assessment of proportionality…</u>
>
> 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*

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"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.

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# 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

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- 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

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- 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.

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# Application in *SC*

# 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).”

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# “Manifestly without reasonable foundation” and deference in socio-economic cases

**Matthew Fraser**

# Origins of the phrase

*James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, § 46

“The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation.”

Context: whether the deprivation of possessions (through new leasehold enfranchisement laws) was “in the public interest” under A1P1.

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*National and Provincial Building Society and Others v. the United Kingdom*, judgment of 23 October 1997, *Reports* 1997-VII, § 80

"it is recognised that a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation and the Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation"

Context: whether retroactive tax measures, which constituted an interference with the enjoyment of possessions, were justified under A1P1.

# The phrase in the Art. 14 context

*Stec* (2006) 43 EHRR 74

Difference in treatment on the ground of sex in relation to entitlement to a state benefit. The benefit was linked to the statutory pension scheme, for which women qualified and 60 and men at 65, with equality to be achieved by 2020.

In determining width of margin of appreciation, the Court had to balance (see para. 52):

- the need for “very weighty reasons” to justify difference in treatment on the basis of sex
- Respecting the legislature’s policy choice as to general measures of economic or social strategy, unless “manifestly without reasonable foundation”.

# Balancing MWRF with “suspect” grounds

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The application of the “manifestly without reasonable foundation” principle is often counterbalanced by a principle pulling in the opposite direction: the need to provide “very weighty reasons” to justify different treatment on certain so-called “suspect” grounds e.g:

- Sex (Stec, *Zeman v Austria* (Application No 23960/02) (unreported) given 29 June 2006);
- Nationality (*British Gurkha Welfare Society v United Kingdom* (2016) 64 EHRR 11).

# MWRF in relation to “non-suspect” grounds

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No balancing of “manifestly without reasonable foundation” principle with the need for “very weighty reasons” if justifying a difference of treatment on a “non-suspect” ground e.g:

- Residence (*Carson* (2010) 51 EHRR 13)
- Prisoner status (*Stummer* (2011) 54 EHRR 11)

# Socio-economic cases where MWRF dropped / qualified

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- *Vrountou v Cyprus* (2015) 65 EHRR 31: Difference in treatment on ground of sex in provision of welfare benefits (specifically housing assistance to the children or men, but not women, displaced by the Turkish invasion of Cyprus) – “suspect ground” and no reference to MWRF.

- *Fábián v Hungary* (2017) 66 EHRR 26: Difference in treatment between civil servants and private sector employees under state pension scheme – non-suspect ground, and MWRF test supplemented at para. 115 by a requirement for non-discrimination and proportionality. Court has “final decision” “irrespective of the scope of the state’s margin of appreciation”.

# Balancing “very weighty reasons” with MWRF

Supreme Court in *SC* (para. 130):

“… in cases involving “suspect” grounds in the field of welfare benefits and pensions, the determinative factor has generally been whether “very weighty reasons” have been shown, but that the court has taken account of the wide margin generally applicable in that field when making that assessment. Whether a measure has formed part of a scheme intended to address historical inequalities, and the presence or absence of common standards among the contracting states, have also been important factors."

# JD & A v United Kingdom

- *JD* [2020] HLR 5
- 2 complaints of discrimination on two “suspect” grounds: disability & gender.
- A1P1 alone: MWRF applies (para. 87).
- A1P1 + Art. 14 (paras 88-89):
  - ”wide” margin “in principle”, but must not discriminate and must be proportionate
  - MWRF is limited to differences in treatment resulting from a transitional measure forming part of a scheme to correct an historic inequality.
  - Outside that context, margin is “considerably reduced” in disability and gender cases, and “very weighty reasons” required.

# SC & Others v SSWP [2021] UKSC 26

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Paras. 134 – 136: Lord Reed criticises the GC's reasoning in JD paras. 87-89 as not accurately reflecting the ECtHR's case law.

Based on JD, Appellants argued that JD establishes new rule:

"… complaints of discrimination on "suspect" grounds fall outside the scope of the wide margin and "manifestly without reasonable foundation" approach usually accorded in the field of welfare benefits, unless the case concerns "transitional measures". Instead, cases concerned with suspect grounds are governed by the principles laid down in cases from outside that field, such as *Markin*, in relation to discrimination on the ground of gender, and *Guberina*, in relation to discrimination on the ground of disability."

# SC's view of ECtHR case law

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Para. 142:

- Nuanced approach, with general principles applied, so that range of factors can take account of particular circumstances, leading to a balanced overall assessment.
- MWRF has neither been completely dropped, nor is it a mechanical rule to be applies.
- Wide margin for welfare benefits and pensions is an "important element", but application can be "greatly affected" by other principles and the facts.
- Presence of a "suspect" ground is "particularly significant" – general need for "strict scrutiny, focused on the requirement for very weighty reasons", unless the issue is timing of reform to address historical inequalities.

# SC's view of domestic case law since *Humphreys*

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1. Application of MWRF as a "test" does not reflect the ECtHR case law, which recognises that other factors may call for stricter standard, e.g. "suspect" grounds requiring "very weighty reasons". Para. 151: "*the question is more complex than a "test" of whether the policy choice is "manifestly without reasonable foundation" might appear to be if that were regarded as the entirety of the inquiry".*

2. MWRF does not "replace or supersede" the requirement for "very weighty reasons" where "suspect" grounds are in issue.

# Key conclusions in *SC* – paras. 157-162

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- MWRF still has a part to play, even in "suspect" cases outside the context of "transitional measures".
- Domestic approach since *Humphreys* needs to depart from applying MWRF as a "test".
- Para. 158: "a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation".
- BUT: "the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case".

# Key conclusions in *SC* – paras. 157-162

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- Some factors high intensity of review, e.g. “very weighty reasons” will usually have to be shown for difference of treatment on a “suspect” ground, or impact on best interests of children in a non-suspect case.
- Some factors will lower the intensity of review, e.g. “transitional measure” cases.
- Avoid a “mechanical approach” … “the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security; but, as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification.”
- MWRF is just a way of describing a wide margin of appreciation. Court should focus on the question of whether a wide margin is appropriate in the light of the circumstances.

# Interesting final observation from Lord Reed (para. 162)

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"In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process."

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# SC – a change in mood?

**Richard Drabble QC**

# Importance of SC

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SC is an important judgment. Here are some short comments about whether it is evidence of a change in mood in the Supreme Court, with implications for a number of matters that should be borne in mind when thinking about human rights and social policy cases.

The issues include the attitude of the court to government policy; to political debate; the role of expert NGOs and pressure groups; and interventions.

# The Conclusion

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"The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies."

"That is what happened in this case. The democratic credentials of the measure could not be stronger. It was introduced in Parliament following a General Election, in order to implement a manifesto commitment (para 13 above). 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). There is no basis, consistent with the separation of powers under our constitution, on which the courts could properly overturn Parliament's judgment that the measure was an appropriate means of achieving its aims."

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1. That is what happened in this case. The democratic credentials of the measure could not be stronger. It was introduced in Parliament following a General Election, in order to implement a manifesto commitment (para 13 above). 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). There is no basis, consistent with the separation of powers under our constitution, on which the courts could properly overturn Parliament's judgment that the measure was an appropriate means of achieving its aims.

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Stepping stones on the way to that conclusion include:

- The consideration of deference and MWRF
- The consideration of the role of parliament and the courts relationship with parliament
- The article 14 analysis; including the question of “status”

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These issues are inter-related. It is possible to discern a feeling in the Court that if a generous approach is taken to, for example, the requirement for status, any social policy issue, and in particular any social security issues, can be subjected to a discrimination analysis; requiring justification of an inevitable difference in treatment between different groups.

But the Court did find that “status” was sufficiently in play. The relevant groups were children living in household containing more than two children, as compared with children living in households containing one or two children.

- In doing so, it followed what it perceived to be the approach of the ECtHR

- Since the court adopts a stricter approach to some grounds of differential treatment than others when considering the issue of justification, as explained below, it refers specifically in its judgments to certain grounds, such as sex, nationality and ethnic origin, which lead to its applying a strict standard of review. But in cases which are not concerned with so-called "suspect" grounds, it often makes no reference to status, but proceeds directly to a consideration of whether the persons in question are in relevantly similar situations, and whether the difference in treatment is justified.

- Accordingly, cases where the court has found the "status" requirement not to be satisfied are few and far between

# An issue for the future?

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Some doubt about whether an indirect discrimination analysis available outside suspect grounds.

Every case to date in which the European court has treated the concept as relevant has concerned a group sharing a common characteristic corresponding to a “suspect” ground of differential treatment such as sex, sexual orientation, ethnic origin, nationality, religion or disability. “Suspect” grounds are discussed at paras 100-113 below. They do not include age: see para 114. The view has been expressed that indirect discrimination is confined to “suspect” grounds: *Theory and Practice of the European Convention on Human Rights*, 5th ed (2018), ed Van Dijk and others, p 1006.

# Accordingly necessary to address relationship with government policy

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There is nothing alien or new about an approach which, in general, accords a high level of respect to the judgment of public authorities in the field of economic or social policy, but balances that with the need for close scrutiny where differences of treatment are based on "suspect" grounds. On the one hand, unjustifiable discrimination by public authorities is likely to be irrational and therefore unlawful at common law: as Lord Hoffmann stated in *Matadeen v Pointu* [1999] 1 AC 98, 109, "treating like cases alike and unlike cases differently is a general axiom of rational behaviour". Indeed, the classic example given of unreasonable behaviour in the *Wednesbury* case was of discrimination (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 229). At the same time, the general need for judicial restraint in the area of economic policy was made clear by Lord Bridge of Harwich's statement in *R v Secretary of State for the Environment, Ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, 597, that where a "statute has conferred a power on the Secretary of State which involves the formulation and the implementation of national economic policy and which can only take effect with the approval of the House of Commons, it is not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity". In other words, the administrative law test of unreasonableness is generally applied in contexts such as economic policy and social policy with considerable care and caution; and the same is true of the Convention test of proportionality. Both tests have to be applied in a way which reconciles the rule of law with the separation of powers.

# Take into account the particular characteristic of proceedings

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Another constitutional fundamental which needs to be borne in mind is that the Government is separate from Parliament, notwithstanding the many connections between the two institutions. As a matter of daily reality, ministers and party whips have to negotiate and compromise in order to secure the passage of the legislation which the Government has promoted, often in an amended form. In fact, as well as in theory, "the legislative function belongs to Parliament not to the executive": *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40; [2004] 1 AC 816, para 111 ("*Wilson*") (Lord Hope of Craighead). Accordingly, as Lord Hope observed (ibid), "it is the intention of Parliament that defines the policy and objects of its enactments, not the purpose or intention of the executive". The reasons which the Government gives for promoting legislation cannot therefore be treated as necessarily explaining why Parliament chose to enact it.

# Title

… the decisions which Parliament takes are not necessarily capable of being rationalised in any event. In the first place, Parliament does not operate only, or even primarily, as a debating chamber. It is also a forum for gathering evidence, and for extra-cameral discussion, negotiation and compromise. Furthermore, the way in which members of Parliament vote will usually, but by no means always, reflect party policy, and may be influenced by the discipline imposed by the party whips.

It follows that Parliamentary methods of resolving disputes are very different from judicial methods….”

# Lord Bingham

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The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament."

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# Q&A

**We will now answer as many questions as possible.**

**Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.**

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# Thank you for listening



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