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SC – a change in mood?

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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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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.

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… 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."

Thank you for listening

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