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Benefit cap and the complexity of discrimination: *R (SG and others) v Secretary of State for Work and Pensions*

ABSTRACT

In *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions*, the Supreme Court evaluated the legality of the benefit cap. The Supreme Court was sharply divided but decided by a narrow margin that the benefit cap did not amount to a violation of the human rights. While the majority accepted the gender discrimination was justified, the Court noted that the current measures fall short of responsibilities under the United Nations Convention on the Rights of the Child. This could prove of outmost importance as the government elected in May 2015 has announced further reductions to the existing benefit cap. The case comment evaluates whether the Court paid enough attention to the multifaceted nature of poverty and discrimination, and argues that the impact the benefit cap has had specifically on women from black and ethnic minorities should have been considered.

Keywords: austerity – benefit cap – gender discrimination – European Convention on Human Rights – United Nations Convention on the Rights of the Child

Introduction

In *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions*¹, the Supreme Court was asked for the first time to rule on whether the benefit cap introduced by the coalition government in 2012 with the Benefit Cap (Housing Benefit) Regulations 2012 (the 2012 Regulations) was compatible with the European Convention on Human Rights (ECHR). By a narrow margin, the Court ruled that the benefit cap was not a violation of human rights, yet the Court considered a number of issues that might have wider significance in similar claims in the future, such as the inherent gender imbalance in the recent austerity measures and whether the UN Convention on the Rights of the Child (UNCRC) could be applied in the proceedings. This case comment argues the Court should have paid more attention to the complexities of poverty and considered not only gender but also indirect racial discrimination.

Background

In 2012, the secretary of state introduced the 2012 Regulations² which place a limit on the total amount of welfare benefits³ that most people aged 16 to 64 could receive from the state at £350 per week for single persons and £500 for families and couples, comparable to average annual salaries of £26,000 and £35,000 respectively. Following the ruling in *SG*, the conservative government elected in May 2015 has announced that the cap will be further

¹ [2015] UKSC 16.

² Enacted under the Welfare Reform Act 2012, s 96 (2012 Act).

³ The Regulations list welfare benefits as out-of-work benefits, child benefit, child tax credit and housing benefit.

reduced to £20,000 families outside London and £23,000 those living in London to further tackle ‘benefit dependency’ (HM Treasury 2015).

The current cap is applied to all families equally, regardless of the size of the family or living costs. The government estimated that at least half of those impacted by the cap are living in the Greater London area where living costs, and therefore housing benefits, are higher than in the rest of the country (DWP 2012). The equality impact assessment by the Department of Work and Pensions (DWP) also found that 60 per cent of those impacted by the scheme would be single women, where only 10 per cent of those were predicted to be single men. The secretary of state, therefore, accepted that the benefit cap disproportionately impacted women, lone mothers in particular, but argued this was justified under the socioeconomic policy for the following reasons:

- 1) the need to achieve savings in public expenditure to ensure the economic well-being of the country;
- 2) to set limit to the extent to which the state will support non-working households from public funds;
- 3) to provide members of such households incentive to work.⁴

There were four claimants in the proceedings: two single parents, NS and SG, and the youngest child of each respective single parent.⁵ The claimants argued that they were unable to mitigate the effects of the cap without finding work or moving home. SG, a single mother of six, had moved to Stamford Hill in London from Belgium. Both the mother and the oldest child had made allegations of sexual and physical abuse against the father. Her children attended a Jewish school in the locality and as orthodox Jews they had family and community

⁴ *Supra* n 1, [63-66].

⁵ The facts were set out by the Court of Appeal in [2014] EWCA Civ 156, [13-18], and Lady Hale in [2015] UKSC 16, [169-177].

support there. Following a rent increase, it would have been impossible for SG to continue living in their current home as it would have left the family with only £80 per week to live on once the cap was applied. The second applicant, NS, was also a single mother who lived in north London with three children. NS, who spoke only limited English and had not worked before, had left her husband following repeated sexual and physical abuse. Both SG and NS therefore showed they were in not in position to seek employment⁶ and that there were cultural and community support reasons for their desire not to relocate – yet, they were unable to maintain their current living arrangements due to the reduction in benefits.

European Convention on Human Rights

The benefit cap applied equally to men and women yet women, particularly single mothers, were disproportionately affected by it. The claimants issued judicial review proceedings, arguing that the cap was unlawful because:

1. it indirectly discriminated against them as women and/or as victims of domestic violence contrary to Article 14 (Freedom from discrimination) as read with Article 1 of the Protocol 1 (Right to peaceful enjoyment of possessions) of the ECHR;
2. it breached the duty to consider the best interest of the child under Article 3 of the UNCRC.

All five judges agreed that the cap was discriminatory against women but disagreed by a narrow margin whether the discrimination was justified due to legitimate aims. Giving the majority ruling, Lord Reed accepted the government justification for the measure and was of the view that beyond the aims put forward by the government, the cap was justified in order

⁶ Single people working 16h per week and couples 24h are excluded from the cap.

to restore public confidence in the welfare system.⁷ Furthermore, he stated that even if the savings from the cap were a relatively small part of the welfare budget, they nonetheless contributed to reducing the fiscal deficit. Following *Stec v United Kingdom*⁸, Lord Reed ruled that the 2012 Regulations were justified under the "manifestly without reasonable foundation" test. He further rejected arguments for alternative and more proportionate cap and said that decisions as to the level and content of the cap were "a matter of political judgement".⁹ He held that in applying *Stec*, the courts should consider that "certain matters are by their nature more suitable for determination by Government or Parliament than by the courts".¹⁰ Lady Hale, in contrast, argued that discrimination was a constitutional issue and said that "even in the area of welfare benefits, where the court would normally defer to the considered decision of the legislature, if that decision results in unjustified discrimination, then it is the duty of the courts to say so".¹¹

Lord Reed concluded on the alleged gender discrimination that "the disparity between the numbers of men and women affected was inevitable if the legitimate aims were to be achieved", a view that was supported by Lords Hughes and Carnwath.¹² Lady Hale and Lord Kerr, in turn, were of the opinion that the discrimination could not be justified, and therefore the measures amounted to violation of Article 14. In her dissenting ruling, Lady Hale expressed concern not only over the discriminatory nature but also over the severity of the measures and stated that

⁷*Supra* n 1, [63-66].

⁸ (2006) 43 EHRR 47.

⁹ *Supra* n 1, [69].

¹⁰ *Supra* n 1, [92].

¹¹ *Supra* n 1, [160].

¹²*Supra* n 1, [76].

the prejudicial effect of the cap is obvious and stark. It breaks the link between benefit and need. Claimants affected by the cap will, by definition, not receive the sums of money which the state deems necessary for them adequately to house, feed, clothe and warm themselves and their children.¹³

The applicants claimed that the Regulations were not only discriminatory against women but also a disproportionate impact on victims of domestic violence. The majority rejected the claim as the government had already sufficiently addressed this after the proceedings in question had begun, by new regulations that exempts ‘specified accommodation’ from the cap, encompassing a wide range of accommodation provided for vulnerable people, including the women's refuges that were excluded from the exemption under the previous regulations.¹⁴

United Nations Convention on the Rights of the Child

The court was also divided on whether the benefit cap amounted to a violation of Article 3 of the UNCRC which states that “in all actions concerning children ... the best interests of the child shall be a primary consideration”. The UNCRC is an unincorporated international treaty and as such Lord Reed argued that it would be “inappropriate for the court to purport to decide whether or not the Executive has correctly understood unincorporated treaty

¹³*Supra* n 1, [180].

¹⁴ The Housing Benefit and Universal Credit (Supported Accommodation) (Amendment) Regulations 2014 (SI 2014/771). However, Lady Hale noted that this exception only impacted the victims of domestic violence who had sought refuge in a shelter and not those who were in expensive temporary accommodation by the local authority.

obligation”.¹⁵ He rejected the argument put forward by the claimants that that it would be unrealistic to distinguish between the rights of the women under Article 14 of the ECHR and those of their children under the UNCRC, and argued that the UNCRC had no relevance on the issue of alleged discrimination between men and women in the enjoyment of the property rights guaranteed by A1P1. Lord Hughes also argued that Article 3 of UNCRC cannot have effect in this case on Article 8 on ‘the grounds that it is irrelevant to its interpretation’.¹⁶

Lord Carnwath, Lady Hale and Lord Reed, in contrast, found that the state fell short of its obligations under the UNCRC. While Lord Carnwath argued that the state had failed to show that the best interest of the child had been a primary consideration in these measures, swinging the vote he agreed with Lords Reed and Hughes on the narrow point that Article 3 could not be used to support Article 14 of the ECHR in the case grounded on alleged gender discrimination. Voicing his concern, Lord Carnwath said he hoped the government would address the implications of the ruling when it reviewed the benefit cap.¹⁷

Lord Kerr argued in a strong dissenting judgment that the violations of Article 3 of UNCRC and 14 of ECHR were intertwined as the “interests of single mothers are ... inextricably bound up with the interests of their dependent children, for the trite and prosaic reason that they are *parents*”.¹⁸ Concurring with Lady Hale on the breach of Article 3, Lord Kerr said “depriving children of (and therefore their mothers of the capacity to ensure that they have) these basic necessities of life is simply antithetical to the notion that first consideration has been given to their best interests”.¹⁹

¹⁵ *Supra* n 1, [90].

¹⁶ *Supra* n 1, [139].

¹⁷ *Supra* n 1, [133].

¹⁸ *Supra* n 1, [266].

¹⁹ *Supra* n 1, [269].

He also argued that the Article 3 should be directly applicable in domestic courts, contradicting the commonly accepted dualist theory that international conventions must be incorporated into domestic law for them to be applicable in domestic courts. He argued the dualist system allows the state to play politics with fundamental rights by showing superficial commitment through signatories but keeping the rights beyond reach of its citizens. Beyond interpretation of legality of welfare cuts, Lord Kerr's comments are potentially far-reaching and constitutionally groundbreaking. Considering the recent hostile political attitude towards ECHR and international human rights instruments, the position will no doubt face substantial resistance.

Comment

Perhaps Lord Kerr's comments on the direct applicability of the UNCRC will prove to have a long-lasting, possibly revolutionary, impact in the future. Arguably, there are other issues left unaddressed by the ruling, most notably the intersectionality of discrimination in the austerity measures. Lord Reed concluded stating that the court is concerned whether the law "unlawfully discriminates between men and women, rather than with the hardship which might result from the cap in the cases of those most severely affected".²⁰ Yet, the question of who are those most severely affected is closely intertwined with the discrimination claim, and with the legitimacy of the austerity measures.

The disproportionate impact of the austerity measures on women has been recognised by feminist commentators for long (Griffin 2015; Bramall 2013) but the impact on women who are from ethnic minorities have received less attention (Sandhu and Stephenson 2015).

²⁰ *Supra* n 1, [75].

All the judges recognised the gender imbalance in the measures but they underplayed the fact that the applicants were also of immigrant and ethnic minority background. While the austerity measures and the benefit cap in particular have hit women the hardest, it must also be recognised that not all women are equal. According to the Equality Impact Assessment on the benefit cap, the DWP estimated that 40 per cent of households impacted by the benefit cap will have at least one person who is BME (DWP 2012). After housing costs, nearly 40 per cent of BME households were living on a relative low income, in comparison to 20 per cent of white households (DWP 2014). The benefit cap, therefore, is likely to have a disproportionate impact on BME women in particular and the failure of the Court to consider this is remarkable. Based on governments own consultations and equality assessments, the benefit cap and wider austerity measures will hit BME single mothers living in London the hardest. Yet, this was not acknowledged by the secretary of state or by the Court. Lord Reed said government policies to incentivise work are not purely cut based but are introduced together with support to return to work. While this might be the case for some, BME women – the hardest hit - have faced a combination of cuts to welfare benefits and cuts to funding of services such as English as a Second or other Language (ESOL). Poor language skills and lack of support, as evident in the case of the second claimant NS, present obvious difficulties to entry into the work market and access to state services.

The judges, Lord Reed in particular, relied heavily on government consultation and responses to understand and outline the austerity measures and their justification, incentivising work in particular. The government emphasised the importance of behaviour change, an argument accepted by the majority, and stated in an earlier consultation (quoted in part in the judgement) that “the aim of the benefit cap policy is to achieve long-term positive behavioural effects through changed attitudes to welfare, responsible life choices and strong work incentives”(DWP 2013). ‘Long-term positive behaviour change’ implies that the

welfare system or those in receipt of welfare benefits demonstrate irresponsible behaviour and crudely juxtapositions them to the ‘good, productive citizens’ (Lonergan 2015). The majority, while sensitive to the plight of impoverished children, placed the responsibility of lifting children from poverty to their parents, in this case single mothers. If it is accepted that the benefit cap and wider austerity measures disproportionately impact single mother households, then it must also be accepted that emphasis on the responsibility to raise a new generation of economically productive citizens, is also deeply gendered. The push for BME single mothers to work and imposing punitive measures on those who do not, is paradoxical when read together with the cuts to services such as ESOL.

Conclusion

The case shows the Court is deeply divided over the controversial measures to reform the welfare state. While the powerful individual rulings condemn the UK’s failure to protect the poorest children, the Court was not able to engage with the complex, multifaceted nature of poverty. The measures and the Court’s ruling ultimately fail to take into account that the welfare state and therefore any cuts to it are, and have always been, intensely gendered and racialised.

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