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Case No: CO/2717/2014 & CO/3220/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2015

Before :

MR JUSTICE COLLINS

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Between :

(1) Ashley Hurley **(2) Mary Jarrett** **(3) Lee Palmer**	**Claimants**
- and -	
Secretary of State for Work and Pensions	**Defendant**
- and -	
Equality and Human Rights Commission	**Intervener**

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Ms Caoilfhionn Gallagher and **Mr Sam Jacobs** (instructed by **Hopkin Murray Beskine**) for the **claimants**
Mr Clive Sheldon QC and **Mr Simon Pritchard** (instructed by the **Treasury Solicitor**) for the **defendant**
Mr Dan Squires (instructed by the **Equality and Human Rights Commission**) for the **intervener**

Hearing dates: 21st and 22nd October 2015

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Approved Judgment

Mr Justice Collins:

1. This judgment deals with two claims which I ordered should be heard together. One is by the first two claimants, the other by the third. Each claim concerns Part 8A of the Housing Benefit Regulations 2006 which was inserted by Regulation 2 of the Benefit Cap (Housing Benefit) Regulations 2012. This provides for a benefit cap on some including the first and third claimants who receive Carer's Allowance (CA) since they provide unpaid care for severely disabled persons for at least 35 hours a week.

2. The statutory provisions which enable Regulations to be made to impose the cap are contained in Sections 96 and 97 of the Welfare Reform Act 2012. The purpose behind the cap is broadly to achieve fairness between working households and those on benefits and to increase incentives to work. By this means savings are intended to be obtained in respect of benefits payable to individuals or couples.

3. The claimants advance two grounds in challenging the scheme set up in Part 8A of the 2006 Regulations. First, it is said that not to exempt those such as the first and third claimants who receive CA is unlawful because it is irrational or, as is submitted to be the present test, disproportionate. In the alternative, it is said that CA should not have been included in the benefits which could be capped. Secondly, it is said that there is unlawful discrimination contrary to Article 14 of the ECHR in the impact both on carers and those for whom they care.

4. The Equality and Human Rights Commission applied for and was granted the right to intervene by submitting written argument, it being left to the trial judge to decide whether any oral argument should be permitted. I allowed Mr Squires to put oral argument before me. There was no objection raised by Mr Sheldon, QC. For obvious reasons Mr Squires' submissions concentrated on the Article 14 ground.

5. The cap is set by reference to net earnings of households at present at £350 per week for individuals without children and £500 per week for couples or lone parents. If the cap is applied, regulation 75D of the 2006 regulations provides:-

> "…..[T]he relevant authority must reduce the amount of housing benefit to which the claimant is entitled by virtue of Section 130 of the Act by the amount by which the total amount of welfare benefits exceeds the relevant amount".

The relevant authority will be the local authority and the relevant amount is the amount of housing benefit which is payable to a particular claimant.

6. It is said that the imposition of the cap can be avoided by obtaining employment during hours when care is not needed. In addition, its effect can be avoided by budgeting or by reducing accommodation costs by moving to cheaper accommodation or persuading the landlord to reduce rent. It may too be possible to obtain a grant from local authorities to cover, inter alia, carer's travel costs pursuant to the Care Act 2014. It is also said that additional benefit in the form of Discretionary Housing Payments (DHP) could be obtained to make up the loss imposed by the cap.

7. Section 97(3) of the 2012 Act provides that the first regulations to be made pursuant to s.96 must be the subject of positive resolutions by each House of Parliament. Subsequent regulations are subject to negative resolution (s.97(4)). Thus the 2012

Regulation inserting Part 8A have been considered by both Houses of Parliament. I have been referred to extracts from Hansard which, it is contended on the defendant's behalf, shows that all material considerations were taken into account in the course of deciding on the terms of the regulations insofar as they applied a benefit cap to carers. This is obviously an important consideration since, if established, it is very relevant in considering whether the provisions in question are unlawful whatever the test to be applied may be.

8. Section 96(1) of the 2012 Act gives power to make regulations which may provide for a benefit cap to be applied to the welfare benefits to which a single person or couple is entitled. Section 96(2) provides that where a single person's or couple's total entitlement to benefits exceeds the relevant amount such entitlement will be reduced by an amount 'up to or equalling the excess'. There can thus be some discretion not to reduce by the full amount. Section 96(4) confers general powers for the regulations to identify the benefits from which a deduction is to be made (s.96(4)(b)) and to provide for exceptions to the application of the benefit cap (s.96(4)(c)). Section 97(1) provides that regulations under s.96 may make different provision for different purposes or cases. Thus, as is common in this sort of legislation, the detail of the manner in which the general power in the primary legislation is to be put into effect is to be dealt with in regulations.

9. The benefit chosen for deduction is housing benefit. Regulation 75G identifies the benefits for which the cap applies. These include CA. Exceptions to the application of the cap are set out in Regulation 75F as amended. These include Regulation 75F(e) where:-

> "the claimant, the claimant's partner or a young person for whom the claimant or claimant's partner is responsible, is receiving a disability living allowance".

Disability living allowance (DLA) is being superseded by what is called a personal independence payment. This is in all material respects available on the same basis as DLA and I will continue to refer to DLA.

10. CA is only available where a carer is providing a minimum of 35 hours each week caring for a person who is sufficiently disabled to receive DLA at the middle or highest rates. The carer must be over 16 and not in full-time education or employment which provides more than £110 per week, net of tax, and various other allowable expenses, the details of which it is not necessary for me to set out. Entitlement is dependent on the person being cared for having sufficient disability to require substantial care on a regular basis.

11. In 2013 a claim for judicial review was lodged against the defendant on the ground that the benefit cap was unlawful in that it provided unjustifiable indirect discrimination against women in that it particularly affected non-working households with several children living in high cost areas of housing, notably London. The majority of such households consisted of single parents, predominantly women, so that a higher number of women were affected by the cap than men. The claim went to the Supreme Court whose decision is reported in [2015] 1 WLR 1449 under the title R(SG) v. SSWP. The case is also referred to as R(JS) v. SSWP which was the title in the Court of Appeal.

12. The judges in SG were divided in that a majority decided that the effect of the cap on the children of single parents affected by it was incompatible with the obligation of the defendant to treat the best interests of children as a primary consideration under the UN Convention on the Rights of the Child. But Lord Carnwath, who was one of the three forming the majority, decided that there was no connection between this failure and the alleged breach of Article 14. Lady Hale and Lord Kerr took a different view and would have allowed the claimants' appeals on that basis. Lord Reed and Lord Hughes, who with Lord Cornwath formed the majority dismissing the claimants' appeal, decided that the discrimination was justifiable in all the circumstances.

13. There was in SG and in the claims before me no challenge to the compatibility of the 2012 Act with the ECHR nor to the fixing of the 'relevant amount'. The court in SG decided that the 2012 Regulation pursued a legitimate aim. There were three elements. First, there was the aim of securing the economic well-being of the country by reducing the expenditure on benefits. That is an aim which can be legitimate even it has discriminatory effect as has been accepted by the ECtHR: see for example Sidabras v. Lithuania (2004) 42 EHRR 104 at paragraph 55. In itself, it will not justify a discriminatory effect unless there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

14. The second aim is incentivising work. This too is legitimate and its importance lies in making efforts to assist those capable of work to find work. Those efforts are perhaps better described as imposing financial disadvantages if efforts to obtain work are not made. The third aim is the imposition of a reasonable limit on the total amount which a household can receive in welfare benefits and that is also legitimate. Apart from being an aspect of securing the economic well-being of the country, it also in Lord Reed's view was intended to reflect a political view as to the nature of a fair and healthy society. Lord Reed continued thus in paragraph 66:-

> "As Ministers explained to Parliament, this objective responds in particular to a public perception that the benefits system has been excessively generous to some recipients: a perception which is related to the stigmatisation in the media of non-working households receiving high levels of benefit. The maintenance of public confidence in the welfare system, so that recipients are not stigmatised or resented, is undeniably a legitimate aim. In the language used by ECtHR in Hoogendijk v. Holland 40 EHRR SE189 and other cases, the benefit system is the means by which society expresses solidarity with its most vulnerable members. That being so, it is in principle legitimate to reform the system when necessary to respond to a threat to that solidarity."

I shall come back to these important observations since it must be obvious that those who are so disabled as to need at least 35 hours care each week are properly to be regarded as some of the most vulnerable members of our society.

15. The policy which was enacted by ss.96 and 97 of the 2012 Act was subjected to detailed and rigorous scrutiny by both Houses of Parliament over a period of some 12 months. In early 2011 Parliament was informed that those in receipt of DLA would be exempted since some people would have additional care or mobility costs and would be less able to alter their spending patterns or reduce their household costs in response to a cap on benefit. Particular reliance is placed on behalf of the defendant on the Parliamentary process which led to the approval of the 2012 Regulations since it is

submitted that due regard was had to all material facts. That being so, this court should not be prepared to find that the provisions in the Regulations which are the subject of this claim are unlawful. I should not make my view prevail over the informed view of both Houses of Parliament as expressed in the democratic process.

16. It will in the circumstances be necessary to consider what was said in Parliament to see whether that submission can be sustained. Consideration of Parliamentary debates to identify the aims pursued by the legislation and information relevant to the issue which the court has to determine is proper and, since the purpose of the exercise is not to assess the quality of the reasons given, there is no inconsistency with anything said in Wilson v. First County Trust Ltd (No2) [2004] 1 AC 816. Nor so far as any material report by a Parliamentary Committee is concerned is there any objection to considering it simply in relation to any relevant information contained in it. What is not permissible is to seek to analyse or criticise anything contained in it since that would be to breach the provisions of the Bill of Rights.

17. The defendant's representatives have produced a helpful note which sets out the relevant Parliamentary material. The issue whether those in receipt of CA should be excluded from the cap was raised in a memorandum submitted in April 2011 to Parliament by Carers UK and the Disability Benefits Consortium. Carers UK is a registered charity which was founded some 50 years ago and which represents the views and interests of some 6.5 million people in the UK who care for their frail, disabled or ill family member, friend or partner. In its memorandum, Carers UK said that placing a cap could have a devastating effect on families, particularly of a single parent with children. It was pointed out in a later debate in the House of Lords that unpaid carers made a huge contribution to society in saving £119 billion pounds each year which would otherwise require public funds. This is indeed a staggering sum. It has not been challenged by the defendant.

18. The then minister, Mr Grayling, responded to an amendment which sought to exempt carer's allowance in the 2012 Act by saying (Hansard for 17 May 2011 Column 941):-

> "[The amendment] is consistent with an intention to exempt the DLA and equivalent benefits but it includes some other benefits where we do not think that the argument for an exemption is as clear-cut. The exemption for DLA means that in effect we will be exempting carer's allowance recipients in households where one member or a couple or a dependant child is severely disabled and the other member cares for them. That does not arise in cases where the carer's allowance claimant is caring for someone outside the household."

Mr Grayling continued:-

> "The reality is that the cap is all about influencing behaviour, it is not about creating hardship. If we succeed in influencing behaviour, the number of cases affected by the cap will be cut to a minimum. However, we will only influence behaviour if we have a simple rule which people can understand, and not one hedged about with numerous exemptions that only welfare rights experts can follow. The simple message to every citizen of this country as they enter adult life is that there is a limit to the amount of financial support that the State will provide

> to people if they fall on hard times, and therefore they need to adapt their circumstances to reflect that reality".

These claims show that hardship can be and has been created by the cap as it affects family carers such as these claimants, and the last sentence of Mr Grayling's observations does not seem to be relevant to most if not all carers. Nonetheless, it seems that what he said formed and continues to form the basis for the imposition and application of the cap.

19. This answer turns on the meaning of 'household' in a benefits context. While the word 'household' is used in public documents, it is a little misleading since it is narrower than I suspect most would believe. A benefit unit and so a household for benefit purposes is limited to partners and dependent children. Thus the exemption for those receiving DLA which applies to the household and so includes the carer only applies if the person cared for is a dependent child or a partner. It does not include care for an adult son or daughter nor for a parent or grandparent. Thus once a child reaches his or her eighteenth birthday, although his or her needs are the same and the parent caring continues to care, the exemption disappears and the cap can apply. Equally, a son or daughter cannot take over care for a disabled parent, if the other parent is either not available or cannot assist, without being subject to the cap. And the financial impact can be significant resulting in losses of over £750 a month so that it is no surprise that some would find and have found it impossible, despite the misery produced, to continue to care full time so that there has to be recourse to public funds.

20. When this was raised in the House of Lords on 23 November 2011, Lord Freud for the government maintained the approach indicated by Mr Grayling but said that they would 'look at ways to ease the transition for families and provide assistance in hard cases' (Hansard Column GC416).

21. The issue was again raised when the 2012 Regulations were being considered. In the House of Commons, the same points were raised. The Government answer (6 November 2012 Column 20) was:-

> "On carers, a question was asked about why those in receipt of DLA were excluded but not those receiving carers allowance. The benefit system is designed to provide financial support for carers when their caring responsibilities prevent them from working full time. As such, for the purpose of the cap, the carer's allowance should be treated in the same way as other income maintenance benefits. If the carer is in the same household as someone who is entitled to DLA……, that household will be exempt from the cap."

Whether that answers the concerns raised I will leave others to judge. In the House of Lords, when the same points were raised, Lord Freud gave much the same answer but added that most carers of working age wanted to retain a foothold in the labour market and 90% of those receiving carer's allowance were claiming another out-of-work benefit which showed they were looking for work.

22. Earlier in January 2012 (Hansard 23 January 2012 Column 892) Lord Freud had said:-

> "I acknowledge and re-acknowledge the vital role that carers fulfil, but I must return to our belief that it is not right that those on benefit can receive more than the average family wage…..[O]ne thing we are not looking to encourage is a change in the carer's behaviour so that they stop caring. That is absolutely not where we want to go. However, if the person being cared for is in a separate household, there is no obvious reason why the cap should not apply. Many carers of working age want to retain a foothold in the labour market where possible not just for their financial well-being but to enhance their lives and the lives of those for whom they care."

23. Reference is made to the report of the Work and Pensions Committee of 26 March 2014 which recommended that the government should exempt recipients of care allowance who lived with and cared for a disabled parent or adult son or daughter. That extended to those who did not live with such a disabled relation.

24. Ms Herklots, the chief executive of Carers UK, refers to research which shows that some 41% of carers had reported a reluctance of those receiving care to use services, preferring to be cared for by relations or known and trusted friends. It must, I think, be obvious that where a child has always been cared for by a parent, he or she will be upset if such care does not continue. As will be seen, the desire for care from a relation is very material in these claims because of the particular needs of the grandparents who are being cared for in each case. Carers UK has carried out surveys which show that a significant number of carers have to cut back on essentials and suffer from real financial concerns by the need to care, let alone if subjected to a cap. Some 48% in response to a 2015 survey were struggling to make ends meet and a similar proportion were suffering in health as a result. None of this evidence is or could be challenged.

25. Mr Darren Bird, the head of Benefit Cap Policy in the Department, has produced a statement on which reliance is placed. He makes the point that the Care Act 2014 provides for stronger rights of and support for carers, which could include help with fares when travelling to the recipient of the care. It is to be noted that all these measures mean the provision of public funds which it was the purpose of the cap to avoid. He refers to the 2011 census which showed that there were 5.8 million informal carers of whom some 3 million were in employment. This figure is of no real value since, as he points out, the census definition of a care provider was 'somebody who looks after or gives help or support to family members, friends neighbours or others because of long-term physical or mental ill health or disability, or problems related to old age.' But it is said that of carers who provided over 35 hours per week some 25% were in full-time and 15% in part-time work. It is difficult to believe that if 35 hours at least a week were spent in care the carer could be in full-time work. The reality is, looking at the Survey Report, that it deals with money from work coming into the household so that it is not necessarily coming from the carer. The thrust of Mr Bird's statement is that carers are 'treated the same as all other claimants receiving other means-tested income replacement benefits which also may not have any work conditionality requirements'. Carers subject to the cap have, he says, the same choices as other capped claimants. They can either take up some work or adjust their household budget. He also refers to available help in the form largely of DHPs. This I will deal with in due course. But what Mr Bird totally fails to engage with is the

evidence from Carers UK that carers are already suffering real financial hardship so that the scope for adjusting household budgets does not in many cases exist.

26. It is to be noted that, as is common ground, only some 1,400 households or 2% of the total with at least one CA claimant are subject to the cap. It is equally noteworthy that some 50% of those live in London and over 40% are female lone parents. Average restrictions resulting from the cap amounted to £65 per week. The main factor which led to the imposition of the cap was housing benefit resulting from the high levels of rent particularly in London, but not by any means limited to London. Mr Bird says that £65 per week equates to 10 hours work at the minimum wage. He does however recognise, as must be obvious, that there may be difficulties in carers obtaining work. This is particularly a problem if the person cared for needs care at irregular intervals because, for example, he or she suffers from incontinence or sudden and unforeseen episodes.

27. In his skeleton arguments, Mr Sheldon used the expression 'workless families' to comprehend those households which depended on benefits. Mr Bird says that many carers choose to undertake remunerative work as well as providing care and there should be no exemption in the interest of fairness between, as he puts it, working and workless households. Mr Bird further states that the cap is 'designed to achieve long term positive behavioral effects by changing attitudes to welfare and work and encouraging responsible life choices, which will benefit adults and children alike'.

28. I observed at the outset of the hearing that to describe a household where care was being provided for at least 35 hours a week as 'workless' was somewhat offensive. I believe reasonable people would recognise that to care for a seriously disabled person is difficult and burdensome and could properly be regarded as work. Equally, those who are prepared to make the sacrifice involved in undertaking such care would not be those who would normally be regarded as work shy and content to rely on benefits. But I recognise that this provides no answer to whether the failure to exempt individuals such as the claimants is unlawful. I only mention it because I am aware and I have some sympathy with them that there are many in the position of the claimants who strongly resent the use of that terminology.

29. I must now set out the salient details of the claimants' circumstances. The first claimant is the granddaughter of the second claimant for whom she provides full time care. She was brought up by her grandparents since her own parents could not look after her. Her grandfather died in about 2010 and shortly after her grandmother was diagnosed with and underwent treatment for lung cancer. She is now in remission, but very frail and in receipt of DLA at the middle rate with a higher rate mobility component. The first claimant had when her claim was lodged in 2014 three young children with a fourth, now born, on the way. Unfortunately, her husband was convicted of a serious offence which has led to a lengthy prison sentence and the virtual certainty that he will play no further part in the first claimant's life. She is thus a lone parent with four children to look after. In 2014 she was living in rented accommodation in Croydon at a rent of £207.69 per week. When the cap came into force in April 2013, she lost £22.37 per week from her housing benefit which, following the increase in child tax credits following the birth of her fourth child, increased to £88.80 per week. As a result, she fell into arrears of rent and was evicted in October 2014. The landlord wrote off some £3676 which had by then accrued, no doubt appreciating that there was no chance of her paying anything. The best offer she

got from Croydon was that if she became homeless accommodation could be provided in Birmingham. That was plainly impossible if she was to continue to care for her grandmother.

30. She has now moved into her grandmother's house in Peckham. She and her four children sleep in a single room. The conditions are intolerable. Croydon refused a request for DHP and Southwark told her that they have run out of DHP funds. She has been making efforts to find alternative accommodation without success, often because landlords will not accept any tenants such as her who have to depend on housing benefit. Southwark for reasons best known to itself has refused to help on the ground that in its view she was intentionally homeless.

31. The second claimant suffers from a number of physical disabilities including partial blindness and severe lack of mobility. She has difficulties in attending to her intimate needs and understandably does not want attention from anyone but her granddaughter whom she brought up and whose children she adores. The first claimant's uncle, aged 71, her grandmother's brother-in-law, lives in the house but, although he helps as much as he can, is unable to give the intimate care that is needed. Since the first claimant is not now receiving housing benefit, she is not subject to the cap. It is said on the defendant's behalf that once she received the extra child benefit when her fourth child was born, she would have been subjected to the cap without the CA. Thus she would be caught in the hardship created by the cap for single parents with four or more children which the Supreme Court in SG considered. But the reality was that she had to move and her caring obligations have made it all the more difficult to work. If the cap were not to apply because she should be exempt as a carer, she would not suffer the hardship created by her situation as a lone parent. Thus the loss of her accommodation can properly be said to have been a result of the cap and her present suffering can be attributed to the cap as it affects carers.

32. There is an added reason why the first claimant needs to maintain her contact with the second claimant. Her partner's criminal conduct left her traumatised and she needs and benefits from her grandmother's support. The second claimant confirms her needs, but states that the present situation is intolerable. If her granddaughter and the children fail to find some alternative but sufficiently close accommodation, the caring will break down. The cap makes such alternative accommodation impossible to find having particular regard to London rents. The second claimant wants to continue to live as long as she can in her own house, but is concerned that she might, if she loses the care of the first claimant, have to move to a home. What is certain is that the State will have to pay more to look after her than would be saved by the imposition of the cap.

33. The third claimant provides regular care and support to his 81 year old grandmother. She is in very poor health. He has his own problems in that he is severely dyslexic and suffers from a condition which means that he has difficulties in understanding, remembering and processing numbers. He has mental health problems. All this obviously means that he would have added difficulties in obtaining any employment. He lives and has for some 5 years lived in Bow and has a support network there. His grandmother spent over a year in hospital in 2011 and her discharge was on the basis that he would provide her with the necessary care since she was incapable of looking after herself. He describes her needs which include difficulties arising from incontinence. He spends most of the day with her. She is, he says, fiercely

independent, albeit she cannot look after herself, and he believes she would not survive a move to a home, which is the only alternative if he cannot continue to care for her. She does not look after her home and cannot manage her finances. She does not spend money wisely and he has to provide for her on occasions. The defendant points out that the cap only means a reduction of £10.45 (now it seems £11.15) per week and suggests that savings could be made or perhaps the claimant's grandmother could pay his fares. He has fully explained why she cannot provide any money for him: rather he has had to pay for some of her necessities. While it may be thought that £11 is not a large sum, for someone such as the third claimant who is on the brink of inability to provide for himself, it can be impossible to bear. Those responsible for the benefit cap must realise that there are indeed those whose circumstances are such that even relatively small sums can tip them into destitution. This evidence shows that the third claimant is such an individual. It is to be noted that the cost to the State if the third claimant is unable to continue to care for his grandmother as he now does would greatly exceed £11 per week.

34. Mr Bird has drawn attention to the surveys which indicate the apparent effect of the cap on those in receipt of CA. A review on the first year of the cap published in December 2014 showed that of those subject to the cap, 50% had moved out of scope of the cap after a year. 15% had moved into work, as defined by a Working Tax Credit, 10% had a lower Housing Benefit claim, 5% had a total benefit receipt which was under the cap amount, 5% were claiming an exempt benefit, 15% were not found in the data and the remaining 50% remained capped. These figures are similar to those for the capped households as a whole. It is said that these figures show that carers were able to respond in a similar way to others whose benefits were subject to the cap.

35. Mr Bird states that the benefit cap does not remove all support for carers and the social care system is available to step in if the carer can no longer care for the disabled person. No doubt this is so but it means that, if the carer has to cease to provide the necessary care, there is a considerable increase in the public money needed to pay someone else to provide that care or move the disabled person to a care home.

36. It is not apparent from the review how many of the 50% had ceased to care. In some cases the need for care may disappear, but what the figures fail to identify is what proportion of those who were subject to the cap gave up their caring responsibilities and so the State had to step in. As Mr Bird himself says, it is not possible to say whether those who moved out of scope had done so as a result of changes to their eligibility or ceasing their caring responsibilities. If, as is probable, many had to cease their caring responsibilities, the whole point of the cap, which is to save the State payments of tax payers' money by incentivising those who receive benefits to work and ensuring that those in receipt of benefit do not receive more than they would if they worked, would seem to be undermined.

37. The options available to those in receipt of CA to respond to the effects of the cap are identified by Mr Bird. The first is the possibility to obtain work. Earnings of up to £110 per week will not affect the eligibility for CA. He says that the latest statistics published in May 2015 show that over 14,000 households who were previously capped have moved into work. I am not sure of the materiality of this figure in the context of these claims since it is accepted that only 1,400 households with at least one CA claimant are subject to the cap. He notes that lone parents who work 16 hours

a week are eligible for Working Tax Credits and so could be exempted from the cap entirely. Thus, he says, the lone parent can consider whether she can afford to maintain 35 hours caring (assuming that is all the hours actually needed by the particular disabled person) or reduce those responsibilities and work. Apart from the obvious disadvantage to the State in having to pay far more to care for the disabled person if the lone parent can no longer provide it, it is far from easy for a lone parent to work particularly if very young children need to be looked after.

38. Secondly, it is said that the cost of housing can be reduced either by persuading the landlord to reduce the rent or by moving to cheaper accommodation. There cannot be many landlords altruistic enough to reduce rents, albeit I note that in one of the SG cases a reduction was obtained. I doubt however that that means of reducing housing costs will be likely to be realistic in all but a tiny minority of cases. Movement to cheaper accommodation, if it can be obtained, is also problematical. If a greater distance from the disabled person, there will be increased fares and difficulties in provision of the care in a number of cases to deal with urgent or unforeseen need. The suggestion that the Care Act 2014 may enable fares to be paid runs counter to the purpose of the cap to avoid public funds being paid in excess of the relevant amount. In the case of the third claimant, it is said that the levels of rent as shown by the relevant amounts fixed for Housing Benefit in local authority areas throughout the country disclose that Bexley is cheaper than Tower Hamlets. Thus if he were to move to Bexley and so be closer to his grandmother, his Housing Benefit could be reduced as could his fares. He has in his statement explained why he needs to remain in Bow and would suffer mentally if he were to move to Bexley.

39. Thirdly, it is said that there can be budgeting to reduce expenditure on non-housing items. While DLA is intended to cover costs which the disability means are increased, as the third claimant's evidence shows, for those such as he who are living on the breadline (and the same will apply to many in his position since it is those who are the most vulnerable and who have already difficulties in making ends meet) budgeting to reduce costs is not at all easy and often not feasible. The suggestion that his grandmother could contribute to his savings is not he says practical.

40. Mr Bird refers to DHP. He says the Government has provided funding for DHPs for those subject to the cap who need assistance in the short term. Mr Sheldon criticised Ms Gallagher for referring to the possibility of obtaining DHP as a short term measure, despite his own witness' evidence that that is what it is. The third claimant has been provided with DHP until March 2016 and, according to Mr Sheldon, it may continue. This again is hardly consistent with the purpose of the cap. Furthermore, as the first claimant discovered, not all local authorities are able or prepared to provide DHPs.

41. In deciding whether the regulations are unlawful in relation to those caring for disabled persons who receive CA, Ms Gallagher has submitted that the common law no longer insists on the uniform application of the Wednesbury test of irrationality. She draws attention to the observations of a number of Supreme Court judges in recent cases which point in the direction of proportionality instead of irrationality. In Kennedy v. Information Commissioner [2015] AC 455 Lord Mance made observations at paragraph 51 which formed Ms Gallagher's submission and in paragraph 54 stated having regard to the approach set out in R v. Ministry of Defence ex p Smith [1996] QB 517 following observations of Lord Bridge in R v. SSHD ex p

Bugdaycay [1987] AC 514 at 531, that "a court must be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines:-

> "As Professor Paul Craig has shown (see eg. 'The Nature of Reasonableness' (2013) 66 CLP 131), both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the Convention and EU law. In the context of fundamental rights, it is a truism that the scrutiny is likely to be more intense than where other interests are involved".

42. It may be that the Supreme Court will decide that irrationality in the sense of a decision which no reasonable person could make is no longer to be the correct approach even outside the ECHR or EU law. But the decision of the House of Lords in R v. Home Secretary ex p Brind [1991] AC 696 is binding unless the Supreme Court decides that it should be overruled. The Wednesbury principles as explained by Lord Diplock in CCSU v. Minister for the Civil Service [1985] AC 374 apply. Thus it is necessary to consider whether all relevant matters have been taken into account and irrelevant matters ignored. The test at common law then requires that the court ask itself whether a reasonable decision maker, on the material before it, could reasonably conclude that the decision in question was appropriate.

43. But I think in the context of this case the claimants do not need to rely on proportionality as a common law principle applicable to all cases. It is accepted that depriving the first and third claimants of their CAs engaged their rights under Article 1 of the First Protocol to the ECHR (A1P1), since the right to receive the benefit is a possession within the meaning of A1P1. The first and the third claimants assert that it would also engage their Article 8 rights to a private life. That is not accepted by the defendant, but, since the interference with A1P1 is accepted, the argument about Article 8 is unnecessary.

44. It is however contended that the second claimant's Article 8 rights are engaged. This is of course material in dealing with the discrimination argument since Article 14 of the ECHR which prohibits discrimination has no free standing existence. Another substantive ECHR right must also be engaged.

45. Article 8 of the ECHR accords to a person a right to 'respect for his private and family life, his house and his correspondence'. In Pretty v. UK (2002) 35 EHRR 1 at paragraph 61, the ECtHR observed:-

> "The concept of 'private life' is a broad term not susceptible to exhaustive definitions. It covers the physical and psychological integrity of a person. It can sometimes enhance the aspects of an individual's physical and social identity…..Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Though no previous case has established as such any right to self-

> determination as being contained in Article 8……, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees".

And in paragraph 65 the Court stated:-

> "The very essence of the Convention is respect for human dignity and human freedom".

46. In McDonald v. UK (2015) 60 EHRR 1 the court decided that a local authority's decision to provide a disabled woman with incontinence pads rather than night-time care in her home did interfere with her Article 8 rights. It is clear that many disabled persons would choose to have their needs, particularly where intimate care is concerned, dealt with by family members or relatives whom they can trust. That this is connected with their human dignity is in my view clear. Mr Sheldon simply submits that a general desire to be cared for by, in the second claimant's case, her granddaughter as opposed to any other person is not within the scope of family or private life. What matters is the reason for that desire which is that her dignity would be compromised by having a stranger deal with such needs. That the second claimant is not unique is, as I have said, apparent. The desire for care to be administered by a particular family member or relation will almost always be likely to fall within Article 8.

47. It follows that all three claimants have rights covered by the ECHR which can be interfered with as a result of the application of the cap. Thus there are fundamental rights involved. This affects the intensity of the review which the court should apply. But however intense the review the common law test remains one of irrationality and the threshold is a high one: see for example R v. MOD ex p Smith [1996] 1 A11 ER 257 at 266g. It is to be noted that the ECtHR decided that the court was wrong to set the threshold so high (see Smith v. UK (1999) 19 EHRR 493). The ECtHR was of course applying the ECHR which was not incorporated into our law by the Human Rights Act at that time.

48. I think that the intensity of review will generally require careful consideration whether the decision making body has indeed had regard to all material factors. In R(Daly) v. Home Secretary [2001] 2 AC 532, Lord Steyn observed in paragraph 27 on p547, that there was an overlap between the traditional grounds of review and the approach of proportionality but that 'most cases would be decided in the same way'. But the doctrine of proportionality will require a somewhat greater intensity of review. The reviewing court may require an assessment of the balance struck by the decision maker and consideration of the relative weight given to interests and considerations.

49. There is an additional important consideration in these claims which affect my approach and means that the traditional approach or one of proportionality will not produce a different result. The attack is on a regulation approved by both Houses of Parliament. The court has power to pass judgment on such a provision. Thus in R(Javed) v. SSHD [2002] QB 129, the Court of Appeal decided that the exercise by the defendant of the power to designate countries as being those where there was no risk of persecution was subject to review and was indeed quashed on the ground that, notwithstanding it had been approved by Parliament, it was unlawful. As Lord Phillips MR observed:-

> "There is no principle of law which circumscribes the extent to which the court can review an order which has been approved by both Houses of Parliament under the affirmative resolution procedure".

50. Consideration to the circumstances in which such review can succeed was given by the Supreme Court in Bank Mellat v. HM Treasury (No2) [2014] AC 700. In paragraph 44, Lord Sumption emphasised the important consideration that:-

> "….when a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the court will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This applies with special force to legislative instruments founded on consideration of general policy."

It is clear from decisions such as R v. SS for Local Government ex p Nottinghamshire CC [1986] AC 24 that public finance is a particularly, as it was put by Sedley LJ in R(Bapio) v. SSHD [2007] EWCA (Civ 1)39, inept subject for judicial scrutiny, albeit such scrutiny is not to be ruled out. Mr Sheldon has also drawn attention to observations of Laws LJ in R(Miranda) v. SSHD [2014] 1 WLR 3140 in describing the 'difficulty in distinguishing [judicial consideration of fair balance] from a political question to be decided by the elected arm of government'. It seems to me that I must be equally circumspect in applying proportionality or irrationality however intense the review should be.

51. Mr Grayling's cited remarks to Parliament effectively express the need for a simple test to be readily understood. This can be referred to as a bright line test. In R(Tigere) v. Secretary of State for Business, Innovation and Skills [2015] 1 WLR 3820, the Supreme Court by a majority decided that, because neither the Secretary of State nor Parliament had applied their minds to the issues relied on by the claimant, the material decision was unlawful albeit it had been approved by Parliament. It concerned a rule which precluded from the right to receive a student loan one who had not been settled, namely having indefinite leave to remain, for at least 3 years before the commencement of the university course in question. Lady Hale considered the appropriateness of a bright line rule. In paragraphs 36 and 37 she said:-

> "36. But even if there is no sufficient rational connection between the aim and the rule, is the Secretary of State nevertheless justified in adopting a "bright line" rule which enables those administering the scheme quickly and easily to identify those who qualify? The Strasbourg jurisprudence is not altogether clear on this question. On the one hand, it tends to disapprove of a "blanket" exclusionary rule, such as that on prisoners' voting (*Hirst v United Kingdom (No 2)* (2005) 42 EHRR 41), or a "blanket" inclusionary rule, such as that governing the retention of DNA profiles (*S and Marper v United Kingdom* (2009) 48 EHRR 50). On the other hand, it recognises that sometimes lines have to be drawn, even though there may be hard cases which sit just on the wrong side of it (see, for example, *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21). The need for bright line rules in administering social security schemes has been recognised domestically, for example in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311. Nevertheless, it was the absence of any possibility of taking the particular circumstances of the case into account which led to the finding of a violation in *Ponomaryov* (para 62).

> 37. The issue is therefore two-fold. First, even if a bright line rule is justified in the particular context, the particular bright line rule chosen has itself to be rationally connected to the aim and a proportionate way of achieving it: see, for example, *R (T) v Chief Constable of Greater Manchester Police (Liberty intervening)* [2014] UKSC 35, [2015] AC 49. Secondly, however, it is one thing to have an *inclusionary* bright line rule which defines all those who definitely should be included. This has all the advantages of simplicity, clarity and ease of administration which are claimed for such rules. It is quite another thing to have an *exclusionary* bright line rule, which allows for no discretion to consider unusual cases falling the wrong side of the line but equally deserving. Hitherto the evidence and discussion in this case has tended to focus on whether there should be a bright-line rule or a wholly individualised system. There are obvious intermediate options, such as a more properly tailored bright line rule, with or without the possibility of making exceptions for particularly strong cases which fall outside it. There are plenty of precedents for such an approach, including in immigration control."

52. I can well understand the need for a clear indication of when the cap should apply and to whom. An element of discretion to meet particular cases would inevitably be difficult to apply and would be likely to lead to expensive and time consuming contests. Mr Sheldon criticises the claimants for not recognising that couples where one is the carer to whom the CA is granted are in a different position from individuals. It seems to me that a bright line could easily be drawn so that individuals, whether with or without children to care for, are treated differently from couples. The question on the common law unlawfulness contention is whether the inclusion of individual recipients of CA is lawful and that does not depend on whether the bright line could have been drawn differently but whether as drawn it is lawful.

53. That a policy may produce hardship in individual cases is not a good reason to consider it to be unlawful. That it has produced hardship there can be no doubt. It may be said that these claims demonstrate a greater degree of hardship than might reasonably have been expected, but it is clear from the evidence obtained from Carers UK that they are by no means unique and that because of the hardship produced by the cap, carers have had to cease caring. But the incidence of greater hardship than was anticipated does not render the regulations unlawful.

54. My mind has fluctuated in considering the claim based on common law unlawfulness. I have no doubt that the objectives in terms of saving of public money and getting those in receipt of benefits into work is not working as it should since the likely result in many cases has been to require the disabled person to be cared for by other than unpaid family members. In addition, it is important to bear in mind that a minimum of 35 hours does not mean that the hours of care do not have to exceed 35 hours, thus making obtaining of employment that much more difficult and in some cases impossible. These claims demonstrate the real difficulties in obtaining employment and the other ways suggested of reducing costs are often impractical and, insofar as they rely on other public funding, inconsistent with the policy behind the benefit cap.

55. I have to recognise the caution I must exercise in deciding that a measure which has been approved by both Houses of Parliament is unlawful whether because it is disproportionate or unreasonable. While it may be that every possible detail thrown up by these claims was not directly put to Parliament, it did have knowledge of the

material matters. The review is directed at the defendant and it was his decision as approved by Parliament which has to be considered. That decision was based on political objectives but had regard to material matters. I cannot properly apply my own views, albeit it must be clear that I am not happy with this legislation.

56. In the circumstances, I am not persuaded that I should declare the regulations to be unlawful. I do think, however, that consideration should be given to whether there should be an amendment which does exempt at least individual family carers such as these claimants since these are very few and the cost to public funds if the cap is to be maintained is likely to outweigh to a significant extent the cost of granting the exemption.

57. I must now consider the contention that the cap on individuals such as the claimants is discriminatory and so contrary to Article 14 of the ECHR. The claimants submit that the regulations discriminate both against the carers and those for whom they provide care. The intervener focuses on the impact on the disabled for which the care is provided.

58. The correct approach to Article 14 discrimination has been stated by the ECtHR. This in Carson v. UK (2010) 51 EHRR 13 at paragraph 61, the court said:-

> "The Court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of Art.14. Moreover, in order for an issue to arise under Art 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised".

The Court goes on to recognise the wide margin of appreciation accorded to a State when it comes to general measures of economic or social strategy. It also makes the point that any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need.

59. In considering discrimination under Article 14, it is not necessary to go through what has been described as the somewhat arid exercise of finding comparators. The primary question is whether there is a difference in treatment between those in analogous or similar situations. In Thlimmenos v. Greece (2001) 31 EHRR 15, the applicant, a Jehovah's witness who had because of his religious beliefs been convicted of failing to serve in the armed forces, complained that the rules governing access to the profession he wished to pursue did not differentiate between convictions for offences committed exclusively because of religious beliefs and other offences. In paragraph 3(g) the Court observed:-

> "The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights

> guaranteed by the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".

60. This extension of the ambit of Article 14 has been described as Thlimmenos discrimination. But in R(MA) v. SSWP [2014] PTSR 584, Lord Dyson stated that there was little if any difference between indirect and Thlimmenos discrimination because, when analysing the extent of justification required, it was the substance of the discrimination that mattered not its form. I should say, as I think should be obvious, that the discrimination relied on is indirect, as was the case in SG.

61. Mr Sheldon submits that there is no discrimination on the ground of disability since the seriously disabled are granted DLA and the effects of the cap on their carers does not discriminate against them. In short, he submits that the carers are not disabled and so cannot say that they have been discriminated against on the basis of their disability. But, the claimants submit, it is not necessary that they are disabled. Any difference of treatment relating to carers for the disabled is, it is submitted, clearly concerned with and so attributable to disability.

62. Reliance is placed by the claimants on Bah v. UK (2012) 54 EHRR 21. The application was by a Sierra Leonean national who was unable, when made homeless, to obtain housing from a local authority because her son, who meant she was in priority need, was allowed to remain in the UK provided he had no recourse to public funds. The Court decided that the applicant's son's status could make the restrictions on the applicant discriminatory on the ground of nationality, but decided, particularly because she voluntarily chose to have him join her in the UK, that the discrimination was justified. Mr Sheldon submits that a mere voluntary association with a disabled person cannot constitute a status which amounts to discrimination within Article 14.

63. It is, I think, more helpful to consider whether there is discrimination against the disabled. It is, as I have already considered, a result of the cap that a significant number of those who are at present cared for in what can broadly be regarded as a family context are unable to have that care continue. The existence or the level of care provided by carers will be affected and the disabled for whom they care will lose to a greater or lesser extent their care. This will inevitably have an adverse effect on the disabled since they will no longer receive care from the family member or relation in whom they trust. The concerns expressed by the second claimant have general application as Ms Herklot's evidence makes clear. For many it matters deeply that they are cared for by a family member. Thus there is adverse treatment since, although care can be provided by others, the loss of the trusted carer can be devastating.

64. In Mathieson v. SSWP [2015] 1 WLR 1250 the Supreme Court had to consider a claim that the suspension of the claimant's DLA when he, a child, was in hospital for more than 84 days breached his right not to be discriminated against. Following the claimant's death, his father was permitted to take over the claim. It was decided that he had a status falling within the grounds of discrimination prohibited by Article 14. The difference depended on the severity of the disabled child's disability. This required hospital in-patient treatment for more than 84 days, which was the cut off point for the DLA, although the parents' expenses and their attendance on and so assistance of him in hospital continued. The analogy here is that the disabled being

cared for by a family member who is regarded as essential and in whom trust is placed differs from the disabled who is not in that position. It is in my view an analogy which is appropriate. Mr Sheldon complains that the claimants have not formally in their pleadings raised the status point. He has had ample opportunity to deal with it and I see no reason to exclude it.

65. I am satisfied that there is indirect discrimination and it matters not whether it is described as such or Thlimmenos discrimination. The question therefore is whether it is objectively justifiable. In cases such as these of indirect discrimination what must be justified is the policy or lack of exceptions to it which produces the discrimination. There can be no doubt that the policy has a legitimate aim. So much is clear from SG. Thus the question is whether it bears a reasonable relationship of proportionality to that aim.

66. In considering this issue, it is noteworthy that nowhere in the impact assessments or in what was put before Parliament was the effect on the disabled of loss of family carers raised. It in my view should have been since it ought to have been apparent that the impact of a possible loss of a trusted family carer could be profound. In SG the differential treatment of men and women was conceded. There is no such concession here in relation to the differential treatment on the disabled cared for by family members and other disabled. But, as I have indicated, that differential treatment exists and should have been appreciated. Nevertheless, the difference may be justified if it is shown to maintain the necessary reasonable relationship of proportionality.

67. The test to be applied has four stages. First, is the objective sufficiently important to justify an adverse impact? Second, is it rationally connected with the objective? Third, could a measure with a lesser adverse impact on the disadvantaged group have been used? Fourth, having regard to those matters, has a fair balance been struck between the interests of the community and the rights of those with a protected characteristic?

68. In the context of State benefits, the normally strict level of scrutiny of justification gives way to a test which respects the Governments' policy choices unless they can be shown to be manifestly without reasonable foundation (MWRF). That was the test applied by the Supreme Court in SG. In Humphreys v. HMRC [2012] 1 WLR 1545, consideration was given by the Supreme Court to the application of the MWRF test. That case concerned a claim that the basis on which child tax credit was payable was discriminatory against men in that it was payable to the main carer who would normally be the mother. It was accepted that there was indirect discrimination. The issue was whether there was objective justification.

69. The judgment of the court was given by Lady Hale. She made the point that the MWRF test did not mean that the justification should not be given careful scrutiny. As is, I think, obvious, the need for careful scrutiny is the more important where vulnerable persons are, as in this case, affected. And, as Lord Reed observed in SG (paragraph 93), the determination of controversial issues of social and economic policy is pre-eminently the function of the democratically elected institutions. But this will not apply in its full rigour unless the particular discriminatory effect has been considered. Here it has not.

70. Mr Squires submits that the MWRF test does not apply to the fourth stage of justification. He relies on the decision of the Supreme Court in Re Medical Costs for

Asbestos Diseases [2015] AC 1016. That case concerned the power of the Welsh Assembly to legislate to recover costs incurred by NHS Wales in treating those suffering from asbestos related diseases from the insurers. This included inter alia consideration of whether the interference with the insurers' rights under AIPI was proportionate. It is not directly applicable and cannot override the clear decisions in both SG and Humphreys that the MWRF test is applicable.

71. Since I am satisfied that the MWRF test is not met in relation to the affected disabled persons, I do not need to decide whether the carers themselves are to be regarded as the subject of discrimination. But I believe that they do have status following the Mathieson approach.

72. The claimants have also prayed in aid the Convention on the Rights of Persons with Disabilities (CPRD). If material, it is clear from a number of ECtHR decisions that it can be taken into account, just as the Convention on the Rights of the Child could be in SG. The CPRD is obviously potentially relevant. But I do not think that in the circumstances of these claims it adds anything of value. It is in any event not necessary for me to take it into account.

73. I am conscious that I have not in this judgment referred to many of the number of authorities put before me or dealt in detail with all the arguments. I have considered them all but I see no need to lengthen this already over long judgment.

74. The result is that in my judgment the failure to exempt at least individual family carers is not lawful because it amounts to indirect discrimination which is not objectively justifiable.

75. I would only add that whether or not the defendant accepts my decision reconsideration will I hope be given to whether the present regulatory regime is appropriate having regard to the hardship it can and does produce and the lack of real benefit to the State in terms of the objectives of the benefit cap. As I have said, a bright line approach is available by simply exempting those single recipients of CA who provide family care.