Article 14 ECHR discrimination challenges to social welfare measures: the second benefit cap case in the Supreme Court

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I. Introduction

There are few contexts which raise more difficult questions about the Courts' proper constitutional role, and the proper delineation between the legal and the political, than Article 14 ('A14') European Convention on Human Rights ('ECHR') discrimination challenges to social welfare policies. Here the Courts' established constitutional role as the guardian against discrimination falls to be reconciled with elementary constitutional doctrine that matters of policy - and quintessentially judgments on social and economic policy - are the institutional territory of the democratically accountable Government and Parliament, not the Courts. The tensions arising have been well-illustrated in a series of challenges directed at politically controversial flagship social welfare policies, a number of which have reached the Supreme Court and divided opinion among the Justices on both approach and outcome. This most recent of these is the seven member decision in *R(DA and DS) v Secretary of State for Work and Pensions* (*'DA & DS'*)[1], concerning a challenge to the revised benefit cap in reliance on A14 read with Article 8 ('A8') and/or Article 1 of the First Protocol ('A1P1').[2]

This paper looks at the Supreme Court's decision in *DA & DS*, and, having identified its key holdings, focuses on just one of the many interesting issues arising: the guidance given on the applicable manifestly without reasonable foundation ('MWRF') test used to determine proportionality of *prima* discriminatory measures in the present context. I begin with an introduction to A14 and when it will be engaged in the social welfare context (Section II), before turning to the *DA & DS* case (Section III), I then consider the correct understanding and implications of what was said in *DA and DS* about the MWRF test, including in light of the very recent decision of the Court of Appeal in *Langford v Secretary of Defence* [2019] EWCA Civ 1271 (Section IV), before offering some brief concluding observations (Section V).

II. Engagement of A14 in the social welfare context

In all cases, A14 raises four interlocking and overlapping issues: (1) Do the circumstances "fall within the ambit" of one or more of the Convention rights? (2) Has there been a difference of treatment between two persons who are in an analogous situation? (3) Is that difference of treatment on the ground of one of the characteristics

[1] [2019] UKSC 2, [2019] 1 WLR 3289

[2] I have been instructed by the Equality and Human Rights Commission ('EHRC') as junior counsel in a number of the A14 discrimination cases discussed below, including *Carmichael* (the bedroom tax case) *SC* (limit on child tact credit for first two children in family) and *DA and DS* (revised benefit cap). I was junior counsel for the claimant in *Tigere* (student loan eligibility) and in the recent post-*DA and DS* case of *Langford* (disentitlement of unmarried adult surviving dependant claimants on grounds of a moribund marriage to a third party under the armed forces compensation scheme).

listed or "other status"? and (4) Is there an objective justification for that difference in treatment?

A1P1, comprising a bundle of rights concerning rights to enjoyment of property, places no restriction on a state's freedom to decide whether or not to have in place any form of social security scheme or to choose the type or amount of benefits to provide under any such scheme. However, pursuant to A14 (read with A1P1), where legislation provides for the payment *as of right* of a relevant benefit, the State must provide objective justification for any differential treatment on grounds of protected status arising in the manner entitlements are provided.

In its well-known admissibility decision in *Stec v United Kingdom* (2005) 41 EHRR SE 295 the Grand Chamber of the European Court of Human Rights ('ECtHR') took the significant step of holding that A1P1 extended to non-contributory benefits, influenced (among other things) by the importance of such social security benefits to vulnerable individuals in a modern, democratic State (§51).The broadening of the reach of A14 (read with A1P1) was however counter-balanced in the Grand Chamber's judgment on the merits ((2006) 43 EHRR 1017) by the adoption of the manifestly without reasonable foundation test, lifted from the pure A1P1 context. The Court explained the rationale for this at §52:

> "…a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy … Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (ibid.)."

It can immediately be seen that this leaves open the approach that a domestic Court can and should take to assessing proportionality under its own constitutional arrangements (i.e. within this broad margin of appreciation afforded by the supra-national Court). Per Lord Mance in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016 at §54: "*At the domestic level, the margin of appreciation is not applicable, …The fact that a measure is within a national legislature's margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level …*"

What can (more or less loosely) be termed social welfare measures may also fall within the ambit of *other* Convention rights:

- The right to respect for family life under A8. In *In re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 425, concerning a restriction on widowed parent's allowance to unmarried partnerships, the Supreme Court applied ECtHR case law to the effect that the notion of family life "*not only includes dimensions of purely social moral or cultural nature but also encompasses material interests*" (§§18 and 65). The Court held that "*…securing the life of children within their families is among the principal values contained in respect for family life. There is no need for any adverse impact other than the denial of the benefit in question*": §22 and 70. As will be seen,

in *DA and DS* the Supreme Court held that the effect of the benefit cap brought it within the ambit of A8.

- The right to respect for home and private life under A8. For example, in *R(Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550 §49 the application of the so-called bedroom tax to reduce housing benefit entitlement for persons with a transparent medical need for an additional room for their carer was held to violate A14 read with A8.

- The right to education under Article 2 of Protocol 1 ('A2P1'). In *R(Tigere) v Secretary of State for Business Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820 ('*Tigere*'), unaffordable levels of tuition fees impinging on the A2P1 right of access to existing public institutions of education was sufficient to bring student loans within the ambit of A2P1: §§23-24.

- The right of access to the Courts under Article 6. In *R(Public Law Project) v Secretary of State for Justice*, the claimants were successful on an A14 ground in the Divisional Court [2015] 2 All ER 689 §88 albeit that the finding of a breach of A14 was overturned in the Court of Appeal [2016] AC 1531 §45 and this ground was not considered in the Supreme Court which allowed the appeal purely on a *vires* ground: [2016] AC 1531.

Three additional features of the A14 case law are relevant to understanding *DA and DS*. First, the concept of "*other status*" has been given a generous scope.[3] Again, this is accompanied by a counter-balancing device, namely that the more peripheral or debatable a status, the less intrusive will be the Court's scrutiny.[4] Secondly, A14 has been established to encompass what in domestic law is characterised as indirect discrimination.[5] Disparate numerical impacts on grounds of protected status, such as gender, will not be uncommon as a result of general social welfare measures (see e.g. the basis on which women were disproportionately statistically affected by the benefit cap as set out in the first benefit cap, *R(SG and ors) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 §2[6]). Thirdly, as *DA and DS* illustrates, the A14 obligation to secure equal enjoyment of Convention rights extends in the other direction generating a duty to treat persons in significantly different situations for reasons linked to protected status differently unless there is objective and reasonable justification for failing to do so (a principle often traced back to *Thlimmenos v Greece* (2000) 31 EHRR 411 and therefore termed '*Thlimmenos* discrimination').

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[3] e.g. *Clift v United Kingdom* The Times, 21 July 2010, ECtHR; *Matthiesen v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250; *Stott v Secretary of State for Justice* [2018] USC 59, [2018] 3 WLR 1831 and now *DA and DS* (see below)

[4] *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2008] UKHL 63; [2009] AC 311 §5 per Lord Walker

[5] *DH v Czech Republic* (2007) 47 EHRR 59, para 175 §184

[6] 'The majority of non-working households with children are single parent households, and the vast majority of single parents are women (92% in 2011). A statistically higher number of women than men are therefore affected by the cap...'

The overall upshot of the above picture is that a broad spectrum of social welfare benefits are capable of engaging A14 and liable to generate a requirement for justification of status-based differential treatment. This has placed substantial focus on the proper test and standard of review at this final stage of the A14 analysis.

III. DA & DS (the second benefit cap case)

The issue and how it got to the Supreme Court (twice)

The benefit cap (original and revised) provides in broad terms that if a household's total entitlement to specified welfare benefits exceed an annual limit, its entitlement is capped at that limit. The cap is given effect to by reduction in housing benefit payable by local authorities. However, these local authorities have a broad discretion to make this back up in whole or part by temporary and short-term discretionary housing payments ('DHPs') from a cash-limited pot. The cap is disapplied if specified hours of relevant work are completed. The aims of the benefit cap (original and revised) were identified in the litigation as follows:

- to improve the fairness of social security system and increase public confidence in its fairness, particularly in not exceeding the average income of a working family;
- to make fiscal savings; and
- to incentivise parents in non-working families to obtain work.

As already noted, in *R(SG and ors) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 ('*SG*' or 'the first benefit cap case'), the Supreme Court, by a majority of 3:2, rejected an appeal by three lone mothers and three of their children holding that the original cap did not discriminate against women contrary to A14 read with A1P1. Important to understanding the outcome of the first benefit cap litigation is that, while the printed case of the claimants had asserted that the cap fell within the ambit of A8, as Lord Carnwath explained in *DA and DS*, "*the main weight of argument at that time…was directed to A1P1"* (§100) and A8 was treated by the Court as not adding to the claim (see e.g. Lord Carnwath at §100 and see his judgment in the first benefit cap case at §§97-99).[7]

At the conclusion of the hearing, a majority comprising Lord Carnwath, Lady Hale and Lord Kerr would have allowed the appeal, with Lord Carnwath appearing to regard a breach of Article 3 ('A3') of the United Nations Convention on the Rights of the Child ('UNCRC') (requirement that the best interests of the child be treated as a primary consideration in relevant decisions concerning a child) as a decisive factor in the assessment of proportionality: §109. However, in a fascinating twist, the Supreme Court entertained post-hearing submissions on the legal relevance of a breach of A3 UNCRC and Lord Carnwath was persuaded to change his mind on the basis that a required subject-matter link between A3 UNCRC and a A14 claim founded on the A1P1 rights of parents was not present (children having no direct entitlement to benefits under English law): §§130-131.

[7] The other majority justices may have conflated the question of interference with Article 8 and ambit: see per Lord Reed at §79 and Lord Hughes at §138 and comment of Lord Wilson in *DA and DS* at §36.

In its manifesto for the May 2015 general election, the Conservative Party proposed a *revised* benefit cap capping benefits at a lower level, which was duly executed in the Welfare Reform and Work Act 2016. As Lord Wilson, giving the leading judgment in *DA and DS*, accepted, the effect of the cap was to (a) take a family below the poverty line (as judged by generally accepted measures), and (b) that there was striking evidence before the Court of the effects on children of an early life of poverty: §§33-34.

The claimants in *DA* and *DS* were parents and young children in affected lone parent families. They relied on A14, read with both A8 and A1P1, to bring a more specific challenge to the revised cap than that brought in *SG*. The claims were formulated in various ways, but the primary and natural formulation - as identified and dealt with by the Courts at all levels - was a complaint that the claimants, as members of lone parent households with young children[8], were in a significantly different position from relevant comparator groups in terms of their ability to mitigate the impact of the benefit cap through the parent obtaining work. As such, applying the *Thlimmenos* principle, A14 required them to be treated differently by disapplying the cap, absent objective and reasonable justification. Unsurprisingly, given the basis for the division of views in *SG*, an alleged breach of A3 UNCRC was put at the heart of the claimants' case on justification. The Government, with varying degrees of vigour, disputed each and every stage of the A14 analysis, except for engagement of A14 on the limited basis that the benefit cap fell within the ambit of A1P1 due to disproportionate impact on women.

The *DA* claim (which focused on the special position of lone parent families with children under the age of two) succeeded at first instance before Collins J ([2017] PTSR 1266) who held that: (i) there was a breach of A3 UNCRC for reasons essentially the same as those of Lords Carnwath, Lady Hale and Lord Kerr in the first benefit cap case; (ii) that the complaint fell within the ambit of A8 so as to engage the children's rights and satisfy the subject-matter link to A3 UNCRC in a way that the central A1P1 discrimination complaint in *SG* could not do (as already noted, because the entitlement to the benefits was the parents not the children's); and (iii) that there was a persuasive albeit not strictly binding majority view in the Supreme Court in *SG* that this combination rendered the measure MWRF. The Court of Appeal by a majority (Sir Patrick Elias and Sir Brian Levinson, McCombe LJ dissenting) reversed this decision, but notably were unanimous that the Judge had been entitled to find a breach of A3 UNCRC. The majority's analysis, found in Sir Patrick's judgment, is as Lord Wilson observed complex. Since it has been substantially overtaken by the Supreme Court decision, it will not be addressed in this paper for reasons of brevity.

The *DS* case (concerning single parent households with slightly older young children) reached the Supreme Court by way of leapfrog certificate, following a summary High

[8] The other statuses relied on were being: (a) a lone parent with a child under two; (b) a child aged under two with a lone parent; (c) lone parent with a child under five; and (d) a child aged under give with a lone parent: §§14-15.

Court decision ([2018] EWHC 698 Admin) rejecting the claim by agreement between the parties on the basis of the Court of Appeal's decision in *DA*.

The second benefit cap case in the Supreme Court

In the Supreme Court, the Justices again divided on both approach and outcome. On outcome, a majority (comprising Lord Wilson, Lord Carnwath, Lord Hodge and Lord Hughes), rejected the appeal with Lady Hale and Lord Kerr dissenting (so a majority of 5:2). In terms of reasoning, while Lord Wilson gave the leading judgment and his approach is likely to be treated as authoritative in many respects, a lack of explicit agreement of a majority of the Court with some of his reasoning and differences of emphasis in the concurring judgments potentially leaves a number of issues unresolved.[9]

(i) Ambit of A8

Lord Wilson gave short shrift to the suggestion that the cap did not fall within the ambit of A8, whatever its effect in an individual case: §§35-37. There was no dissent from this approach.[10] Read together with *McLaughlin*, this appears to end a chapter of considerably uncertainty around the ambit of Article 8 in the welfare benefits context following *SG* and *Carmichael*. For the time being at least, both a core values[11] and a modalities analysis[12] illuminate whether A8 is engaged. Lord Wilson's analysis treated a broad range of potential effects and reactions to reduction of benefit entitlement to below the poverty line as sufficient to engage A8 regardless whether payment of DHPs were made: §§35 and 37.

(ii) Other status

Lord Wilson recalled that all of the Justices in the recent Supreme Court decision of *Stott v Secretary of State for Justice* [2018] UKSC 59, [2019] 2 All ER 351 (except Lord Carnwath, dissenting) confirmed that the concept of *"other status"* was broad. He considered that the asserted statuses in *DA* and *DS* were *"more obviously composed of personal characteristics"* than those recognised in the prior unanimous Supreme Court

[9] Lord Carnwath (with whom Lord Reed and Lord Hughes agreed) did not explicitly agree with Lord Wilson's reasons and gave a judgment identifying *"differences"* and *"differences of emphasis"*. Lord Hodge (with whom Lord Hughes in turn agreed) did agree with Lord Wilson's reasons, save on the status issue: §124. Lord Hughes can therefore perhaps be taken to agree with Lord Wilson's approach subject to the differences of emphasis drawn out by Lord Carnwath. Lady Hale suggested that there was no difference as to the applicable legal principles between her and Lord Wilson (§132), but differences may be said to emerge from her judgment, as flagged below. Lord Kerr said there was much in Lord Wilson's judgment with which he completely agreed and the areas of disagreement were "*relatively few*" (§158).

[10] e.g. Lord Carnwath explicitly agreed with this conclusion: §102

[11] §35: citing Lord Nicholls dictum from §24 of *M v Secrteray of State for Work and Pensions* [2006] 2 AC 91 that "*The more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will be regarded as within the ambit of the right*". Lady Hale in *McLaughlin* had queried whether this formulation may need to be re-visited.

[12] §36: asking whether "*the subject matter of the disadvantage …constitutes one of the modalities of the exercise of the right guaranteed*".

decision in *Mathiesen v Secretary of State for Work and Pensions* (severely disabled child in need of lengthy in-patient hospital treatment) and *Stott* (prisoner serving an extended determinate sentence imposed pursuant to s.226A of the Criminal Justice Act 2003) such that he "*had no doubt*" that the present statuses sufficed.

However, a majority of the Court[13] did not share his confidence. While a "*relatively broad view of the concept of "status""*[14] was accepted, general reservations were recorded about the sufficiency of the particular statuses relied on and these Justices were only prepared to assume that the statuses sufficed for the purpose of the appeal. Lord Hodge (with Lord Hughes) expressed concerns around the lack of clarity of the entitlement of multifarious groups and sub-groups to challenge national rules on social security benefits that are necessarily expressed in broad terms (§§126-127) and Lord Carnwath (Lords Reed and Hughes agreeing) appears to have taken the view that the concept of "*other status*" may be different in the context of the relatively under-developed *Thlimmenos* principle, and that the lack of ECtHR case law made it difficult to reach a concluded view (§§103-108).

Arguments around what can qualify as an "*other status*" are therefore likely to recur in the present context. There appears to be an emerging tension between the considerations underlying the established generous approach (a proper desire not to prematurely terminate inquiry into potential discrimination impinging on Convention values[15]) and concerns about the broad application of A14 to general welfare benefit measures as sketched out earlier in this paper and touched on by Lords Carnwath and Hodge.

(iii) Formulation of complaints, comparators, and difference of situation

Whilst recognising the inherent difficulty of discrimination law and making polite comments about the parties' unavoidably long and detailed written cases, Lord Wilson expressed considerably frustration that the foregoing examination of the issues by the Courts had been "*unnecessarily cumbersome and complicated*" and extolled the virtue of simplicity of analysis (§§20, 47 and 49). In contrast, Lady Hale – explicitly recalling an entire career of grappling with discrimination law – felt that no apology was required for the inherent complexity of discrimination law, which she felt did not ultimately prevent it lacking sufficient clarity (§132).

Lord Wilson's analysis recognises the potential for different tenable formulations of complaints and comparators. While he found the *Thlimmenos* analysis and the claimants' chosen comparator (all others subject to the cap) to be the natural way to identify the core complaint (§§44-45), he suggested that regard to alternative tenable formulations and comparators was permissible to illuminate the strength or weakness of the complaint when assessing justification (§§43 and 47).

[13] Lord Carnwath, Reed, Hughes and Hodge.
[14] Per Lord Carnwath §108.
[15] See e.g. *Matthiesen* at §22.

Having underscored that only *prima facie* evidence of difference of treatment was required to shift the burden of proof to the Government, Lord Wilson again gave short shrift, on the evidence, to the Government's contention that there was no relevant difference of situation between the relevant cohorts and others caught by the benefit cap (§§50-51). The Court of Appeal in *DA* (McCombe LJ dissenting) had taken a different approach.

Overall, Lord Wilson's analysis sets out a deliberately (more) straightforward approach to the analysis and is no doubt intended to reinforce and entrench the existing A14 guidance in cases such as *AL(Serbia*) (specifically recalled by Lord Wilson at §46) about the non-technical nature of the A14 analysis and associated imperative to avoid "*arid debate*" around the overlapping questions arising under A14.

(iv) Reminder of the focus of the justification question

Noting that this may have been overlooked in Lord Reed's leading judgment in the first benefit cap case, Lord Wilson took the opportunity to restate the principle that what must be justified under A14 is the discriminatory effect of a measure, not the measure itself or the scheme as a whole. So here the Government needed to explain the failure to amend the relevant regulations to make an exemption for the DA and DS cohorts not to justify the benefit cap in general: §§52-54. Lord Carnwath added that, as Sir Patrick Elias had identified in the Court of Appeal, it was also necessary to "*distinguish between the general impact of the cap, which is undoubtedly harsh, but is inherent in the scheme as approved by Parliament, and particular effects on an identifiable group which can properly be the subject of a distinct claim under article 14*" (§120).

(v) Test for justification:

This is one of the most significant parts of the judgment and is the focus of discussion further below. Lord Wilson suggested that "*This court has preceded down two different paths in its search for the proper test by which to assess the justification under article 14 for an economic measure introduced by the democratically empowers arms of the state. In retrospect this duality has been unhelpful. I regret having contributed to it*" (§55).

He then set side by side two citations, which he suggested explained the source of the duality:

> "First, from the judgment of Lord Hope of Craighead in *In re G (Adoption: Unmarried Couple)*[2009] AC 173, para 48:
> "Cases about discrimination in an area of social policy … will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests."
> Second, from the judgment of Lord Reed JSC in the first benefit cap case [2015] 1 WLR 1449:
> "92. Finally, it has been explained many times that the Human Rights Act 1998 entails some adjustment of the respective constitutional roles of the courts,

the executive and the legislature, … [it] does not alter the fact that certain matters are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as matters of that nature have to be considered by the courts when deciding whether executive action or legislation is compatible with Convention rights, that is something which the courts can and do properly take into account, by giving weight to the determination of those matters by the primary decision-maker.

"93. That consideration is relevant to these appeals, since the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. It is therefore necessary for the court to give due weight to the considered assessment made by those institutions."
Lord Reed JSC then completed para 93 by adding "Unless manifestly without reasonable foundation, their assessment should be respected".

At paragraph 59, Lord Wilson stated that:

"I now accept that the weight of authority in our court mandates inquiry into the justification of the adverse effects of rules for entitlement to welfare benefits by reference to whether they are manifestly without reasonable foundation."

And at §65, having expressed regret at expressing himself too widely in *A v Secretary of State for Health* (concerning the refusal to provide free abortion services in Northern Ireland) [2017] 1 WLR 2492 where he had accepted it to be established that the MWRF test generally did not apply to the fourth fair balance stage of the domestic proportionality test, he said:

"…by then there was—and there still remains—clear authority both in the *Humphreys* case [2012] 1 WLR 1545 and in the bedroom tax case [2016] 1 WLR 4550 for the proposition that, at any rate in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it."

In paragraph 66, Lord Wilson briefly commented on how the MWRF test is to be reconciled with the burden on the state to provide justification and suggested that, given the Court's "*proactive role*" in examining justification, it was fanciful that a case would turn on where the burden lay or indeed the difference between unreasonableness and manifest unreasonableness of the foundation of a measure:

"How does the criterion of whether the adverse treatment was manifestly without reasonable foundation fit together with the burden on the state to establish justification, explained in para 50 above? For the phraseology of the criterion demonstrates that it is something for the complainant, rather than for the state, to establish. The rationalisation has to be that, when the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular to a burden of proof, is more theoretical than real. The court will

> proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable."

The correct understanding of this guidance and its implications are considered further below. It has already been the subject of consideration by the Court of Appeal in a judgment handed down on 18 July 2019 in *Langford v Secretary of Defence* [2019] EWCA Civ 1271 (*'Langford'*), in which McCombe LJ (with whom Legatt and Baker LJJ agreed), described this as providing "*a clear practical guide [to lower courts] as to how one should approach the MWRF test in any individual case*" (§50).

(vi) Use of UNCRC/international law in analysis

Lord Wilson confirmed the authoritative status of UNCRC Committee guidance (§§67-60) and the relevance of such international law standards to informing the Court's inquiry into a breach of A14 under the established ECtHR case-law, such as *Neulinger v Switzerland* (2010) 54 EHRR 31. He noted that the problem of the lack of a subject-matter link between the rights in issue and the UNCRC was no longer present since the women complainants were now cast as lone parents and the children as victims in their own right (§74). In these circumstances, both the children's right and lone parents who were asserting indistinguishable interest to their children needed to be construed in light of the UNCRC: §§76-77.

The Government had raised a series of constitutional objections to the use of A3 UNCRC (to the extent not incorporated into domestic law as it was not in the present context) in determining proportionality under A14. It had argued that treating a breach of A3 UNCRC as having determinative effect in assessing proportionality was to substitute a test of breach of A3 for the MWRF test and therefore to override the constitutional balance that the MWRF test reflected; that it was generally constitutionally improper for the Courts to determine questions of construction and compliance with unincorporated provisions of international law; and that the solution was an approach whereby the Government's interpretation of international law/compliance should be accepted by the Courts unless "*untenable*" (even if this approach was contrary to authoritative UN treaty body guidance).[16]

Lord Wilson adopted a variation on a formulation of McCombe LJ in the Court of Appeal in *DA* that "*a foundation for the decision not made in substantial compliance with article 3.1 might well be manifestly unreasonable*" (§78). This formulation summarily rejects much of the Government's case on the use of international law. However, in using the formulation of "*substantial compliance*" and countenancing that a breach of international law only "*might well*" render justification manifestly without reasonable

[16] The Government's case in this respect had been substantially accepted by Mr Justice Ouseley at first instance in *SC v Secretary of State for Work and Pensions (EHRC intervening)* [2018] EWHC 864 (Admin), [2018] 1 WLR 5425 and Ouseley J's analysis was then specifically adopted and relied on by the Government before the Supreme Court. The Court of Appeal, whilst rejecting the appeal, departed from much of Ouseley J's reasoning on this issue in a judgment handed down a few weeks before the decision in *DA and DS*: [2019] EWCA Civ 615.

foundation, the approach appears to allow for treating a breach of A3 UNCRC as less decisive than the judgments of Lord Carnwath, Lady Hale and Lord Kerr in the first benefit cap case might have tended to suggest. Additionally, Lord Wilson directed himself and future lower courts to adopt an institutionally cautious approach, stating that the "*court must impose on itself the discipline not, from its limited perspective, to address whether the Government's evaluation of its impact was questionable; nor whether its assessment of the best interests of young children was unbalanced in favour of perceived long-term advantages for them at the expense of obvious short-term privation.*" (§87). This collectively goes some way in the general direction pressed on the Court by the Government.

Lord Kerr specifically dissented from the qualification in §87 of Lord Wilson's judgment on the Court's role (§§184-185), but welcomed what he discerned as implicit in his judgment, namely that "*the question of whether the Government was in breach of [Art. 3] is pivotal to the issue of proportionality*" (§187).

Having conducted a close examination of the Parliamentary debates regarding the adoption of the revised cap (which had specifically considered whether to exempt lone parents with young children) and the Government's Equality Analysis dated September 2016 which asserted that it was not in the best interests of the child to live in workless households (§§81-86), Lord Wilson ultimately held "*by a narrow margin*" that the refusal to amend the relevant regulations to include an exemption did not breach Article 3.1 of the UNCRC, in either its procedural or substantive dimensions, concluding:

> "…The Parliamentary and other materials to which I have referred demonstrate that it did evaluate the likely impact of the revised cap on lone parents with young children; and it did assess their best interests at a primarily level in its overall consideration. ...." (§87)

Lord Carnwath specifically agreed with this conclusion and stated that his finding in the first benefit cap case pertained to procedural defects on the part of the Government, which he regarded as not present in the present case. Only Lady Hale (§155) and Lord Kerr (§§192-197) dissented.

It is interesting to set Lord Wilson's analysis alongside that of Lady Hale (who it will be recalled stated her agreement with the legal principles that Lord Wilson identified). This is found at §155 as part and parcel of her conclusion that there was a manifest lack of a fair balance violating A14. She appears to conclude that – contrary to Lord Wilson's marginal conclusion the other way - the foregoing evaluation and the balance struck by the cap in respect of the best interests of the child went well beyond the realm of the questionable or unbalanced and into the impermissible:

> "**...** it is not enough for the Government to show that it was aware of the concerns raised by many in and outside Parliament about the effect of the revised benefit cap on the welfare of children in lone parent families. Awareness is not the same as taking the best interests of those children seriously into account. Even taking them into account is not the same as giving them first priority which is an intrinsic part of striking a fair balance where children's rights are concerned….In particular, there is little or no evidence that proper account has

been taken of the risks of psychological harm to very young children if they are separated from their primary carers, or the multiple risks to the health, development and life chances of children living in poverty in their early years. There is little or no evidence that these very real and well-documented risks have been fairly balanced against the much more speculative risks of spending those very early years in a household dependent on welfare benefits—we are talking here of children who are below compulsory school age, whose understanding of where the money to live on comes from will be limited, although of course there may be older children in the same household. Once all the children are of school age, there will be ample incentive for their parents to try and find work outside the home if they can."

It is also interesting to recall the direct primary findings of inherent incompatibility between the cap with the substantive aspect of the best interests of the child made by Lady Hale and Lord Kerr, but also on at least one reading Lord Carnwath, in the first benefit cap case. For example, Lady Hale put the analysis in the following stark terms at §226:

> "It cannot possibly be in the best interests of the children affected by the cap to deprive them of the means to provide them with adequate food, clothing, warmth and housing, the basic necessities of life. It is not enough that children in general, now or in the future, may benefit by a shift in welfare culture. In so far as the Secretary of State relies on this as an answer to article 3.1, he has misdirected himself."
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> (and see Lord Kerr agreeing with this reasoning at §269 and Lord Carnwath at §126[17] ostensibly to similar effect).

I note that such a primary conclusion by the Court is not the end of the A3 UNCRC analysis since it is well-understood that the best interests of the child must be *a* not *the* paramount consideration and, as such, a judgment can be formed that the best interests of the child are outweighed by countervailing factors of sufficient weight. This point in the analysis might be thought to offer the constitutionally most apt point for the Courts to afford latitude to political judgments about the relative weight of the child's best interests and other countervailing factors (including asserted countervailing long-term general interests of children such as relied on in the benefit cap cases). This would allow the Court to protect the integrity of the objective (even if substantially open-texture) international legal concept of the best interests of the child by rejecting strained interpretations[18] that have the effect of side-stepping the

[17] "…The cap has the effect that for the first time some children will lose these benefits, for reasons which have nothing to do with their own needs, but are related solely to the circumstances of their parents. It is difficult to see how this result can be said to be consistent with the best interests of the children concerned, or in particular with the first and seventh principles in *Zoumbas* [2013] 1 WLR 3690."

[18] For example, in the present case UNCRC Committee guidance in General Comment No. 14 is explicit in rejecting what it describes as "negative conceptions" of the rights of the child i.e. interpretations that compromise certain rights of the child: ""The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child. The Committee has already pointed out that "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention." It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in

important justificatory burden imposed by A3 UNCRC, whilst at the same time allowing the Court to, where appropriate, respect the proper constitutional remit of the democratically accountable arms of the State.

(vii) Result and post-script

Lord Wilson ultimately concluded:

> "I am …driven to conclude that the Government's decision to treat the appellant cohorts similarly to all others subjected to the revised cap was not manifestly without reasonable foundation. … The appellants have not entered any substantial challenge to the Government's belief that there are better long-term outcomes for children who live in households in which an adult works. The belief may not represent the surest foundation for the similarity of treatment in relation to the cap; but it is a reasonable foundation, in particular when accompanied by provision for DHPs which are intended on a bespoke basis to address, and which on the evidence are just about adequate in addressing, particular hardship which the similarity of treatment may cause." (emphasis added)

He however entered an unusual post-script to his judgement to make clear that the claims "*were rightly brought*" and had "*been of such weight as to attract this court's most careful and sympathetic consideration*" (as well as two "*powerful*" dissents). He noted that the Work and Pensions Committee of the House of Commons had recently published its report on "The Benefit Cap", 24th Report of Session 2017–19, (HC 1477) calling on the Government to urgently conduct a full audit of the policy behind the benefit cap; to reconsider the limits at which benefits are capped; and in particular to disapply the cap to those who, by reference to the conditions attached to the receipt of income support, are not yet expected to look for work. While Lord Wilson identified this development as being relevant to the relief that the Court might have granted had the appeal been allowed, the overall impression is that he also did not wishing the Court's judgment to be misused within the political sphere to undermine the Committee's concerns and recommendation.

IV. Proportionality and the MWRF test

I focus in this section on just one of the interesting issues that emerged from the second benefit cap litigation, namely Lord Wilson's guidance on the application of the manifestly without reasonable foundation ('MWRF') test. The key question I ask is how this fits with the well-known four domestic proportionality test in the present context.

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the "child's best interests" and no right could be compromised by a negative interpretation of the child's best interests." (§4). As Lord Kerr pointed out the affected children's rights to social security benefits and to an adequate standard of living in arts 26 and 27 UNCRC were clearly engaged: §193.

(a) The domestic proportionality test

In *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] UKSC 39 Lord Sumption explained at §20 the interrelationship between rationality and proportionality review and how the distinct four-stage domestic test had emerged in a passage that bears setting out in its entirety:

> "The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case law, notably *R (Daly) v Secretary of State for the Home Department*[2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247, paras 57–59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill) and *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective. Lord Reed JSC, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68–76) which I would disagree with." (emphasised of the identification of the four-stage test added)

Prior to the second benefit cap litigation, the four-stage test had been applied by the Supreme Court alongside the MWRF test in a number of cases, including A14 discrimination cases. See e.g. the unanimous Supreme Court decision *In re Brewster* [2017] 1 WLR 519 at §66 (complaint of violation of Article 14 with A1P1); *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016 (freestanding A1P1 complaint); and *A v Secretary of State for Health* [2017] 1 WLR 2492 (complaint of violation of Article 14 read with Article 8).

However, in other cases the Supreme Court had merely asked and answered whether the difference of treatment was manifestly without reasonable foundation: e.g. *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545 (complaint of violation of Article 14 with A1P1[19]) and *Carmichael* [2016] 1 WLR 4550 (complaint of violation of Article 14 with Article 8 and/or A1P1 arising from application of the so-called bedroom tax). These judgments could either be read as short-hand reasoning for finding compliance with the underlying proportionality questions judged to the MWRF standard or that the four-stage test was inapplicable.

In each category the approach adopted was not accompanied by specific reasoning on the point. This includes the 7 Judge case of *Carmichael*, in which the approach in *Humphreys* was specifically affirmed. As Lady Hale explained in *DA and DS* at §151, in *Carmichael* a wholesale attack on the application of the MWRF test to suspect status discrimination in social security cases was (unsuccessfully) mounted, but the court did not explicitly address the more nuanced question of the relationship between the MWRF test and the four domestic proportionality questions.

This picture was yet further complicated by the Supreme Court decision *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016, - a freestanding A1P1 violation case rather than an A14 case – in which Lord Mance applied the four-stage domestic proportionality test alongside the MWRF test and held that the MWRF test had no application to the fourth stage of the proportionality test in that context:

> "I conclude that there is Strasbourg authority testing the aim and the public interest by asking whether it was manifestly unreasonable, but the approach in Strasbourg to at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of "manifest unreasonableness". In this connection, it is important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker." (§52)

In *A v Secretary of State for Health* (concerning the refusal to provide free abortion services in Northern Ireland) (*'A'*) [2017] 1 WLR 2492, Lord Wilson applied Lord Mance's conclusion in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* to an A14 claim (within the ambit of Article 8) and phrased himself so as to give the impression that this proposition was applicable generally:

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[19] unsuccessful challenge to rule providing for payment of Child Tax Credit to primary household and preventing splitting so as to disadvantage minority- carers who were disproportionately numerically men.

> "… it is now clear that, while this criterion may sometimes be apt to the process of answering the first question, and perhaps also the second and third questions, it is irrelevant to the question of fair balance, which, while free to attach weight to the fact that the measure is the product of legislative choice, the court must answer for itself: see *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*[2015] AC 1016, para 46, Lord Mance JSC." (§33)

(b) The unambiguous (narrow) holding in DA and DS

In the second benefit cap litigation, the claimants (supported by the EHRC) had relied on Lord Wilson's dictum in *A* for the dis-application of MWRF to the fourth fair balance stage of the domestic proportionality test. However, as we have seen, Lord Wilson in effect held that – while "*sound in law*" in the context he applied it (discriminatory denial of access to abortion services in violation of Article 14 read with Article 8), the breadth of his dictum in *A* so as to appear to extend to the welfare benefit context was contrary to *Humphreys* and *Carmichael*. The only dissenter on this point was Lord Kerr (§177), although Lady Hale thought there might be a need to revisit this issue in future (§152).

At a minimum it is therefore now clear that - in the welfare benefit context - the MWRF test applies to all parts of the assessment of proportionality. However, in other contexts in which the MWRF test applies, such as the deprivation of property at issue in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*, it will remain the case that this test does not apply to the fourth (and possibly third) proportionality questions

Leaving aside the desirability of such a bifurcation in approach (a point returned to below), there seems to be force in Lady Hale's critique that it is difficult to discern a principled basis for adopting a more intrusive approach to insurance companies challenging interferences with their property rights (as in the *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* and before that in *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868) than discrimination in children's enjoyment of family life such as in the benefit cap litigation (§150). However, the point would appear to be decisively settled for the time being.

It might also be thought that the extent of the conceptual difference between the Court (a) deciding the fair balance test for itself whilst attaching proper weight to judgments made within the institutional competence of the primary decision-maker as it must still do[20], and (b) only upsetting a judgment on fair balance if shown to be manifestly lacking in reasonable foundation is open to question. This is all the more so when it is clear that (i) the intensity of the MWRF test itself responds to the circumstances of the case and can call for lesser or greater scrutiny (*Stec v United Kingdom* (2006) 43 EHRR 1017 at §52), and (ii) in particular, an absence of evaluation of relevant matters by the primary decision-maker will enhance the proper scrutiny under the MWRF test (e.g.

[20] *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* at §54 " "*…domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis*"

In re Brewster [2017] 1 WLR 519 §§50-52 and 64). Nevertheless, the Courts and parties have plainly attributed significance to the distinction. The MWRF test is a label containing a strong constitutional health warning which it is reasonable to suspect is capable of making a practical difference to a lower Court's willingness to reject a Defendant Government body's case on justification in the present context.

(c) The less clear (wider) holding that the MWRF test ousts the four-stage domestic proportionality test altogether

When Lord Wilson said that "*the sole question is whether it is manifestly without reasonable foundation*", did he (or a majority of the Court) go further than the above unambiguous narrow holding and rule that the four stage domestic proportionality test has no application? Lord Wilson's language in isolation is capable of being read in this way and this could be said to be reinforced by the fact that he nowhere set out and applied the four domestic proportionality questions. But substantial doubt seems, to me at least, to arise for at least three reasons.

First, the relevant passage of his judgment is immediately preceded by discussion of the excessive breadth of his dictum in *A* regarding the dis-application of the MWRF standard to the fourth stage of the proportionality test (§64) so as, on one reading, to give an impression of being intended to correcting this. Secondly, none of the other majority Justices specifically addressed the relevance of the domestic proportionality questions (see Lord Carnwath at §110-118 and Lord Hodge at §125). However, at §118, Lord Carnwath did specifically address Lord Kerr's dissent on the narrower point which it would only be relevant to address if the four proportionality questions remained in play. Thirdly, the two dissenting judgments appear to proceed on the understanding that Lord Wilson only went as far as the narrower holding. Lady Hale - the author of the judgment in the leading case of *Humphreys*, who regarded herself as agreeing with Lord Wilson in *DA and DS* on the applicable legal principles (§132) and did not dissent from the application of the MWRF test to all parts of the assessment of proportionality (§152) - can be seen to have applied the domestic proportionality questions as distilled in *Bank Mellat No.2* (§§153-157). And Lord Kerr at §§172-177 appears to have understood the question for the Court to be "*has the [MWRF] formulation any part to play in the answering of any of [the domestic proportionality] questions*" (§173). Given that he saw the differences of approach between himself and Lord Wilson to be "*relatively few*" (§158) and otherwise addressed such differences, one would have expected him to explicitly address the general disapplication of the domestic proportionality test, which he applied (§172), if he understood Lord Wilson to have taken this step in his judgment.

However, in the very recent judgment for the Court of Appeal in *Langford*[21] handed down on 17 July 2019, Lord Justice McCombe (with whom Leggatt and Baker LJJ agreed) understood that Lord Wilson did reach the wider holding and specifically

[21] a case concerning an A14 (with A1P1) challenge to an exclusionary rule in a scheme to compensate *inter alia* bereaved unmarried partners of armed forces service members. which excluded eligibility where the partner was in an undissolved marriage to a third party even if this was moribund. The exclusionary rule is widely replicated across public sector pension and compensation schemes.

rejected the Appellant's submission that what the "*MWRF test meant was that that the [MWRF] criterion had to be applied to each of the four stages of the conventional justification/proportionality test*": §52.

(d) Practical effect and desirability of the wider holding

In *Langford,* having identified the sole test to be the MWRF test, McCombe LJ's assessment that there was a manifest absence of foundation for the discrimination in issue can be seen to have had regard to considerations corresponding to *inter alia* the third domestic proportionality questions. For example, he reasoned:

> "…I find it impossible to accept that the scheme has to be protected by such a broad exclusionary rule when such protection could be provided by a rule requiring evidence from a claimant that any relevant spouse is not a member of such a scheme. In other words, the rule seems to be… "a sledgehammer to crack a nut" (§64)

This seems entirely unsurprisingly. Regardless of the latitude which a Court properly accords a primary decision-maker in scrutinising a discriminatory measure, the fundamental inquiry surely remains whether the differential treatment in issue is capable of justification as proportionate to the legitimate aim or aims relied upon, albeit that put in the parlance of the MWRF test, the question becomes whether the differential treatment in issue is not manifestly disproportionate to the legitimate aim pursued (see *R (SC and others) v Secretary of State for Work and Pensions and others* [2019] EWCA Civ 615 (16 April 2019) per Leggatt LJ at §89 identifying this as the approach of the Supreme Court in *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250). Logically inherent within the concept of proportionality are surely the overlapping considerations of rational connection between legitimate aim and rights-infringing measure, existence of less intrusive means and ultimately fair balance between individual rights and countervailing public interests i.e. the domestic proportionality questions.

This begs the question of whether it is a desirable development to collapse the inquiry into a composite question that obscures the relevant considerations against which the question of a manifest absence of reasonable foundation is properly assessed. A comparison with relatively recent developments in rationality review under domestic public law is instructive here (especially given the interlocking relationship between rationality and proportionality review illuminated by Lord Sumption in the above passage from *Bank Mellat No. 2*). In taking steps to align irrational review with features of the assessment of proportionality under domestic public law, the Supreme Court has identified (by reference to a powerful body of academic literature) that a central benefit of the terminology of proportionality is to "*introduce 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*": *Kennedy v Charity Commission* [2014] UKSC 20 at §54 per Lord Mance.

If it is right that the four proportionality questions remain relevant under a composite MWRF test as I have suggested is surely the case, it could well be said that the loss of structure and transparency in the Court's analysis from collapsing the test to a single

question is a retrograde and unnecessary development. This is more not less so in the constitutionally sensitive context of challenges to welfare benefit measures in which clarity and transparency of judicial reasoning might be thought to be at a special premium. As Lord Mance went onto point out in the same passage from *Kennedy*, asking the questions of proportionality does not impose a particular standard of scrutiny or preclude respecting relevant judgments of the primary decision-maker. In the present context, this is even clearer, since on the unambiguous narrow holding in *DA and DS*, each of the domestic proportionality questions must be answered applying a MWRF standard of review.

The case for retaining explicit consideration of the structured four-stage proportionality test is reinforced by its continued mutual coexistence with the MWRF test in other A14 contexts (e.g. access to free abortion services in the *A case* or public sector pension schemes in *Brewster*) and under A1P1 (e.g. *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868 and *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*) i.e. in contexts raising similar macro social and economic issues to the welfare benefit context. It might be thought that such distinctions do not promote the overall coherence of the law and are liable to provoke arid points of legal debate contrary to the overall thrust of the A14 domestic case law including *DA and DS*.[22]

(e) Burden of proof, proactive enquiry and manifest unreasonableness

As set out above, Lord Wilson explained at §66 that, in practical terms, while the burden of proof under the MWRF test appears to be on a complainant, the relevance of this is in reality more theoretical than real given the Court's "*proactive role*" in scrutinising the reasonableness of proffered justification. He moreover appears to downplay the practical significance of the tautological formulation of *manifest* lack of reasonable foundation observing that it was:

> "fanciful to contemplate [a Court] concluding that, although the state had failed to persuade the court that [its justification] was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable"

In *Langford*, we see an early application of this guidance by a Court of Appeal panel with considerable experience of discrimination cases. Lord Justice McCombe (having identified the Court's task in terms of §66 of Lord Wilson's judgment and having found the justifications relied on not to be objectively reasonable on the evidence before the Court), concluded his analysis as follows:

> "On "proactive" examination (as Lord Wilson enjoined), I do not find that the foundation for the clear discrimination in this case is reasonable, and in such circumstances, it appears to me to be indeed "fanciful" to find that Mrs Langford's claim should fail because the discrimination, although unreasonable, it is not "manifestly" so."

[22] Indeed, in *Langford*, while assuming Lord Wilson's guidance to apply, McCombe LJ queried in a footnote whether the armed forces compensation scheme in issue in *Langford* was in fact more properly allied with public pension sector schemes rather than the welfare benefit category at issue in *DA and DS* (§54).

Lord Wilson's guidance in this respect constitutes a welcome deprecation of the difficult concept of an unreasonable but not manifestly unreasonable justification for a discriminatory measure and will, it is hoped, again conduce to a more straightforward analysis. A more fruitful focus is surely not on degrees of unreasonableness but on (i) the underlying relevant constitutional considerations arising from the issue and context calling for greater or lesser scrutiny/respect for relevant primary judgments, and (ii) ultimately whether the justification passes muster as not clearly lacking a reasonable foundation on properly calibrated review.

V. Concluding observations

The application of A14 in the welfare benefit context requires a delicate balancing act. The Court must act as the guardian against discrimination under A14, whilst also respecting the Government and Parliament's pre-eminence in matters of social and economic policy. *DA and DS* has brought greater clarity on certain aspects of the A14 inquiry in this context (ambit, formulation of complaint of differential treatment/*Thlimmenos* discrimination, the relevance of international law and in *certain* respects the application of the MWRF test), but questions around other parts of the A14 analysis in the welfare context remain (in particular, scope of "*other status*" and relationship between the MWRF test and the domestic proportionality questions). Overall, I do not read the approach in *DA and DS* as attempting any major re-balancing between the two competing underlying constitutional imperatives in play.

I have suggested that to the extent that, as the Court of Appeal in *Langford* assumed, Lord Wilson's judgment in *DA and DS* requires the application of a composite test and disapplies the structured four-stage domestic proportionality test, this is a retrograde step in tension with the progressive development of domestic public law rationality review in the other direction. Clarity and transparency of reasoning is more not less important in discharging the Court's constitutional role in the present difficult constitutional territory.

The recognition in *DA and DS* of the impingement of certain social welfare benefit measures on the core values and interests protected by the A8 right to respect for family life (and especially the family life of children) is in keeping with the recognition by the Grand Chamber in *Stec* of the real world importance of social welfare measures to significant sections of modern democratic societies and in turn reinforces the importance of the Court's constitutional role as the guardian against impermissible discrimination in this context. Politically contentious social welfare reform is a context where the impact of a measure on vulnerable affected groups is liable to be overlooked or downplayed within the majoritarian democratic processes without practical and effective recourse for such groups to right this through the democratic process. Lord Hope's justification for the Court's ultimate role in *Re G (Adoption: Unmarried Couples) [2009] AC 173* §48 (cited by Lord Wilson), accordingly remains apposite: "*the more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests*".