Neutral Citation Number: [2018] EWCA Civ 504

Case No: C1/2017/1930

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE MR JUSTICE COLLINS
CO/379/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2018

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LORD JUSTICE McCOMBE
and
SIR PATRICK ELIAS

- -

Between :

THE QUEEN ON THE APPLICATION OF DA and OTHERS	**Respondents**
- and -	
THE SECRETARY OF STATE FOR WORK AND PENSIONS	**Appellant**
- and -	
EQUALITY AND HUMAN RIGHTS COMMISSION	**First Intervener**
- and -	
SHELTER	**Second Intervener**

- -
- -

Mr Clive Sheldon QC and **Mr Simon Pritchard** (instructed by **Government Legal Department**) for the **Appellant**
Mr Ian Wise QC, Ms Caoilfhionn Gallagher QC and **Mr Michael Armitage** (instructed by **Hopkin Murray Beskine**) for the **Respondents**
Ms Helen Mountfield QC and **Mr Raj Desai** (instructed by the **Equality and Human Rights Commission**) for the **First Intervener**
Mr Martin Westgate QC, Ms Shu Shin Lu and **Mr Connor Johnston** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Second Intervener**

Hearing dates: 24, 25 October 2017

- -

Approved Judgment

Sir Patrick Elias :

Introduction

1. By the Welfare Reform Act 2012, the Government introduced a cap on the amount of benefits which, inter alia, all non-working households could receive. This set a limit to the amount of benefits which, but for the cap, would have been received by these households. The impact of the policy was felt most severely by those households with several children living in areas where the cost of housing is high. The reason was that non-working households would typically be receiving housing benefit to help them meet the cost of accommodation, and the rent - and therefore the benefit required to meet it - would necessarily be greater for bigger families requiring larger accommodation, and for those households living in areas where housing costs are higher, notably London. In addition, child benefit is payable for each child (and possibly other child related benefits too) and so the benefit received will increase with the size of the family. Since the cap applies in the same way irrespective of the number of children in the household, it impacts more severely on large families.

2. The cap was initially set at £26,000 per annum. This figure reflected the net median earnings of households in work. Although the cap itself was fixed by primary legislation, the detailed rules implementing the policy were left to the Minister to determine and set out in regulations. There are a number of exemptions from the application of the cap. The material exemption in this case is for households in work. Households are exempted from the cap if, in the case of a single parent household, the parent works for at least 16 hours per week and in the case of a couple, they work between them at least 24 hours per week and one partner works for at least 16 hours.

3. The Government sought to justify the cap on three related grounds of economic and social policy. First, it considered that as a matter of fairness those in work should not on average earn less than non-working households were receiving by way of benefits. It was also thought that if benefits were linked to pay in a fairer and more acceptable way, this would make it less likely that benefit claimants would be stigmatized for taking from the state what might be perceived to be excessive sums of money. Second, the policy was designed to provide an incentive to work. The government considers this to be an important element in its attempt to improve the life prospects for disadvantaged children. It takes the view – and there is much evidence to support this - that the life chances for such children are damaged where they grow up in households where parents have not worked for years and there is no work ethic. For example, they are more likely to have behavioural problems and more likely than children in working households to fail at all stages of their education. In addition, the Government believes that in the longer term the best way to reduce poverty and improve health is work. Third, it was designed to be part of the overall austerity drive to achieve savings in public expenditure considered necessary in the interests of the economic well-being of the country.

4. The majority of non-working households with children are single parent households, and the vast majority of single parents are women. Not surprisingly, therefore, whilst only a relatively small proportion of single parent households overall were caught by the cap, those adversely affected were predominantly households run by single

mothers. The policy therefore gave rise to *prima facie* indirect sex discrimination, that is discrimination which would be unlawful unless the scheme could be justified.

5. There was a challenge to the legality of the regulations implementing the original cap brought by three single mothers and their youngest children. The principal basis of the claim was that there was unlawful sex discrimination contrary to article 14 of the European Convention on Human Rights. It was conceded that article 14 was engaged and the issue turned on justification. In that context it was also argued that given the adverse impact of the cuts on the children of single parent households, the Secretary of State was under a duty to comply with article 3.1 of the United Nations Convention on the Rights of the Child (UNCRC) which provides that "In all actions concerning children … the best interests of the child shall be a primary consideration." The claimants alleged that the Secretary of State had not complied with that duty and that this was material to the question of justification.

6. The challenge failed in the Divisional Court, the Court of Appeal and by a bare majority in the Supreme Court: see *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449. The reasoning in that case is central to this appeal and it is analysed in some detail below.

7. The cap has been further revised by the Welfare Reform and Work Act 2016. This implemented a pledge in the manifesto of the Conservative Party in 2015. By section 8 of that Act the cap has been reduced and is now set at £23,000 for non-working families living in London and £20,000 for those living outside London. Instead of reflecting the net median earning, it represents the wage at the 40% percentile i.e. 60% of households in work will earn more than this and 40% will earn less (although this takes no account of social welfare benefits which many working households receive in addition to their pay). Other features of the scheme have remained essentially the same.

8. One of the reasons for further reducing the benefit limit in this way was the Government's claim, based on research carried out within the department, that the imposition of the cap had successfully encouraged lone parents in workless households to find work. Although the reliability of the statistic has been strongly challenged (in particular by Mr James Harvey, a specialist in microeconomics), the Government claimed that capped households overall were 41% more likely to move into work after a year than uncapped households. Even so, the actual figures are relatively small: this is an increase of 4.7 percentage points from 11% of people who, it is estimated, would have entered work in any event. It is anticipated that additional economic pressures might achieve better results. Another reason was that it was believed that the original cap disproportionately affected families in London. By far the majority of households brought for the first time within the new cap were from outside London.

9. There is now a fresh challenge to the validity of the new regulations. As in *SG*, it is alleged that the regulations as amended discriminate contrary to article 14 of the ECHR. The focus of the challenge is not, however, as far reaching as it was in *SG*. It is not alleged that the scheme discriminates against women because of its effect on single parent households as a group. Rather it is said that the rules unlawfully discriminate against single parents who have children under two years of age (whether the parents are male or female). Unlike in *SG*, it is alleged that there is discrimination

not only against the parents but also the children themselves. The particular claimants are four single mothers and their children under the age of two. (In the case of one of the claimants, DA, she had not in fact given birth when the claim was brought.) Collins J upheld the judicial review challenge relying heavily upon the Supreme Court decision in *SG*. The Secretary of State now appeals against that decision. The judge himself granted permission to appeal.

The relevant legislation

10. The fundamental principle of the benefit cap is described in section 96(2) of the 2012 Act as follows:

> "… applying a benefit cap to welfare benefits means securing that, where a single person's or couple's total entitlement to welfare benefits in respect of the reference period exceeds the relevant amount, their entitlement to welfare benefits in respect of any period of the same duration as the reference period is reduced by an amount up to or equalling the excess."

11. Although primary legislation lays down the broad principle and the amount of the cap, a wide discretion is given to the Secretary of State as to how the policy is to be implemented. Section 96(4) sets out a range of matters which may be covered by the regulations. For example, they include making provision as to which welfare benefits should be subject to the cap, and they may also provide for exceptions to the application of the cap. Both housing benefit and child benefit have been made subject to the cap.

12. The relevant regulations under challenge are the Benefit Cap (Housing Benefit and Universal Credit) Regulations 2016/909. These amend earlier regulations including the Housing Benefit Regulations 2006/213. Regulations 75E and 75F set out exceptions to the application of the cap. They include, for example, those in receipt of a disability allowance or a war pension, and certain carers entitled to a carer's allowance. The Government justifies these exemptions on the basis that these categories have additional needs such that it would be unreasonable to expect them to work. The particular exemption in issue in this case arises where the claimant or partner is eligible to receive a working tax credit. This occurs where, in the case of a lone parent, he or she is working for at least 16 hours a week, and in the case of a couple, they are working at least 24 hours per week and one partner is working at least 16 hours.

The relevant Strasbourg law

13. The claimants contend, as in *SG*, that they have been discriminated against contrary to article 14 of the ECHR. This provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or

> other opinion, national or social origin, association with a national minority, property, birth or other status."

14. Article 14 is not a free standing right. The non-discrimination principle it enunciates applies only in relation to the substantive rights and freedoms found in the Convention. It is not necessary that there should be a breach of the substantive rights relied upon and indeed article 14 would add little to the substantive breach were that the case. Nor is it even necessary to show that some other Convention article is directly engaged, in the sense that there is an interference with the right which will be unlawful unless it can be justified. It is now firmly established that article 14 is brought into play if the policy or scheme in issue falls within the "scope or ambit" of another Convention right, as the Strasbourg court typically describes it, even where the right is not directly engaged: see *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015]1 WLR 3250 per Lord Wilson para.17. As Lord Wilson pointed out, an example of such a situation is provided by *Carson v United Kingdom* [2010] 51 EHHR 369 which concerned alleged discrimination with respect to a pensions' retirement scheme. There was no Convention right to have the scheme implemented at all, but the government having chosen to do so, the scheme fell within the ambit of article 1 of the First Protocol (A1P1), which concerns the protection of property rights, and therefore attracted the non-discrimination principle set out in article 14.

15. As with English law, the non-discrimination concept embraces both direct and indirect discrimination. The Strasbourg Court held that the latter concept fell within the terms of article 14 in *DH v Czech Republic* (2008) 47 EHRR 3. It described indirect discrimination as the situation where a general policy or measure, ostensibly applying neutrally, in fact has a disproportionately prejudicial effect on a particular group. It may be considered discriminatory notwithstanding that it is not aimed at the group. That was the form of discrimination in issue in *SG* where it was claimed that the benefit cap which applied inter alia to all parents with children in fact disproportionately impacted on single mothers and could not be justified.

16. However, the protection afforded by article 14 goes beyond the traditional areas of direct and indirect discrimination. Not only is it unlawful to adopt measures which treat similarly placed persons differently, absent proper justification; it may also amount to unlawful discrimination to treat significantly different situations in the same way. This was established by the Strasbourg court in the seminal case of *Thlimmenos v Greece* (2000) 31 EHRR 12. The claimant had been convicted of a felony for refusing to serve in the Armed Forces. He was a Jehovah's Witness and a committed pacifist. As a consequence of this conviction he was disqualified from practising his profession as an accountant. He successfully argued that this constituted unlawful discrimination contrary to article 14 read with article 9 (freedom of religion); it was illegitimate to fail to recognize the reason why he had committed the offence. His situation was different from other criminals who could not point to a moral objection to complying with the law, and the law should have recognised this. The court agreed. It defined the relevant principle as follows:

> "The court has so far considered that the right under Article 14 is violated when States treat differently persons in analogous situations, without providing an objective and reasonable justification. However, the court considered that this is not the

> only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against….is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

17. These different types of discrimination are all closely related concepts, underpinned by the fundamental principle that like cases should be treated alike and different cases treated differently. The concepts of indirect and *Thlimmenos* discrimination in particular significantly overlap but they are conceptually distinct and, as Laws LJ pointed out in *R (on the application of MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (QB); [2013] PTSR 1521, para.38 the appropriate analysis of the type of discrimination in issue determines what has to be justified:

> "Notwithstanding these categorisations, the law of discrimination, domestic or European, rests on a single principle: the principle of consistency. Elias LJ at once stated the principle and exposed its different applications in *AM (Somalia)* [2009] EWCA Civ 634: "like cases should be treated alike, and different cases treated differently. This is perhaps the most fundamental principle of justice" (paragraph 34). Even so, discrimination, including direct discrimination in Article 14 cases, may be justified; and the difference between direct and indirect discrimination (and Thlimmenos discrimination) retains a conceptual importance, because it will determine what it is that must be justified. Where the discrimination is direct – where a rule, practice or policy prescribes different treatment for persons in like situations – it is the rule itself that must be justified: the difference in treatment. Where the discrimination is indirect – where a single rule has disparate impact on one group as opposed to another – it is the disparate impact that has to be justified. With *Thlimmenos* discrimination, what must be justified is the failure to make a different rule for those adversely affected."

18. I would add that in indirect discrimination, in order to justify the adoption of a rule which has a discriminatory effect, the rule or measure which gives rise to the disparate impact will have to be justified in the sense that it must have a legitimate aim and be a proportionate means of realising that aim: see *SG* para.13 per Lord Reed and para.189 per Lady Hale. As Lady Hale pointed out in *SG* with respect to the benefit cap (para.188):

> "It is not enough for the Government to explain why they brought in a benefit cap scheme. That can readily be understood. They have to explain why they brought in a scheme in a way which has disproportionately adverse effects on women."

19. As Lord Dyson MR observed in *R (MA) v Secretary of State for Work and Pensions* [2013] EWCA Civ 13 paras. 43-47, the Strasbourg court concentrates on substance rather than form, and it ought not in principle to matter how one characterizes the discrimination. Nonetheless, in analyzing the issue of justification it is important to

understand in what way the measure in question is said to discriminate, and the categories help to elucidate that question. I respectfully doubt whether Lord Dyson was right to say that the concepts are always essentially the same, for reasons I develop below.

20. Article 14 identifies the grounds on which the discrimination may be established. These include not just the conventional grounds relating to personal characteristics such as race and sex but extend to discrimination relating to any "other status". This concept, as Lord Wilson pointed out in *Mathieson*, has been very generously construed by the Strasbourg court. After reviewing a number of domestic and Strasbourg cases he concluded (para.22):

> "It is clear that, if the alleged discrimination falls within the scope of a Convention right, the Court of Human Rights is reluctant to conclude that nevertheless the applicant has no relevant status, with the result that the inquiry into discrimination cannot proceed."

An issue in this case is whether children under two, and the single parents caring for them, fall within the concept of "other status".

The relationship of the claims in this case to those in SG

21. In *SG* the claim was one of indirect discrimination on grounds of sex. It was not a claim that single parent mothers with children should be treated differently from single parent fathers with children; rather it was that a rule which had that adverse discriminatory effect was not justified and should not have been adopted. If the claim had succeeded it would have rendered the measure unlawful with respect to all lone parents notwithstanding that the alleged discrimination was against women only. If the discrimination against women was not justified, it would not thereafter have been lawful to continue to apply the cap to lone fathers but not lone mothers since that would amount to direct sex discrimination. This case is more narrowly focused; it is that single parents with children under two, and those children themselves, are in a significantly different situation from other workless households and should not be subject to the same rules. It is alleged that for a variety of reasons lone parents with children under two are less able than other parents with older children to obtain work and thereby bring themselves within the exemption for working households. It is also alleged that the objectives of imposing the cap have less traction in their case. The premise is that although the imposition of the cap may be justified for others to whom it is directed, it ought not to have been applied to this particular cohort because their circumstances are significantly different. This is a classic claim of *Thlimmenos* discrimination. At the same time it is not said that the rule disadvantages all lone parents with children under two, merely that it disproportionately impacts upon them. This is a form of indirect discrimination. The two forms of discrimination therefore interlink in this case. However, the fact that an exception to a rule is being claimed for a group only some of whom are prejudiced by the rule's application necessarily makes the *Thlimmenos* case more difficult to sustain than would be the case if each member of the group were adversely affected.

How is article 14 engaged?

22. There are two distinct substantive provisions relied upon as the route to article 14. The first is article 1 of the First Protocol (A1P1) which provides:

> "Every national or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

It is not disputed, as with the case of *SG*, that welfare benefits fall within the definition of possessions and that reducing benefits engages this provision so as to attract the application of article 14.

23. The second provision is article 8:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

24. It is alleged that the facts fall within the scope of the article 8 rights of both the lone parents and their children under the age of two. This is potentially a matter of some importance in this appeal because it is contended that if the cap falls within the ambit of article 8 rights of the children, this not only provides the link with article 14 but it also brings in its train the obligation under article 3 of the UNCRC to treat the best interests of the children as a primary consideration.

25. This does not mean that a decision must necessarily be one which is in the best interests of the children. As Lord Hodge put it in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74; [2013] 1 WLR 3690 para.10:

> "… the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;…..although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant."

26. In *SG* also reliance was placed on both article 8 and A1P1 as the route into article 14. In that case, for reasons considered below, the majority of the Supreme Court considered that the article 8 route into article 14 added nothing to the A1P1 route. More particularly, a majority in the court considered that in neither case was article 3 UNCRC engaged. The argument advanced before Collins J was that the article 8

analysis in *SG* should be distinguished on the grounds that the facts in this case fell within the scope of the article 8 rights of the children who were complaining of discrimination in their own right, and that this in turn meant that the article 3 UNCRC obligation was in play. It was also alleged that the cap could not be justified once the "best interests" obligation had been taken into account. *SG* therefore lies at the heart of this appeal and I will consider it before analysing in detail the arguments in this case.

The decision in SG

27. As I have said, in *SG* it was common ground that the imposition of the cap constituted an interference with the peaceful enjoyment of property so that A1P1 was directly engaged and article 14 was therefore applicable. It was also conceded that the application of the cap to lone parents with children *prima facie* discriminated against women, and the only question was whether it was justified. On the question whether the scheme fell within the ambit of article 8, the Divisional Court ([2013] EWHC 3350 (QB); Elias LJ and Bean J) had tentatively expressed the view that it did, and the Court of Appeal ([2014] EWCA Civ 156) reached a firm decision to that effect. Lord Dyson MR, giving the judgment of the Court of Appeal (Lord Dyson MR, Longmore and Lloyd-Jones LJJ), concluded that limiting benefits by the imposition of the cap fell within the ambit of article 8 because it was envisaged that it would cause some families who could no longer afford their accommodation to be homeless and to have to be re-housed (para.85). At the same time, Lord Dyson considered in some detail a submission that there had been an interference with family life (paras. 94-100). He recognized, citing various authorities, that in very exceptional circumstances there may be a positive duty to house a family but was not satisfied that the circumstances in the cases before him were so extreme as to give rise to such a duty. He therefore concluded that the obligation was not directly engaged and there was no breach of article 8 as such. He also agreed with the observation in the Divisional Court that even if in an individual case the cap caused such extreme consequences as to give rise to a breach of article 8, it would not follow that the scheme itself required amending. This finding was not appealed to the Supreme Court; it was not there suggested that article 8 had been infringed, merely that the facts fell within its ambit.

28. In the Divisional Court the question also arose whether, in determining the issue of justification, the Secretary of State was obliged to have regard to article 3 UNCRC so as to treat the best interests of the children as a primary consideration. The Divisional Court, rejecting the Secretary of State's submission to the contrary, held that even on the assumption that the only route to article 14 was via A1P1, the Secretary of State was under a duty to apply article 3 essentially on the grounds that the welfare payments were intended for the benefit of the family including the children, and it would be artificial to treat them as strangers to the article 14 argument. This finding was not appealed to the Court of Appeal. It was for this reason that both the Divisional Court and the Court of Appeal considered that the article 8 argument added nothing of substance to the analysis based on the link between article 14 and A1P1; the same analysis on justification was required whatever the route to article 14, and in each case it would involve a consideration of the children's best interests. However, both the Divisional Court and the Court of Appeal held that whilst the Secretary of State was obliged to comply with article 3 UNCRC, the children's best interests had been treated as a primary consideration and there had been no breach of that article.

Both courts also held that the prima facie discrimination was justified. The Court of Appeal said in terms (para.86) that the article 14 claim which relied upon article 8 for the gateway should be rejected for exactly the same reasons as the article 14 claim relying upon A1P1.

The judgment in the Supreme Court

29. The issue turned on justification in the context of an indirect discrimination claim. So the question was whether it was justified to adopt the rule which resulted in the difference of treatment. Lord Reed succinctly summarized what this involved (paras. 7-9):

> "7. The general approach followed by the European Court of Human Rights in the application of article 14 was explained by the Grand Chamber in *Carson v United Kingdom* (2010) 51 EHRR 13, para 61:
>
> "In order for an issue to arise under article 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."
>
> 8. A violation of article 14 therefore arises where there is:
>
> (1) a difference in treatment, (2) of persons in relevantly similar positions, (3) if it does not pursue a legitimate aim, or (4) if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> 9. In practice, the analysis carried out by the European court usually elides the second element – the comparability of the situations – and focuses on the question whether differential treatment is justified. This reflects the fact that an assessment of whether situations are "relevantly" similar is generally linked to the aims of the measure in question (see, for example, *Rasmussen v Denmark* (1985) 7 EHRR 371, para 37)."

30. The court accepted that following Strasbourg case law in such cases as *Carson v United Kingdom* (2010) 51 EHRR 369 and *Stec v United Kingdom* (2006) 43 EHRR 1017 which, in turn, had been followed by the Supreme Court in the context of a sex discrimination claim with respect to welfare benefits in *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545, the scrutiny of proportionality in a case such as this is not intensive. The relevant test when general measures of economic or

social strategy are under consideration is whether the rule is "manifestly without reasonable foundation".

31. This test respects the fact that matters of this nature, affecting as they do priorities in public expenditure, are pre-eminently suited to the democratically elected institutions. Moreover, as Lord Reed pointed out, the need to afford considerable weight to the assessment of the elected government was reinforced in this case by two further related considerations: first, the fact that the regulations under challenge had been approved by affirmative resolutions by both Houses of Parliament (see the observations of Lord Sumption in *Bank Mellat v HM Treasury* (No.2) [2014] AC 700, para.44); and second, the fact that issues in the appeal had been specifically discussed in Parliament. As Lord Bingham of Cornhill observed in *R (Countryside Alliance) v AG* [2008] 719 (para.45):

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

The potential significance of article 3 UNCRC

32. A potentially critical issue in *SG* was whether article 3 UNCRC was relevant to the issue of justification, as the Secretary of State had conceded before the Court of Appeal. Even where it is applicable this would not justify the substitution of the "best interests" test for the "manifestly without reasonable foundation" test. That would make best interests the paramount consideration. The question will be whether, giving the children's best interests the significant weight as a primary consideration which article 3 UNCRC requires, the decision is manifestly without reasonable foundation. That, I believe, is consistent with the observations of Lord Kerr in *SG*, para.268 when he said:

> "So, as a yardstick of the proportionality of this general measure of economic or social strategy, the question is whether it was manifestly without reasonable foundation. But, if article 3(1) of UNCRC has to play its part in deciding whether the benefits cap was without reasonable foundation, it requires that first consideration be given to the best interests of the children directly affected by the decision."

33. It follows that even if a decision is defective because of the failure to give effect to the "best interests" test, it does not necessarily follow that it is also manifestly without reasonable foundation or that the decision would have been any different had the "best interests" test been applied. Nevertheless, if article 3 is relevant to the justification assessment and if it has not been complied with, that fact is likely to weigh heavily in the justification assessment.

34. Late in the day before the Supreme Court, the Secretary of State successfully sought to reopen the concession made below that article 3 UNCRC was applicable, and written submissions on this issue were provided to the Court after the oral hearing. Although the position is not entirely clear, it seems that these submissions were only made with respect to A1P1 and not article 8. According to the judgment of Lord Carnwath (para.113), the appellant had during the oral hearing relied principally upon

article 14 when read with article 8 as the source of the obligation to have regard to article 3 UNCRC. Indeed, it seems that the Secretary of State was asserting that the appellants had not relied upon A1P1 as a source of the article 3 obligation. As Lord Carnwath pointed out, this was hardly a sustainable proposition given the way in which the case had been run in both the Divisional Court and the Court of Appeal. Nevertheless, the Secretary of State was allowed to put in further submissions on that point. The Court held by a majority of three to two (Lords Reed, Hughes and Carnwath; Lady Hale and Lord Kerr dissenting) that at least in the context where article 14 was read with A1P1, article 3 was not engaged and had no bearing on the issue of justification with respect to the particular nature of the discrimination relied upon. Lord Reed, with whose judgment on this point Lords Hughes (para.134) and Carnwath (paras.129-132) expressly agreed, explained his reasons, in a passage which is important in the context of this appeal, as follows (paras. 86-89):

> "86. It is clear, therefore, that the UNCRC can be relevant to questions concerning the rights of children under the ECHR. There are also cases in which, although the court has not referred to the UNCRC, it has taken the best interests of children into account when considering whether an interference with their father's or mother's right to respect for their family life with the children was justified. An example is the case of *Uner v Netherlands* (2007) 45 EHRR 14, which concerned the deportation of an adult, resulting in his separation from his children. In circumstances of that kind, the proportionality of the interference with family life could not be assessed without consideration of the best interests of the children, a matter which was relevant to respect for his family life with them, as it was also to their right to respect for their family life with him. Indeed, they might themselves have been applicants, on the basis that their own article 8 rights were engaged.
>
> 87. The present context, on the other hand, is one of alleged discrimination between men and women in the enjoyment of the property rights guaranteed by A1P1. That is not a context in which the rights of the adults are inseparable from the best interests of their children. It is of course true that legislation limiting the total income which persons can receive from benefits, like any legislation affecting their income, may affect the resources available to them to provide for any children in their care, depending upon how they respond to the cap: something which will vary from one case to another. They may increase their income from other sources, for example by obtaining employment or by obtaining financial support for the upkeep of a child from an absent parent; or they may respond by reducing their expenditure, for example by moving to cheaper accommodation. Depending on how parents respond, the consequences of the cap for their children may vary greatly, and may be regarded as positive in some cases and as negative in others.
>
> 88. The questions (1) whether legislation of this nature should be regarded as "action concerning children", within the meaning of article 3(1) of the UNCRC, (2) whether that provision requires such legislation to be in the best interests of

> all the children affected by it, and (3) whether the Regulations fulfil that requirement, appear to me to be questions which, for reasons I shall explain, it is unnecessary for this court to decide. Even on the assumption, however, (1) that article 3(1) of the UNCRC applies to general legislation of this character, (2) that article 3(1) requires such legislation to be in the best interests of all the children indirectly affected by it, and (3) that the legislation in question is not in reality in the best interests of all the children indirectly affected by it, that does not appear to me to provide an answer to the question whether the legislation unjustifiably discriminates between men and women in relation to their enjoyment of the property rights guaranteed by A1P1.
>
> 89. It is true that the benefits which are taken into account when deciding whether the cap has been exceeded include benefits payable to parents by reason of their responsibility for the care of children. It is also true that the differential impact of the measure upon men and women arises from the fact that more women than men take on responsibility for the care of their children when they separate. It is argued that it is therefore unrealistic to distinguish between the rights of women under article 14 read with A1P1, and those of their children under the UNCRC. There is nevertheless a clear distinction. In cases where the cap results in a reduction in the resources available to parents to provide for children in their care, the impact of that reduction upon a child living with a single father is the same as the impact on a child living with a single mother in similar circumstances, or for that matter a child living with both parents. The fact that children are statistically more likely to be living with a single mother than with a single father is unrelated to the question whether the children's rights under article 3(1) of the UNCRC have been violated. There is no factual or legal relationship between the fact that the cap affects more women than men, on the one hand, and the (assumed) failure of the legislation to give primacy to the best interests of children, on the other. The conclusion that the cap is incompatible with the UNCRC rights of the children affected therefore tells one nothing about whether the fact that it affects more women than men is unjustifiable under article 14 of the ECHR read with A1P1. The contrary view focuses on the question whether the impact of the legislation on children can be justified under article 3(1) of the UNCRC, rather than on the question whether the differential impact of the legislation on men and women can be justified under article 14 read with A1P1, and having concluded that the legislation violates article 3(1) of the UNCRC, mistakenly infers that the difference in the impact on men and women cannot therefore be justified."

35. On this analysis, the fact that there may have been a breach of article 3 UNCRC has no relevance to the question whether the discrimination in issue - the differential

impact on men and women - was justified. Lady Hale, with whom Lord Kerr agreed on this point, disagreed with Lord Reed and considered that the best interests of the children were plainly relevant to the question whether the cap could be justified.

Does the article 8 route to article 14 engage article 3 UNCRC?

36. Lord Reed's analysis focused solely upon article 14 read with A1P1. It leaves open the question whether article 3 might be relevant to the issue of justification if the route to article 14 is article 8, particularly if the article 8 rights of the children are in play. The majority considered the potential relevance of article 8 although, save for Lord Hughes, rather cursorily. Lord Reed (paras. 79-80) noted that although the issue had been raised, it was not pursued in the course of argument (although this seems to conflict with the understanding of Lord Carnwath). He did not accept that the reduction in benefits of itself fell within the ambit of article 8, observing that if general legislation which increased taxes or reduced benefits of itself constituted an interference with the right to private or family life then "the ambit of article 8 is enlarged beyond current understanding". He recognised that a reduction in income may have consequences which engage article 8, such as where it leads to a family being evicted - the example given by the Court of Appeal for treating the facts as falling within the scope of article 8 - but that did not, in Lord Reed's view, justify treating the reduction in benefits itself as falling within the ambit of article 8.

37. Lord Hughes considered the legal relevance of article 3 UNCRC and its relationship to article 8 in some detail. He did not dismiss its relevance, as Lord Reed had done, simply on the grounds that the facts did not fall within the ambit of article 8. He concluded (para.139) that article 8 was not engaged as such, and indeed it was not suggested before the Supreme Court that it had been. There was therefore no question of the children's rights having to be interpreted in the context of justifying an article 8 infringement, which might well have justified recourse to article 3. Lord Hughes accepted that an international instrument would be relevant where it was directly concerned with the form of discrimination in issue, citing *Demir v Turkey* (2008) 48 EHRR 1272 *Opuz v Turkey* (2009) 50 EHRR 695, *Ponomaryov v Bulgaria* (2011) 59 EHRR 799 and *Burnip v Birmingham City Council* [2013] PTSR 117. But that did not mean that it was relevant "to every ECHR question which arises, simply because children are as a matter of fact affected by the decision or legal framework under consideration" (para.142). So too, it may be relevant where the discrimination was directly in connection with the rights of the child, such as in *X v Austria* (2013) 57 EHRR 405 where it related to the adoption of children by a partner in same sex couples. Lord Hughes accepted that in such a case the discrimination bore directly on the article 8 rights of the child. However, he thought that this was far removed from a case like the present, where the children's rights were only loosely affected by the decision (paras. 139-144). After considering *X v Austria*, he summarised his conclusion as follows (paras.145-146):

> "145. At its highest, this decision is another in which the UNCRC is referred to as relevant to the content of article 8 rights, and thus to the issue of justification for discrimination in relation to such rights. That is a very long way from saying that article 3(1) is relevant to justification upon any kind of discrimination issue, whether or not the decision is about the child's upbringing, and whether or not either the

> ECHR rights of the child or article 8 rights of his family are at stake. Such issues simply did not arise in *X v Austria*.
>
> 146. If the rights in question are the A1P1 property rights of women, and their associated derivative right not to be discriminated against in relation to those rights, it is an impermissible step further to say that there is any interpretation of those rights which article 3 UNCRC can inform. In the case of article 8, the children's interests are part of the substantive right of the parent which is protected, namely respect for her family life. In the case of A1P1 coupled with article 14, the children's interests may well be affected (as here), but they are not part of the woman's substantive right which is protected, namely the right to be free from discrimination in relation to her property. There is no question of interpreting that article 14 right by reference to the children's interests. The protected right to respect for family life under article 8 is entirely different from the protected right to property under A1P1. Nor can the article 8 rights of the child be said to be in need of interpretation when it is clear for the reasons given in all the judgments that they are not infringed. The necessary connection between the ECHR right under consideration and the international instrument is not present. That can be seen by considering the position of the appropriate comparator, namely a lone non-working father with the same children and household outgoings. The interests of the children would be exactly the same in his case, but he would have no article 14 claim to discrimination."

38. As I read this, Lord Hughes is saying that given the nature of the discrimination in issue, it makes no difference whether the route to article 14 is A1P1 or article 8. Even if the scheme falls within the scope of the latter, article 8 rights are not as such engaged. Furthermore, in so far as the child has an article 8 right, it is as an aspect of family life. Even if the discrimination is scrutinised by reference to article 8, it is still discrimination against the parents, and since the child's interests are equally affected whether the single parent is male or female, these interests do not bear upon the nature of the discrimination in issue.

39. Lord Carnwath observed that article 8 had been relied upon by the appellants, inter alia, in support of the "best interests" argument, but he added, somewhat enigmatically, that in his view the article 8 argument "did not add anything of substance" to the claim based on A1P1 (para.99). Like Lord Hughes, he did not, however, simply dismiss the relevance of article 8 by saying that the facts did not fall within its scope. This might suggest that he agreed with Lord Hughes that even assuming that the scheme fell within the ambit of article 8, that would not of itself suffice to bring article 3 UNCRC in its train.

40. Neither Lady Hale nor Lord Kerr dealt specifically with article 8 at all. It was not necessary for them to do so since they agreed with the courts below that article 3 UNCRC was engaged even where A1P1 was relied upon as the route to article 14. They differed from those courts, however, in concluding that article 3 had been

infringed, and this was an important, and arguably critical, factor in their analysis that the discrimination was not justified.

Was article 3 infringed?

41. Given the conclusion of the majority that article 3 UNCRC was not engaged, it was immaterial whether or not it was in fact infringed. However, the issue was addressed by four members of the court, and it is potentially highly material, so it is necessary to address it.

42. The Government's case, expressed on many occasions in the course of the passage of the Act and the subsequent regulations, was that it was very conscious of the impact of the cap on workless families but that it was in the interests of children as a whole to live in working households. This consideration outweighed the detrimental effect which the cap would have on particular children in the shorter term. In my view, the Government's position can be characterized primarily as a claim that taking interests of children as a whole, the scheme is in fact in the best interests of children notwithstanding some detrimental effect on particular children in the shorter term. Alternatively, if the scheme cannot be said to be in the children's best interests even taken as a whole, they have nonetheless been taken into account as a primary consideration and the wider considerations of social policy, in particular the need to bring up children in working households, justifies the decision not to give effect to them. Lady Hale, with whose judgment on this point Lord Kerr agreed, was not impressed with this argument and expressed herself in uncompromising terms. Indeed, she considered that it could not be in the best interests of children to damage the interests of the children directly affected in favour of future generations of children (paras 225 -226):

> "225. Both the Divisional Court and the Court of Appeal concluded that the Government had complied with its obligation to treat the best interests of the children concerned as a primary consideration (paras 75 and 49, respectively). They were, of course, correct to say that "the Government was keenly aware of the impact the benefits cap would be likely to have on children" (Court of Appeal, para 74(2)). But it does not follow from that that the "the *rights* of children were, throughout, at the forefront of the decision-maker's mind" (para 75, emphasis supplied). Still less does it follow that their best interests were being treated as a primary consideration. In agreement with the powerful judgments of Lord Carnwath and Lord Kerr on this point, it is clear to me that they were not.
>
> 226. The Government's contention was that "the long term shift in welfare culture", or "reversing the impact of benefit dependency on families and children", would be beneficial to children in the longer run. This may well be so, although it is interesting how little prominence was given to this aspect of the matter in the justifications put forward by the Government for their policy. But in any event, this is to misunderstand what article 3(1) of the UNCRC requires. It requires that first consideration be given to the best interests, not only of children in general, but also of the particular child or children directly affected by the decision in question. 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. Insofar as the Secretary of State relies upon this as an answer to article 3(1), he has misdirected himself".

43. The logic of this analysis seems to be that it can never be in the interests of children as a group to give priority to the long term beneficial interests of children in general over the immediate detrimental effects on children directly affected. This analysis comes perilously close to treating the interests of the children as a paramount consideration and substituting the best interests test for the manifestly without reasonable foundation test.

44. Lord Carnwath agreed that there had been a failure to treat the interests of the children as a primary consideration but he did so on a narrower basis than Lady Hale. He did not assert that there was a material misdirection in allowing the interests of children in general to take precedence over the interests of children directly affected. Rather he felt that the "best interests" obligation made it incumbent on the Secretary of State to identify in clear and unambiguous terms the impact on the children directly affected and to explain why other considerations had been allowed to trump their interests, and in his view this had not been done. After referring to certain passages from a report adopted by the UN Committee on the Rights of the Child, he continued (para.108):

> "In relying on this guidance, Mr Wise accepted that it was not necessary for the decision-maker to address the issues in a "particular structured order", as the Court of Appeal may have understood his argument. What matters is the substance of what is done rather than the form. However those passages do show in my view that the evaluation needs to consider, where relevant, the interests both of children in general and of those directly affected by the action. It also needs to indicate the criteria by which the "high priority" given to children's interests has been weighed against other considerations. In so far as that evaluation shows conflict with the best interests of the children affected, it needs either to demonstrate how that conflict will be addressed, or alternatively what other considerations of equal or greater priority justify overriding those interests."

45. Lord Carnwath was not satisfied that this approach had been adopted but, as we have seen, he did not believe this to be relevant to the question whether the particular form of discrimination in issue was justified.

46. Lord Hughes agreed with the courts below that even if article 3 was engaged, it had been fully complied with. He agreed with Lady Hale that when assessing the best interests of the children it was not enough to consider their interests generally without considering also those directly affected by the scheme, but he observed that the converse was also true. Lord Hughes thought it plain that the Secretary of State had properly directed himself as to the full consequences of the effect on single families of imposing the cap and had reached a decision which could not possibly be said to infringe any article 3 obligations (para.155). As we have seen (para.88 in *SG*, cited in

para.34 above), Lord Reed did not consider this issue at all because on his analysis the question did not arise for consideration.

Justification in SG

47. Since the majority had rejected the relevance of article 3 UNCRC to the justification issue, they had to decide whether the scheme could be justified independently of any consideration of the best interests of the children. Again, the reasoning with respect to this issue has some bearing on the appeal in this case, and therefore it needs to be considered, albeit relatively briefly.

48. The leading judgment analysing this question was given by Lord Reed. He first set out in considerable detail (paras.17-52) the background to the passage of the Act and the regulations implementing it, and in so doing he identified a wide range of issues which had been considered by the Secretary of State. I will not repeat these important paragraphs but simply record the gist of his analysis.

49. Lord Reed noted that the three policy aims of the measure, summarised in para.3 above, were identified from the start. There had been extensive consultation from the earliest stages with interested groups, including Shelter and the Equality and Human Rights Commission who are interveners in this appeal. It was always obvious that the impact would fall most heavily on larger families and those living in high cost areas. Two documents, entitled respectively *Benefit Cap (Housing Benefit) Regulations 2012: Impact assessment for the benefit cap* and *Benefit Cap Equality Impact Assessment* were laid before Parliament. It was estimated that some 56,000 households would be caught by the cap and would need to make up the shortfall in income either by obtaining work, obtaining other income (perhaps maintenance payments from absent parents), reducing non-rent expenditure, negotiating a lower rent, or moving to cheaper accommodation. There was what Lord Reed described as "detailed and vigorous scrutiny" by both Houses of Parliament over a twelve month period, which included consideration of House of Commons research papers and various briefings from organisations opposed to the policy. During the Committee stage of the Bill various proposals to amend the Act were suggested and considered, including ways to ameliorate the impact upon single parents with young children. One proposal was that households where a single parent had children under five should be exempt from the cap altogether on the grounds that they would be less likely to be able to obtain work because of child-care responsibilities; another was that the cap should include not only average earnings but in addition any in-work benefits which an average earner may be expected to receive. The Bill was also considered by the Joint Committee on Human Rights when the Secretary of State explained why the Government considered the cap to be a proportionate way of achieving legitimate objectives. Some of the concerns raised during this process were accepted and subsequently reflected in the regulations. These included exempting benefits used for paying child care; providing single parents with job focused interviews to assist them in finding work; and reducing to sixteen the number of hours required to be worked by single parents in order to obtain exemption. In addition, a decision was made to provide additional funding for discretionary housing payments (DHP) to claimants who require further financial assistance, in addition to welfare benefits, in meeting housing costs.

50. There was again considerable consultation before the draft regulations were laid before Parliament, and updated impact assessments were provided. The regulations were, in the usual way, considered by various Parliamentary committees. Certain amendments were made to the regulations, including exempting from the cap housing benefit provided for those women living in a refuge for victims of domestic violence. Prior to the cap being implemented, a number of steps were taken to assist those affected by the cap as to how to respond.

51. In the light of all this material, Lord Reed considered that the regulations clearly pursued a legitimate aim and were not manifestly without reasonable foundation: paras. 67-77. He explained, with reasons, why it was in his view not irrational, in the sense of manifestly without reasonable foundation, for the Government to reject various criticisms of the scheme and to refuse to make further amendments which its critics demanded. These criticisms included that fairness required that the benchmark should have been average earnings with in-work benefits; that fiscal savings were marginal and did not justify the imposition of the cap; that single parents faced particular difficulties in finding work and should be excluded, alternatively those with children under five should be excluded; and that the scheme was unjust because children would be deprived of the basic necessities of life. On this last point, Lord Reed noted that in the last resort local authorities were under an obligation to provide suitable and affordable accommodation. Lord Reed also specifically disagreed with Lady Hale that taking child-related benefits out of the scope of the cap would not emasculate the scheme; he considered that even if confined to single parent households, "it would have compromised the achievement of the legitimate aims." (para.77).

52. Lord Reed considered that the availability of DHP was a factor which had some significance when considering the justification issue. After referring to the fact that some families might need to move house, he made the following observation (para.75):

> "It is also necessary to recognise that transitional financial assistance is available for households affected by the cap who cannot move until suitable arrangements have been made in relation to the children, as I have explained. Although assistance of that nature may not constitute a complete or satisfactory answer to a structural problem of a permanent nature arising from discriminatory legislation, such as the inadequacy of housing benefit to meet the cost of accommodation suitable for the needs of severely disabled claimants (as was held in *Burnip v Birmingham City Council* [2012] EWCA Civ 629; [2013] PTSR 117), it is relevant to an assessment of the proportionality of a measure which is liable to give rise to transitional difficulties in individual cases."

53. Lord Hughes expressly agreed with this analysis (para.134). Lord Carnwath focused only on the potential relevance of the article 3 UNCRC argument when considering the issue of justification. Had article 3 been relevant to the discrimination in issue, the discriminatory effect would in his view not have been justified. However, had he disagreed with Lord Reed's approach on the general proportionality issue considered independently of article 3, he would have had to allow the appeal, which he did not

do. Accordingly, whether or not he agreed with the detail of Lord Reed's analysis, he must have concluded that once article 3 was out of the picture, the Secretary of State had satisfied him that the scheme was justified notwithstanding its adverse effect upon women.

54. Neither Lady Hale nor Lord Kerr focused directly on this question. They held (Lord Kerr agreeing with Lady Hale on this point) that there had been a failure to treat the best interests of the children as a primary consideration, as article 3 requires, and that had this been done, the imposition of the cap could not have been justified even applying the manifestly without reasonable foundation test. It is clear, however, that in certain respects Lady Hale did not agree with Lord Reed's analysis. For example, she did not accept that exempting child-related benefits from the scheme would emasculate it; and both she and Lord Kerr considered, contrary to the views of Lord Reed and the courts below, that the effect would be to deprive children of the basic necessities of life. She also set out in some detail (paras.190-210) the arguments which the appellants had advanced to suggest that the scheme would not effectively secure the aims which they were designed to achieve and she was not persuaded that the existence of DHPs could properly be treated as a solution to the problems facing single parents. Nor did she accept that the three objectives relied upon by the government carried any real weight in relation to lone parents. She summarised her conclusions on justification as follows (para.229):

> "Viewed in the light of the primary consideration of the best interests of the children affected, therefore, the indirect discrimination against women inherent in the way in which the benefit cap has been implemented cannot be seen as a proportionate means of achieving a legitimate aim. Families in work are already better off than those on benefits and so the cap is not necessary in order to achieve fairness between them; saving money cannot be achieved by unjustified discrimination; but the major aim, of incentivising work and changing the benefits culture, has little force in the context of lone parents, whatever the age of their children. Depriving them of the basic means of subsistence cannot be a proportionate means of achieving it."

55. An important element in this analysis is the failure by the government to comply with article 3 UNCRC - it was "viewed in the light of" that provision that the cap was not justified - but it seems likely that both Lady Hale and Lord Kerr would have reached the same conclusion quite apart from that consideration, given in particular her denial that the Government's objectives had any real substance for lone parents. But that view was not shared by the majority. So even if she and Lord Kerr had expressly disagreed with Lord Reed on this point, they would have been in the minority.

56. The effect of *SG* can, in my view, be summarized as follows. A majority of the court (Lords Reed, Carnwath and Hughes; Lady Hale and Lord Kerr dissenting) held that the discrimination against lone mothers was justified and that article 3 UNCRC was not engaged and thus was irrelevant to the justification issue. Lord Hughes and Lord Carnwath appear to have accepted that article 3 was not engaged whether the route into article 14 was A1P1 or article 8. Lord Carnwath agreed with Lady Hale and Lord

Kerr that article 3 had not been complied with, and he would have agreed that the discrimination was not justified had he found, as they did, that article 3 was engaged.

The Welfare Reform and Work Act 2016

57. The Act set out a series of welfare reforms designed to achieve what the government believes to be a more sustainable welfare system, and they include the further reduction in the benefit cap. As with the 2012 Act, there was again detailed scrutiny of the proposed reduction, both when the Act was passed and when the amended regulations were introduced. The detail is set out in a witness statement from David Edson, the lead official on the benefit cap policy.

58. The fundamental aims of the cap are those identified in 2012 - fairness, costs savings and incentivisation. During the course of debates, Ms Emily Thornberry MP tabled an amendment which would have exempted from the cap responsible carers of children under two, including lone parents, on the grounds that child care was neither available nor affordable. The Government rejected the premise that it was not realistic to expect this group of lone parents to work, and noted that many parents with young children did work. Ms Patel MP, then Minister of State for Employment, said in the course of debate:

> "The benefit cap is working and we believe that the existing exemptions combined with additional funds that we have provided for discretionary housing payments provide the most effective means of increasing incentives to work and promoting fairness, while ensuring that the most vulnerable are supported."

59. Various organizations also made submissions about the difficulties facing lone parents with young children. Gingerbread said that there was a lack of available child-care for young children and little sustainable part-time employment.

60. In the House of Lords the question was raised whether it was reasonable to expect lone parents with children under one to work. Other proposed exemptions included pregnant women and those in receipt of income support. The response of Lord Freud for the government was that blanket exemptions were not appropriate and would undermine the objectives of the cap, and that it was better for hard cases to be dealt with by discretionary housing payments. He pointed out that the government had undertaken to commit £800 million over five years for such payments. An additional point made forcefully during debates was that since the government did not think that lone parents with children under two should be available for work as a condition of receiving benefits, it was illogical to penalize them for not working (the "conditionality argument"). Lord Freud's response was, in effect, that there is nothing illogical in not requiring a parent with very young children to work as a condition of receiving a benefit, whilst at the same time structuring the amount of that benefit in a way which is designed to encourage them to work.

61. In the course of the third reading the Government did agree to exempt both those in receipt of carer's allowance and guardian's allowance from the application of the cap. This was because it was thought necessary to support carers and those who are willing to act as guardians of vulnerable or bereaved children.

62. There was further Parliamentary discussion when the regulations were amended. Again, a number of amendments were proposed similar to those which had been raised and rejected when the Bill was under consideration, including exempting lone parents with children under one and exempting child benefit from the cap. They were rejected for essentially the same reasons as earlier.

The basis of the claim before Collins J

63. The claim was brought by four single parents with children under two, and by the children in their own right. The individual factual circumstances are not directly relevant to this appeal since the legal analysis turns on the situation of lone parents with children under two as a group. However, they do give some indication of the very real hardship faced by many lone parents with small children when seeking to obtain even part time employment, and these were necessarily exacerbated by the further reduction in the amount of the cap effected by the 2016 Act. I set out in an appendix the paragraphs of Collins J's judgment where he described the individual circumstances of each claimant, drawing upon their witness statements.

64. The claimants alleged that they were unlawfully discriminated against contrary to article 14 which was, they claimed, engaged both via A1P1, a point conceded by the Secretary of State, and via article 8, which was disputed. The article 8 argument is particularly important in the context of the children's claims because it is said that if the cap falls within the ambit of their right to family life, that brings within its train article 3 UNCRC. The claimants allege that as in *SG* there had been a failure to comply with that article, but that unlike *SG*, where the children of the claimants did not make any challenge in their own right, the failure is relevant to the issue of justification, at least in relation to the children's claims.

65. The essence of the claim was that this cohort of lone parents was in a materially different situation from other lone parents with children and that whatever the justification for imposing the cap on other parents, including lone parents, it ought not to have been applied to them. The claimants relied upon a number of factors to support their contention that they were adversely affected as a group and therefore are in a significantly different position from other parents so as to warrant different treatment in accordance with the *Thlimmenos* principle.

66. Essentially the contention was that their child care responsibilities to these very young children made it considerably more difficult for them when compared with other lone parents to obtain employment for the requisite 16 hours which would exempt them from the operation of the cap. The claimants relied in particular on evidence put forward in the course of the debates and in witness statements before the court, especially from the Policy Officer of Gingerbread which provides advice and support for single parents, and from the Joint Chief Executive of the Family and Childcare Trust, which concerns itself with policy, research and advocacy on childcare and family issues. They alleged that the problem of finding child care for this cohort was exacerbated by the fact that it is likely to be more expensive than for older children since children at that very young age will often need one to one or at any rate more intensive care; that there are difficulties in finding places which will take young children (although it was conceded that this is equally true for lone parents with children under school age); that there are sometimes up-front payments which need to be made and which the parent will not be able to pay (although there is a discretionary

Flexible Support Fund available to meet that problem); that there were limited opportunities for sustainable part-time work – although again that is true for many lone parents and will vary in different parts of the country; and that the problem of finding appropriate employment is particularly problematic for mothers whose children are being breastfed. Moreover, and a point on which particular emphasis was placed, this cohort of lone parents with children under the age of two is not entitled to the 15 hours a week of free childcare which is made available to children aged 3 and above and children aged two where particular hardship is established. (That figure was increased to 30 hours with effect from September 2017 for 3 and 4 year olds). Free child-care is a benefit given by the Department of Education and the purpose is to assist disadvantaged children rather than to assist with childcare costs, but the latter is a beneficial side-effect. Child care for those under two is now subsidised but is not as beneficial as free child care. If a lone parent works 16 hours a week and thus becomes entitled to working tax credits, he or she can recover 70% of child care costs, subject to a limit; and if in receipt of universal credit (a benefit which is gradually being introduced to replace a number of benefits, including working tax credits) the proportion is 85%. (Exceptionally for reasons to do with the interrelationship of various regulations, this figure may rise to 95.5%). These payments are not themselves subject to the cap.

67. A further factor relied upon as demonstrating that workless families with children under two are in a materially different situation (but not specifically mentioned by the judge) is the conditionality argument referred to above, namely that it was illogical to make it a requirement for lone parents with children under two to work in order to avoid the cap, even though it was not in general a condition of receiving welfare benefit that lone parents with children under three should be even available for work. Parents of one year old children will be required to attend what are termed "work focused interviews" and parents of two year old children will be required to attend interviews and be subject to a work preparation requirement, but neither group is obliged to be available for work in order to claim benefits.

68. In essence the contention was that having regard to these factors it was irrational, in the sense of manifestly without reasonable foundation, not to exempt this group from the application of the cap. They had great difficulty combining work and child-care which placed them in a materially different category from other lone parents.

69. As a related point, the claimants contended that the objectives of the cap did not have any real relevance for this cohort. In particular, the main objective of incentivising work could not sensibly apply to parents who could not realistically be expected to obtain work even if they wished to do so. Their circumstances were different and it was article 14 discrimination of the *Thlimmenos* kind to subject them to the same measure.

70. Insofar as the position of the children was concerned, it was argued that the facts fell within the ambit of their article 8 rights and engaged the obligation under article 3 UNCRC to treat the best interests of the children as a primary consideration. This had not been done, and just as the majority in *SG* would have found that the discrimination was not justified had article 3 been engaged, similarly it could not be justified here where article 3 is engaged.

71. The Secretary of State disputed that article 14 was engaged at all on the grounds that the claimants did not have the requisite status to bring themselves within its terms. He also denied that the claims fell within the ambit of article 8 but even if they did, and even if as a consequence article 3 UNCRC was engaged, it had not been infringed. The problems facing this particular cohort of parents had been fully aired and considered by the Secretary of State. There had been the extensive debate and discussion about the desirable nature and scope of the cap both when the cap was first introduced and again in 2016 when it was amended. Whatever the justification for the finding in *SG* that article 3 had been infringed, that finding related to the earlier regulations; there was now further material showing that whatever the position then, the Secretary of State had by the time of the introduction of the 2016 regulations fully complied with any article 3 obligation.

72. The Secretary of State did not deny that there were greater problems for single parents in obtaining work than families with two parents and also accepted that the problems were exacerbated for those with young children under school age. However, he submitted that the additional difficulties facing this cohort of parents were nowhere near sufficiently strong as to require them to be treated differently so as to be exempt from the cap. The difficulties of juggling child-care with a job were far from unique to this cohort and depended on a range of factors which were specific to each household. Many lone parents with children over two would have greater difficulties than lone parents with children under two, for example where they had a larger number of children, or if they had no support from family or friends which might be available to the lone parent with children under two. It would undermine the objectives of the scheme and create unfairness as between lone parents to give this cohort more favourable treatment by exempting them from the cap. It could not be said that it was manifestly without reasonable foundation for the Secretary of State to refuse to do so and instead to treat all lone parents in the same way.

73. The Secretary of State also relied upon the fact that in so far as these lone parents faced particular financial hardship, this was mitigated by the availability of DHPs.

The judgment of Collins J

74. Collins J recognised that this was a case of *Thlimmenos* discrimination but he followed the observation of Lord Dyson MR in *R(MA)* to the effect that there was little, if any, difference between indirect and *Thlimmenos* discrimination and so he approached the case as one of indirect discrimination. He noted that some 13,300 households constituting some two thirds of all households affected by the original benefit cap, were lone parents with children. Although no precise figures were available, he estimated that some 5,000 of these were households with children under the age of two (para.17). He identified the three aims of the scheme (para.11) and accepted that they were in principle legitimate. He recognized that both the 2012 and 2016 Acts had been subject to extensive consideration by Parliament (para.12). In that context he noted that Lord Reed had set out in detail the consideration given to the 2012 Act and accompanying regulations in his judgment in *SG*. He also referred to the Impact Assessments and the Equality analyses made in 2016. He explained the reasons for looking at the Parliamentary history in the context of summarizing the case for the claimants (or at least the parents) as follows (para.13):

> "But it is important to see whether a particular effect of the legislation has been taken into account. In this case, what has not, it is submitted, been taken into account is the position of lone parents with children under the age of two since they are particularly badly affected by the cap because they are not reasonably able to work and thus escape the cap and the financial assistance made available upon which much reliance is placed by the defendant does not provide the protection it is said to provide. The need to consider a particular group who are adversely affected is important…"

75. The judge referred in various paragraphs (see especially paras.18, 31 and 36) to the matters relied upon by the claimants to sustain their case that this cohort was in a significantly different position from other lone parents because of the greater difficulty in obtaining work. These are essentially the points referred to in paras. 66-67 above. He accepted that the cap will have encouraged some households, including lone parents, to go to work, notwithstanding that the statistics had been disputed, but in his view the position of lone parents with children under two was particularly difficult and had not been appropriately addressed (para.16):

> "…The important consideration for the purposes of these claims is the difficulty and often the impossibility of lone parents with children under two being able to work because of the need to have some means of caring for the child. There has not, in the figures set out in the Impact Assessments or the Equality Analyses been a specific assessment of the ability of such lone parents to enter work."

76. The judge appears to have accepted, therefore, that it was particularly difficult for this cohort to obtain work; in any event, absent a specific assessment, he was going to make that assumption.

77. The judge noted (para.18) that the Government had accepted that it was harder for lone parents to find work due to childcare responsibilities but had claimed that the adverse effects were mitigated by steps such as "employment support, support for childcare costs, free childcare places and Discretionary Housing Payments." He described the DHP scheme in some detail and specifically referred to the guidance issued by the government which had ensured that discretionary payments should be targeted at particular groups which included those with young children likely to be particularly affected by the benefit cap. These include households with children under 9 months, women within eleven weeks of the expected date of childbirth, and households moving to, or finding difficulty in moving to, more appropriate accommodation. However, he accepted evidence from Shelter and the claimants' solicitor that this was not a satisfactory solution to the problems faced by this group; the money was limited, no permanent awards were made, and the short term payments which were made

> "give those affected no peace of mind. Whatever may have been the hope, the safeguard relied on is not by any means satisfactory. For those such as the claimants who are living on the edge of, if not within, poverty the system is not working with any degree of fairness." (para. 28)

78. Although the judge did initially refer to the three objectives of the policy, when dealing with the issue of justification he focused only on the objective of incentivising work. He accepted that it was generally not in the interests of children to grow up in workless households, as the Government claimed. However, he expressed the view that (para.19):

> "… those observations are entirely irrelevant in relation to lone parents such as the claimants who find themselves in real difficulty in being able to enter work because of the need to care for a child under two."

79. Later he referred to certain discussions in Parliament relied upon by Mr Sheldon to show that the Government was fully aware of the arguments now being advanced in support of the claim. These included the proposed amendment to exclude lone parents with children under two and the fact that there had been express reference to the *SG* decision and the need to treat as a primary consideration the best interests of the children. The Government's response in each case was that it was in the interests of children for the parent to work because of the damage to children brought up in households where parents did not work. With respect to each of these responses, the judge said that such observations were "entirely irrelevant" (para.19) and did "not engage with the difficulties of those faced by those with children under two" (para.33).

80. It was at the end of his judgment that the judge turned to consider the relevant test for establishing justification. He noted that although there was very powerful evidence of the damaging effect of the cap on lone parents, that "cannot mean necessarily that unlawfulness is established." (para.37). He observed that since it was accepted that A1P1 was engaged, article 14 was in issue. He had stated earlier in his judgment that *SG* was "crucial" to the claim and required close analysis (paras. 3-4). At this point in his judgment, he returned to *SG* and summarized what he took to be the reasoning of the majority in the case. He said that it was unnecessary to go through the arguments in *SG* in relation to the application of article 3 UNCRC because "a majority of the Supreme Court has decided that it did apply" (para.37). I observe at this point that for reasons I have sought to explain, that does not in my view accurately state the conclusion of the majority in *SG*. The judge then referred to the judgment of Lord Carnwath in relation to the question whether article 3 UNCRC had been complied with, and held that Lord Carnwath's observations which led him to the view that it had not been were equally applicable here.

81. The judge then considered the appropriate test to apply in a case such as this and accepted, following the Supreme Court in *SG*, that it was whether the difference in treatment (or in this case the failure to treat differently) was manifestly without reasonable foundation (para.38). He also recognized the other factors referred to by Lord Reed in *SG* (see para.32 above) which militated strongly against the court interfering with the considered policy of government on socio-economic matters particularly when reflected in regulations approved by Parliament.

82. The judge then rejected a submission from Mr Wise that the manifestly without reasonable foundation test was no longer the proper test to apply and continued (paras. 38-39):

> "38. … But I do not need to go into detail since, *as will become clear*, application of the MWRF test does not save the discrimination by showing justification."
>
> 39. Lord Carnwath decided to dismiss the appeal because the discrimination was against the parents not the children and the children would have been treated the same whether the lone parents were male or female. Mr Sheldon submits that the narrowing of the cohort does not avoid that conclusion since the convention right remains A1PI. It is to be noted that Article 8 rights of the children were not pursued as an issue in *SG*. Lord Reed in *SG* suggested at paragraph 29 that to apply Article 8 because the reduction in income constituted an interference with Article 8 rights of those affected would extend the ambit of Article 8 beyond current understanding. But it is submitted by Mr Wise that since then the court has in the claims relating to the bedroom tax accepted that Article 8 can apply. The case is *R (MA and others) v. SSWP* [2016] 1 WLR 4550. The 'bedroom tax' was a cap on housing benefit in under-occupation of properties. Incidentally, that case confirms the correctness of the MWRF test. One of the claimants was the wife of the householder who needed to sleep in a different room because of her disability. The cap affected her Article 8 rights as, without needing to give reasons, the court accepted. Thus it is clear that benefit cuts can properly be said to engage the Article 8 rights of those affected. That they can include the young children whose welfare is likely to be affected by the cuts in the benefits which are specifically for their benefit seems to me to be clear. It follows in those circumstances that Article 14 is in play. As is apparent from the SG decision and what I have said, there has been a failure to apply the best interests of these children. Thus the barrier to relief which Lord Carnwath felt bound to apply no longer is valid." (Emphasis added.)

83. I confess that I find the reasoning in the judgment elusive and somewhat confusing at this point. The italicized words suggest that the judge is now about to explain why the claim should succeed, even accepting the manifestly without reasonable foundation test. He does so by reference solely to article 3 UNCRC. He explains why in his view the facts fall within the ambit of article 8 and why Lord Reed's observations to the contrary should not be followed. He then appears to assume, perhaps because of what I believe to be a mis-reading of *SG*, that once the facts fall within the ambit of article 8, including the interests of the children, their best interests must be taken into account as a primary consideration. He then relies upon *SG* and his own earlier analysis to conclude that they were not given that significance, and that the claims should therefore succeed. As he puts it, "the barrier to relief which Lord Carnwath felt bound to apply is no longer valid."

84. The judge then observed (para.40) that it was "difficult to follow why article 8 was not relied on in *SG*" and thought that it was because the point had not been pursued.

He did not refer to the consideration of article 8 given by either Lord Hughes or Lord Carnwath.

85. The judge then granted a declaration in the following terms:

> "The Housing Benefit Regulations 2006, as amended by the Benefit Cap (Housing Benefit and Universal Credit) (Amendment) Regulations 2016, are unlawful insofar as they apply to lone parents with a child or children under the age of two, in that:
>
> a. They involve unjustified discrimination against lone parents of children under the age of two, contrary to Article 14 ECHR read with (i) Article 1 of the First Protocol and (ii) Article 8 ECHR;
>
> b. They involve unjustified discrimination against children under the age of two with lone parents, contrary to Article 14 ECHR read with Article 8 ECHR in light of Article 3 of the United Nations Convention on the Rights of the Child."

86. We were told that this was an agreed order, but I confess that I am puzzled by its drafting in the light of the judgment. Paragraph (b), concerning discrimination against the children, is consistent with the passage in the judgment which I have extracted in para.80 above, which relies upon article 3 UNCRC as the basis for concluding that there was no justification for any discrimination. Paragraph (a), however, which relates to discrimination against the parents, does not make any reference to article 3. It would seem to follow that the judge was satisfied that quite independently of article 3, there had been discrimination against them which was not justified. The judge did not, however, identify in any very structured way why the claim for justification failed with respect to the cohort of parents. However, reading the judgment as a whole I think that the reasoning can probably be summarised as follows. Lone parents with children under two faced particular difficulties which made it extremely hard, if not impossible, for them to obtain work. This gave rise to indirect discrimination which was unlawful unless justified. There was no justification for failing to treat them differently and exempting them from the application of the cap. It was not legitimate for the Secretary of State to seek to rely upon the general aims of the cap because a central objective, namely incentivizing parents to work, had no real traction in circumstances where there was no realistic prospect of working. It was irrational, in the sense of manifestly without reasonable foundation, to penalise this group of parents for failing to work at least 16 hours a week when this was such a difficult requirement to satisfy.

The grounds of appeal

87. Mr Sheldon QC, counsel for the Secretary of State, mounted a full scale attack on the judgment of Collins J. The essence of the appeal is that the judge's legal analysis of article 14 was flawed in various ways. The judge ought not to have found article 14 applicable at all on the facts of the case, and so the issue of justification did not arise.

88. In support of these contentions Mr Sheldon relied upon the following submissions, some of which had been advanced before the judge. First, the judge had not identified with sufficient precision which group had been disadvantaged. Second, insofar as it was lone parents with children under two and those children, the judge wrongly treated these groups as having a relevant status within the meaning of article 14 without even analysing the issue. Given their transient status, they do not fall within that concept. Third, he submitted that the judge should have carried out a detailed analysis of precise comparators, and that this should have been done before the issue of justification was considered.

89. I do not accept the first two of these arguments. There is no basis at all for saying that the judge did not properly identify the groups adversely affected; in my judgment it is perfectly plain from the judgment, and is reflected in the order giving effect to his decision, that he was focusing on lone parents with children under two and those children.

90. I agree that the judge ought specifically to have addressed the question of "other status" since it was in issue, but had he done so I am satisfied that he would have been bound to treat lone parents with children under two, and those children themselves, as having a "status" within the meaning of the article. The fact that their status is temporary is not inconsistent with it falling within article 14. That is sometimes equally true of other conditions which have attracted the express protection of article 14, such as marital status or political opinion. Moreover, I have no doubt that the concept of lone parent or child would constitute a relevant status and the narrowing of these categories by reference to children below a certain age does not in my view materially alter that fact, particularly given the generous way in which the Strasbourg Court defines the notion of status, as Lord Wilson noted in *Mathieson*, para.22.

91. As to the third issue, it is in general the case in an indirect discrimination claim that once it is established that a rule has a disproportionate impact on one group, the issue of justification arises, irrespective of the extent of the disproportionate impact. It is not necessary precisely to measure the extent of that impact before engaging with the issue of justification. In so far as Mr Sheldon was suggesting otherwise, I would reject that submission.

92. In my judgment, however, it is important to recognise that the claim being advanced is one of *Thlimmenos* discrimination, which is a particular type of indirect discrimination. The premise of the claim, and indeed the finding of the majority in *SG* (admittedly under the less draconian cap) is that the scheme is in principle justified for all other parents whose children are over the age of two. The claimants must show that their situation is materially different so as to be capable of undermining that justification in their case and if the Secretary of State can show that the decision to include the claimants in the scheme is not manifestly without reasonable foundation, the claim must fail. The appellant complains that the judge did not properly address that issue of material difference. I return to that point below.

93. A further alleged error by the judge was his conclusion that the facts fell within the ambit of article 8. Mr Sheldon submitted that even if A1P1 provided a gateway into article 14, article 8 did not do so. He relied upon the observations of Lord Reed in *SG* who expressed the view that the cap did not fall within its ambit. I have discussed above the approach of the majority in *SG* to the application of article 8 and in my

view neither Lord Hughes nor Lord Carnwath analysed the potential relevance of article 8 in the same way as Lord Reed.

94. In my judgment, the authorities support the judge's conclusion on this point. The approach of the Court of Appeal in *SG* was that the case fell within the ambit of article 8. Mr Sheldon submitted that the Court of Appeal was only intending to say that the parents' rights to family and private life fell within the ambit of that article, not those of the children. But it is well established that the two are inextricably linked: see *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; [2009] 1 AC 115. I do not accept that the family rights of the parent can fall within the ambit of the article without the rights of the children doing so also, nor do I believe that the Court of Appeal was seeking to draw that distinction. Any change of residence brought about by the cut in benefits, which was the reason why the Court of Appeal considered that the facts fell within the ambit of article 8, affects both parent and children. In my judgment, given the lack of any consistent contrary approach by the Supreme Court on this question, the court should follow the Court of Appeal's analysis.

95. Moreover, the analysis of Lord Dyson in *SG* is in my view supported by a decision of Sir Terence Etherton MR, giving the lead judgment of the Court of Appeal in *Smith v Lancashire Teaching Hospitals NHS Foundation* [2017] EWCA Civ 1916, in a case heard after the hearing in this appeal. In that case the claimant was a woman who had co-habited with her male partner without getting married or being in a civil partnership (which of course they could not do since it is not an option for opposite sex couples.) Sadly her partner died in an accident and she sued, *inter alia*, for bereavement damages pursuant to section 1A of the Fatal Accidents Act 1976. She would have been entitled to bring such an action had she been either married or in a civil partnership and she claimed (successfully in the event) that it was a breach of article 14, read with article 8, for the law to deny her the same right. A declaration of incompatibility was made. One of the issues before the court was whether the facts fell within the ambit of article 8. The Master of the Rolls, with whose judgment McCombe LJ and I agreed, held that they did. He extensively considered a number of domestic and Strasbourg authorities on the point (paras. 41-55) including two decisions of the House of Lords, *M v. Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 and *R (on the application of Clift) v. Secretary of State for Work and Pensions* [2006] UKHL 54, [2007] 1 AC 484 as well as the Supreme Court decision in *Mathieson*. The Master of the Rolls summarized what he considered from the authorities to be the proper approach to the ambit question in the following terms (para.55):

> "The legal position may, therefore, be summarised as follows in a case where, as here, the claim is that there has been an infringement of Article 14, in conjunction with Article 8. The claim is capable of falling within Article 14 even though there has been no infringement of Article 8. If the State has brought into existence a positive measure which, even though not required by Article 8, is a modality of the exercise of the rights guaranteed by Article 8, the State will be in breach of Article 14 if the measure has more than a tenuous connection with the core values protected by Article 8 and is discriminatory and not

> justified. It is not necessary that the measure has any adverse impact on the complainant in a positive modality case other than the fact that the complainant is not entitled to the benefit of the positive measure in question."

96. In my judgment, there can be no doubt that granting welfare benefits can properly be described as a modality of the exercise of an article 8 right in circumstances where at least one of the purposes of housing benefit is to enable families to live together in appropriate accommodation. The question, therefore, is whether imposing a cap to limit those benefits has more than a tenuous connection with the core values protected by article 8. As Lord Bingham noted in *M* (para.5), the mere fact that legislation leaves a family with less money than would otherwise be the case does not of itself mean that it falls within the ambit of article 8, notwithstanding that it may impact on decisions within the family which affect its members. Nor, in my view, could it be enough that a possible consequential effect of the measure is that it might in future give rise to an article 8 claim. Such a possibility could rarely be wholly eliminated. But in my view where the measure is designed to encourage single parents to work and to prejudice them if they do not, it does potentially impinge on family life (and indeed private life). If the lone parent works it could well affect the family dynamic, and if he or she does not work there is a realistic possibility that it will cause the family to have to move accommodation, possibly to a new and unfamiliar area. It is true that the evidence shows that fewer families have in fact needed to move than had originally been anticipated when the cap was first imposed, but that does not in my view dilute the force of this point. These were foreseeable results and in my view they cannot be said to be so unlikely or remote as to be characterized as tenuous. In *Petrovic v Austria* (2001) 33 EHRR 14 para. 27 the European Court of Human Rights held that the award of a parental leave allowance affected the way in which family life was organized because, when taken in conjunction with parental leave, it enabled the parent to stay at home and look after the children. The cap has the opposite effect, but it equally affects the way in which family life is organized.

97. In my opinion the judge was right, therefore, to say that the facts fell within the ambit of article 8 family rights which embraced the rights of both parents and children. However, I do not think that the interests of the children under the age of two can sensibly be treated as separate from the interests of their parents. They have no independent private life and their family life is inextricably inter-twined with their parents. Their claims fall within the ambit of article 8 only because their parents' claims do so. In my judgment this has a bearing on their own independent claim, for reasons I develop below.

98. The judge in his analysis of the article 8 ambit issue also relied upon the decision of the Supreme Court in *MA* (see para.39 reproduced in para.80 above). That case related to alleged disability discrimination contrary to article 14 in relation to a number of appeals concerning the application of the cap on housing benefit to those who had unoccupied bedrooms. The judge considered that the case clearly demonstrated that imposing a cap of this nature fell within the ambit of article 8 because it was held to have done so in that case. However, there appears to have been no discussion in *MA* about whether the facts fell within the ambit of article 8; the point seems to have been conceded. Also, the denial of benefit in those cases directly affected the living arrangements for certain disabled people, and was more directly linked to their

personal lives than is the case with respect to these claimants. I do not, therefore, consider that *MA* determines the point. Nonetheless the judge did, in my view, reach the right conclusion on this issue.

Was there discrimination and was it justified?

99. In my judgment, therefore, Collins J was right to hold that article 14 was engaged both because the imposition of the cap affected property rights of the parents so as to engage A1P1 and because it fell within the ambit of the article 8 rights of the parents and their children under the age of two. I turn to consider the question whether the claimants were in a significantly different situation from other lone parents with older children so as to attract the *Thlimmenos* principle, and if so whether the failure to exempt them from the cap was justified. The appellant submits that the judge erred in his approach to both these questions. Mr Sheldon contends that there was a wholly inadequate assessment of the relative disadvantage of the cohort group when compared with other lone parents, particularly those with children under school age. If the judge had properly analysed that issue, the only proper conclusion he could have reached was that there was no significant difference between the position of the claimants and other lone parents with children under school age and that accordingly it was not incumbent on the Secretary of State to exempt this group from the operation of the cap. Furthermore, even if the difference could be characterized as significant, it was nonetheless legitimate for the Secretary of State to take the view that it would undermine the objectives of the measure to allow the exemption to operate. So far as the children's claims were concerned, the judge's finding rested on the conclusion that article 3 UNCRC was engaged and had been infringed but neither conclusion was justified on the facts here.

Discrimination as against the parents.

100. I will first consider the position with respect the parents. The terms of the declaration suggest that the judge was not treating article 3 as relevant to their claims, even with respect to the breach of article 14 when read with article 8.

101. Mr Sheldon's short answer to the finding of discrimination in relation to the parents is that it is inconsistent with the decision of the majority in *SG*. He submits that the cohort of lone parents in that case included, even if it was not limited to, lone parents with young children. The position of lone parents with children under five was expressly raised but no exception was made with respect to them. I reject that submission; *SG* cannot be said, even by inference, to have rejected the arguments now advanced. The focus now is narrower being trained on a relatively small group of lone parents rather than a much larger group of all lone mothers, and the nature of the discrimination relied upon is *Thlimmenos* rather than traditional indirect discrimination.

102. Having said that, Lord Reed did make certain observations with respect to the argument that lone parents with children under five should be exempted because of the difficulties in obtaining work, in terms which suggest that in his view at least the argument now advanced may be difficult to sustain (para.74):

> "In relation to the difficulties of finding work, data from the Office for National Statistics (ONS) indicate that 63.4% of

> single parents with dependent children were in work during the second quarter of 2014. An ONS analysis based on data for 2012 indicated that the employment rate for single parents with a dependent child under the age of 2 was 32%; for the age range 2-4 it increased to 42%; for the age range 5-11 it was 63%. Plainly, many single parents, including those on low incomes, make arrangements for the care of children in order to work. Their children over five years of age are required to attend school. Their younger children may attend nurseries or may be looked after by family members or child minders. The amount of work which a single parent has to perform, in order to be exempted from the cap, is only 16 hours per week. Even those hours need not necessarily be worked throughout the year: if a person works in a place of employment which has a recognisable cycle of employment, such as a school, the holiday periods during which she does not work are disregarded. As I have explained, assistance with meeting the cost of child care is available and is excluded from the cap. The statistics set out at paras 56 and 57 above do not support the contention that single parents with children under five have experienced greater difficulty in obtaining work than other claimants affected by the cap. Some people take the view that it is better for the single parent of a young child to remain at home full-time with the child, but there is no basis for requiring that view to be adopted by Government as a matter of law."

The passage refers to para.57 in which Lord Reed noted that figures up to March 2014 showed that 29% of households where lone parents had children under five which had been capped were no longer capped, and 38% of those had become exempt because the parent had obtained work. He described this as being in line with the figures for all households.

103. The question is whether the failure to exempt this cohort of parents from the cap is lawful. In considering this question there are in my view three related points which need emphasis. First, since the claimants are alleging that they are in a significantly different position from other lone parents, it is not enough for them to show that they face difficulties in obtaining employment because of their childcare responsibilities: these difficulties must be disproportionate compared with the problems facing other non-working households, including those where lone parents have children over two. Nor is it sufficient to show that some of the claimants are unable to work despite wishing to do so; that too is true of other lone parents with older children and it was the position of many of the claimants in *SG*, but that fact was not sufficient to render the scheme unlawful. The difference in their situations must be sufficiently marked to justify the court concluding that the reasons which justify the imposition of the cap generally either do not apply, or alternatively apply with such diluted force to this cohort of claimants that it was manifestly without reasonable foundation for the Secretary of State to subject them to the same rules.

104. Second, although Collins J was at various points in his judgment highly critical of the effect of the cap on those already in or close to poverty – and much of the evidence

adduced before the court was directed to that matter - that was not strictly relevant to the issue before him. It is not alleged that the imposition of the cap on these claimants is unjustified simply because the detrimental effect on the claimants' families is disproportionate to the legitimate aims. Indeed, it would have been inconsistent with the premise of the claim to have advanced that argument. It is accepted that the imposition of the cap is justified with respect to other lone parents, yet they too will be subject to serious financial pressures as a result of the cap and many of them will also be constrained by child care duties and other factors from obtaining work, even if they wish to do so. The majority in *SG* accepted that the cap could be justified in its application to lone parents notwithstanding these consequences and it would not be legitimate to row back on that reasoning. It is true that the cap has been further reduced thereby exacerbating the difficulties which non-working households have to face, but it has not been argued that the cap can no longer be justified in its application to lone parents for that reason. That would effectively involve revisiting *SG* in the light of the more restrictive cap which is not how these claims were advanced. The claims are not that the damage caused by the cap for those unable to work is too great to justify its imposition; it is that the particular claimants were prejudiced because they were in practice unable to escape its clutches by obtaining work.

105. A third and related point to emphasise is that there is no basis for saying that the additional financial strain which the cap imposes on households with children under two is any greater than for other non-working households. At various points in his judgment Mr. Justice Collins emphasized the detrimental impact which the imposition of the cap has on these claimants, and there is no doubt that it does. No one should underestimate the very real hardships caused by the imposition of the cap, and the particular circumstances of the individual claimants in this case bear witness to the harsh circumstances in which they and those similarly placed live, as does detailed evidence from Shelter. But they are difficulties which have to be borne by all non-working households to a greater or lesser extent; they are not unique to this cohort, nor does the cap necessarily bear more harshly on them. There is no linear relationship between the financial impact on families caused by the cap and the age of the children. Indeed, it is obvious - and evidence from Shelter demonstrated this (para.55 of the evidence of Mr Graeme Brown, the then Interim Chief Executive) - that households with a greater number of children will typically suffer more, whatever the age of their children, simply because the parent or parents have more mouths to feed and are likely to need larger accommodation. Households with two parents will be worse off than households with single parents. Collins J did rightly observe that poverty can have a very damaging effect on children under five (para.29) and evidence from, inter alia, the Children's Commissioner supported that statement, but many such households will in fact be financially better off than other households with more children albeit none under two. Exempting the claimant children on that ground would work in a relatively arbitrary way.

106. It follows that the proper focus in this case must be whether the problems faced by the particular cohort of parents in securing effective and affordable child care are sufficiently different from problems facing other lone parents to entitle the court to conclude that it is manifestly without reasonable foundation to fail to exempt them from the operation of the cap. There is good reason why any difference in the situation of the claimants should be "significant", to use the language of the

Strasbourg court in *Thlimmenos*. Underlying a *Thlimmenos*-type complaint is the notion that different cases must be treated differently. But if the circumstances are not obviously significantly different, to make an exception for the group risks infringing the principle that like cases should be treated alike. That constitutes an unfairness and creates a sense of grievance in those who whose circumstances are not materially different and yet are not treated in the more favourable way. It will necessarily be a matter of judgment in any given case whether the circumstances are sufficiently different to warrant different treatment. The question in substance is: was it clearly unfair not to exempt them from the rule? The manifestly without reasonable foundation test reflects that principle. The question is not whether government might have made an exception for this group; it is whether it was obliged to do so. The difficulties of a claimant establishing a case of this nature are in my view compounded in circumstances where even putting the case at its highest only some of the cohort are prejudiced as a result of the alleged difficulties.

107. Accordingly, where the claimants are in a different position, but not significantly so, an implicit rationale for not dis-applying the measure to them is that the justification for imposing the measure still in essence holds good and it would create a sense of unfairness to treat them differently. It is perhaps a matter of no real importance in such a case whether the appropriate analysis is that the failure to make an exception for the group is justified for this reason, or whether it is that there is nothing to justify because no significant difference has been established.

108. Even where there is a significant difference in the claimant cohort's situation so that prima facie the rule impacts upon it in a materially harsher way, there will still be no breach of the *Thlimmenos* principle if the Secretary of State is able to justify failing to treat the claimants differently. As with traditional indirect discrimination, the justification relied upon will typically be that notwithstanding the material disadvantage in which the group is placed, the aims of the measure nonetheless remain legitimate with respect to this group and it is not disproportionate to impose the measure upon them.

109. As I have indicated, Collins J identified at different points in his judgment certain difficulties which made it more difficult for lone parents with children under the age of two to obtain employment: the higher child-care costs; the need in some cases for up-front payments; the difficulty in finding places; and the fact that these lone parents have to bear a higher proportion of childcare costs than those with older children who are in receipt of free child care. However, in my judgment what the judge did not do was to assess how seriously these factors impinged on the ability to find work when compared with other lone parents with older children and whether the difficulties could properly be characterized as so significant at least prima facie to require an exemption from the cap. The judge assumed that these factors made it very difficult or virtually impossible for this cohort to obtain work, in contrast to other lone parents. But in my judgment he reached that conclusion on the basis of limited evidence and without considering potentially relevant statistical information.

110. There will in practice be a range of factors which are likely to affect the ability of a lone parent to obtain work, and many of them are wholly unrelated to the age of the children. Such factors will include the availability of work in the locality for someone with the individual's skills; whether there is help available with child care from family or friends, perhaps through a sharing arrangement; the number of children the

lone parent has and their ages; the complexity of any care arrangements; and the difficulty in getting to work which is available. Moreover - and in my view this is a matter of real importance - the factors which suggest that lone parents with children under two may have to pay more from their budget for childcare, namely the fact that child care may be more expensive for very young children, and that the costs are only partially recouped where the child is under three whereas there is free child care for older children - does not go to the ability to obtain work but rather to the financial benefit of undertaking it. It is true that the benefit which lone parents under three will derive from working will be less than will be the case when the children are over three, assuming that child care has to be paid for. Even so, it will be highly unlikely that work will not benefit the family to some extent given that at least 70%, and often 85%, of the cost of child care is recoverable and that the cap does not apply once 16 hours are worked. Mr Sheldon pointed out that free child care of 15 hours a week (as it was until increased to 30 hours), when 16 hours needs to be worked, is not substantially more beneficial than the 85% recoverable by those on universal credit. Collins J was no doubt justified in saying that even relatively small sums can have a seriously damaging effect upon those close to poverty, and there may be powerful arguments for extending free child care to lone parents with children under the age of two. But the fact that work is less financially advantageous for most lone parents with children under three than for lone parents with older children does not mean that it is more difficult, let alone impossible, for these claimants to obtain work. It may be that they are less inclined to take it because they consider the rewards to be inadequate once child care has been paid, but that is a different matter. Similarly, the so-called "conditionality" argument, which relies on the alleged illogicality of on the one hand not requiring lone parents with children under two to work as a condition of obtaining benefits yet on the other requiring them to work to avoid the cap, has no bearing on their ability to obtain employment.

111. In my judgment, there was also relevant statistical evidence in this case, referred to by Mr Sheldon, which was not referred to by the judge but lends support to the argument that the impact on this cohort of lone parents is not significantly different from other parents with young children. First, the Household Annual Population Survey for 2015 showed that some 40% of lone parents with children under two work and 95% of them do so for at least 16 hours a week. For lone parents with children three to four the percentage increases to 50% of which 90% are working at least 16 hours a week; and the proportion increases for lone parents with children aged five to nine to 70%. These statistics are consistent with the proposition that it is easier for lone parents to move into employment as the youngest child gets older, but they are not consistent with the conclusion that it is either extremely difficult, far less impossible, for parents with children under two to obtain employment. It is true that these figures do not relate to those subject to the cap, but many of the problems of accessing work and finding appropriate childcare apply to all lone parents with children under two.

112. Second, in his first witness statement Mr Edson, the lead official on the benefit cap policy for the Department of Work and Pensions, referred to statistics relating to the period when the cap was introduced in April 2013 until November 2016. They showed that 83,700 households had been capped and of these some 63,600 were no longer capped. Of those, 41% had moved into work (as demonstrated by receiving working tax credits) and others had avoided the cap in other ways. Taking the cohort of claimants in this case, lone parents with children under the age of two, 13,600 had

been capped since 2013 but 8,700 (amounting to 64%) were no longer capped and of those 40% had found work. The statistics for those with children under the age of three was very similar; 19.900 had been capped but 12,800 were no longer capped (also 64%) and 41% of those had found work. For lone parent households with children under five, some 30,900 had been capped but 20,500 were no longer subject to the cap (amounting to 66%) and of these 44% had obtained employment.

113. In his second witness statement, Mr Edson provided more up to date figures (para.76). These show that in the period since the introduction of the benefit cap in 2013 up to February 2017, 16% of lone parent households which had been capped in that period when the youngest child was under two had moved into employment; the proportion is the same for lone parent households where the youngest child was aged two; it rises to 18% where the youngest child was aged three; 23% where the youngest child is aged four; finally rising to 30% where the youngest child was five.

114. It is true that it is not clear from the above statistics when the lone parents moved into employment, and no doubt in some cases those households capped when the youngest child was under two will have found employment when that child was two or possibly even older. But there must be a significant number of lone parents in the under two category whose youngest was still under two in February 2017, and if it was so much more difficult for this group to obtain employment than lone parents with older children, one would have expected the overall proportion of those moving into employment by February 2017 to be markedly lower than for lone parents with children aged two or over. Yet that is not the case.

115. In my judgment taking the evidence in the round, it does not support the proposition that the cohort of lone parents with children under the age of two in practice face substantially greater difficulties that lone parents with older children in obtaining work, nor indeed that it is virtually impossible for them to go to work because of their child care responsibilities. When combined with the fact that it is in any event only some of the claimant parents who are likely to be affected by such factors as do genuinely inhibit their ability to find work (because, for example, child care may be provided by friends or family) the submission that there are obvious and significant differences which mark this group out from other lone parents is not in my judgment made good.

116. Mr Wise QC, counsel for the respondents, submitted that we should respect the conclusion of the judge on this matter. He said that there was a plethora of evidence before the judge and that it is not for this court to select bits and pieces which might cast doubt on the judge's conclusions of fact. I recognise that in many contexts such an argument will have considerable force and may be decisive, but I do not accept that it does here. It is true that there was extensive evidence before the judge but much of it was directed at matters which were not directly in issue before him, such as the reliability of the government's statistics and whether they showed that the imposition of the cap had encouraged the take up of employment as the Secretary of State claimed; the hardship which the cap imposed on lone parent households, particularly where they have young children; and the extent to which the DHPs mitigated any adverse effects on the claimants. The evidence relating to the difficulties of moving into work was much more confined. Moreover, the relevant question, which the judge did not directly address, was how much more difficult it was for this cohort of lone parents than those with older children. In so far as he may have thought that it was not

necessary to carry out that task because it was practically impossible for this cohort to obtain employment, the evidence does not in my view sustain such a bleak conclusion, and indeed the statistics suggest otherwise. Those with children under two do face some impediments in obtaining work, and they may be discouraged from seeking work because the lack of free, as opposed to subsidised, child care means that the financial benefits are not as rewarding as they are for lone parents with older children. But the test is whether the problems they face in moving into employment are so marked as to make it manifestly without reasonable foundation for the Secretary of State not to exempt them from the application of the cap. Given the weight which the government gives to the policy of enhancing the life prospects of children by encouraging even lone parents to obtain work, I do not believe that it was open to the judge to conclude that it was so much more difficult for this cohort of parents to obtain work when compared with lone parents with older children that it would not be fair to subject them to the same rules.

117. In my judgment, the availability of DHPs lends support to the Secretary of State's decision not to exempt this cohort of lone parents. In *SG* Lord Reed accepted that the existence of discretionary housing payments was a material consideration to take into account when assessing justification in that case (see para.44 above). As he pointed out, the existence of discretionary payments would be no answer to fundamental structural discrimination but it was an appropriate way of seeking to deal with particular hardships which could not be readily identified in advance because they depend upon a range of factors which vary from household to household. In my judgment that observation is equally apposite here. In these circumstances it is not unreasonable to adopt a system of discretionary benefits which can be targeted where they are needed. Moreover, as the judge fairly pointed out, the guidance produced by the Department relating to the payment of DHPs, which local authorities are obliged to apply, identifies a number of categories considered as suitable to receive payment and these include various groups affected by the benefit cap and some who fall within the claimant cohort. For example, it includes those fleeing domestic abuse, households with children under the age of nine months and women within 11 weeks of the expected day of childbirth. Mr Edson gave some data (which he admitted was limited) which showed that more than 2 in 5 capped households had received a DHP at some point. As Mr Sheldon pointed out, these particular claimants had benefited from these payments. I accept that the payments come nowhere near mitigating in full the loss of income to this group resulting from the imposition of the cap, but that is not their purpose. In my view the fact that a discretionary payment of this nature is available, and is to some extent targeted to ameliorate the difficulties facing at least some lone parents with children under two, is a consideration which reinforces the conclusion that there is no unlawful discrimination in this case, albeit that I would treat it as a factor of only limited importance.

118. I appreciate that it may be said that even if other lone parents are in a similar position, the evidence shows that the overall proportion of lone parents with children under school age who are at work is still relatively small and that many of them who seek work are unable to obtain it for a variety of reasons. It may be argued that an exception should be made for this wider group as a whole. But that raises a different case (and one which Lord Reed did not find persuasive in *SG).* It does not assist these parent claimants.

Was the discrimination justified?

119. Given that I have found that there was no discrimination arising from the failure to exempt this cohort of parents from the application of the cap, the question of justification does not strictly arise. The judge appears to have concluded that because of the difficulties facing the claimant cohort, the aim of incentivising work was irrelevant in their case. In the last paragraph of his judgment (para.43) he said this:

> "..the cap is capable of real damage to individuals such as the claimants. They are not workshy but find it, because of the care difficulties, impossible to comply with the work requirement."

120. The logic appears to be that if the practical difficulties in obtaining work make work a wholly unrealistic option, the aim of incentivising work cannot be realized however much the parents may be penalised for not working. A key plank in the justification case for the Government was therefore undermined.

121. I would accept that if it were indeed the case that the circumstances of these claimants were significantly different to lone parents with older children to the point where they were in practice unable to obtain employment, the aim of incentivizing them to work would have no legitimate traction in their case. The judge's conclusion that the *Thlimmenos* principle required different treatment would be sustainable. Mr Sheldon submitted that even if that were the position, the judge ought to have recognized that the fairness objective in particular (and to a lesser extent, costs savings, at least in the long term) would still have merit and would be capable of justifying the cap. Indeed, he complained that the judge gave no weight at all to these considerations in his justification analysis.

122. I do not accept that criticism of the judgment, once the important premise of the judge's reasoning is accepted. It was always a major reason for imposing the cap to incentivise lone parents to work, including the cohort of lone parents with children under two. If there was indeed no proper scope for incentivisation, it is difficult to see how the fairness objective on its own could justify imposing the cap. It is hard to see how it could be perceived to be fair to penalize a group for not working if they cannot work. In any event, at no stage in the course of the extensive discussions relating to the cap did the government suggest that the fairness objective alone, or even in harness with cost savings, justify the cap; the refusal to exempt lone parents with young children from the application of the cap was based upon the Government's strong commitment to bring about a change in welfare culture by adhering strongly to the principle that work pays. That may justify imposing the cap even where it disadvantages some who wish to work but cannot for reasons beyond their control, but it is a hollow refrain if applied to a group which cannot in practice work at all.

123. There is one further point to address about the judge's reasoning. He laid considerable emphasis on the fact that the government had carried out no specific consideration of the position of children under the age of two and observed that "the need to consider a particular group who are adversely affected is important". It is true that where a decision maker relies upon factors in support of justification which were not in its mind before the decision was taken, "this will call for a greater scrutiny than would be appropriate if they could be shown to have influenced the mind of the decision maker", as Lord Kerr put it in *In re Brewster* [2017] UKSC 8; [2017]1 WLR 519

para.52. That is not to say, however, that the courts will not pay due respect to retrospective judgments. Moreover, the point seems to me to have less force in a case such as this. The government faced pressure to exempt lone parents with children under school age from the imposition of the cap from the moment the cap was first introduced. The basis of those arguments was essentially, as in this appeal, the difficulty of combining child care responsibilities with holding down a job. It would therefore be wrong to suggest that the position of lone parents with young children generally was not actively under consideration, even if the focus was not specifically on the particular position of lone parents with children under the age of two. The suggestion to narrow the exemption to that particular cohort was first made in the course of the Parliamentary debates on the 2016 Act. The Secretary of State has now engaged with the more nuanced arguments bearing upon that issue and has taken the view that to the limited extent that there are particular problems facing this cohort of claimants, they do not warrant their exemption from the cap and can reasonably be dealt with by other means, notably DHPs.

124. In my judgment, whilst the Secretary of State would arguably have been entitled to make an exception for this cohort, it is not possible to say that the failure to do so can properly be characterised as a decision which is manifestly without reasonable foundation. As Lord Reed pointed out in *SG*, that is a particularly high hurdle when the relevant regulations have been approved in Parliament and when the very issue in this case, namely the desirability of treating the cohort in a different and more favourable way, was expressly raised in Parliament but not accepted. Whether the better analysis is that the disadvantage is simply not significant enough to need justification, or whether it is that there is some disadvantage but it is in the circumstances remains justified by the aims of the policy, is a moot point.

The children claimants

125. I turn to consider the position of the children claimants. Collins J's conclusion that they were subjected to unjustified article 14 discrimination was inextricably linked to his finding that article 3 UNCRC was engaged and had been infringed. The appellant submits that even assuming that the children had the relevant status to bring article 14 into play, this analysis displayed three errors: first, article 3 was not engaged with respect to the issue of justification; second, if it was, it had not been infringed; and third, even if it had been, this did not justify the finding that it was not justifiable to impose the cap on this group.

Was article 3 engaged?

126. The decision in *SG* clearly shows that where the route into article 14 is A1P1, article 3 UNCRC is not engaged. In essence the point made by the majority was that although children may be affected by the reduction in the income to their lone parent, neither that fact nor the question whether the best interests of the children had been taken into consideration were relevant to the question whether the discrimination against the property rights of single mothers was justified. The detriment to the children was the same whether their lone parents were male or female. In my judgment the same logic is apposite to any challenge where the route to article 14 is A1P1; the reasoning is not limited to a complaint of sex discrimination. The judge's order is consistent with this since he did not rely upon article 3 with respect to the claims brought by the parents

with respect to A1P1. Indeed, he did not rely upon it with respect to the parents' article 14 rights when linked with article 8 either.

127. Does the position alter when the route into article 14 is article 8 and the claimants are the children? The judge held that article 3 was engaged in those circumstances because in his view *SG* had so decided. In fact, for reasons I have given, there was no majority in *SG* supporting the conclusion. Indeed in my view Lords Hughes and Carnwath if anything came to the opposite conclusion and appear to have held that article 3 UNCRC was not engaged even where the route into article 14 was that the facts fell within the ambit of the article 8 right to family life of the parents and children. The position would have been otherwise had article 8 been engaged as such, in the sense that it was prima facie infringed and required justification pursuant to article 8.2, but that was not the position.

128. In any event, and whatever the proper reading of the judgments of Lords Hughes and Carnwath, in my judgment the fact that children are claimants in their own right does not bring article 3 UNCRC into the frame even though the facts fall within the ambit of article 8. The critical point, as in *SG*, is that the nature of the discrimination is the same whether article 8 or A1P1 is relied on as the route into article 14. It is that the parents are put at a disadvantage because of the greater problems they have obtaining work, given their child care responsibilities. The reformulation of a claim by relying on the article 8 family right as well as A1P1 does not alter the essential nature of the discrimination under consideration, at least in circumstances where the article 8 right is not engaged as such and reliance is placed instead on the ambit of the right. The fact that the children can make their own claim which can be characterised as discrimination with respect to the right to family life does not alter the fact that what is in issue remains in substance discrimination against this particular cohort of lone parents, focusing on the difficulties they face. The case falls within the ambit of the children's article 8 rights only because those rights are inextricably intertwined with those of their parents. That is particularly so in this case where the children are so young. It is not as if this cohort of children are necessarily affected by the imposition of the cap more than other children of parents living in workless households, and particularly other children under school age. Indeed, as I have indicated earlier, the precise consequence is likely to depend more on the number of children than on their ages. There is therefore no reason why the best interests of these children under the age of two should be materially different to the best interests of other children affected by the cap.

129. In my view, therefore, consideration of the best interests of the children would no more assist in elucidating the issue of justification for the discrimination in this case than it did in *SG*, and that is so even with respect to the children's own article 14 claims.

130. In view of this conclusion, it does not matter whether the judge was entitled to find that there was a breach of article 3 UNCRC or not. However, in my judgment that was a finding open to the judge in the light of the majority conclusion in *SG* that the children's best interests had not been taken into account as a primary consideration. Mr Sheldon submitted that this conclusion was reached on the basis of the information then before the court and that subsequently, during the process leading to the imposition of the new cap, the government has specifically considered the position of lone parents with children under two, and had also specifically had its attention

drawn to the decision in *SG*. But the analysis of Lady Hale and Lord Kerr in *SG* was that it could not be in the best interests of the children to subject them to a state of poverty; and the further reduction in the cap exacerbates those problems. Lord Carnwath focused more upon the failure of Government explicitly to face up to and evaluate the consequences for these children and to explain clearly why it was thought acceptable to subject them to this harsh regime. In my view, whilst it must be true that given the range of consultation with so many bodies, the Government was well aware of the difficulties which the cap would create for non-working families, including those with children under two, the "best interests" exercise has still not been carried out in the structured way which Lord Carnwath required. Had the "best interests" test been in issue, I would have found, in the light of the reasoning of the majority in *SG*, that the judge was right to find that it had not been satisfied.

131. It does not necessarily follow, however, that this would invalidate the cap as regards this group of children. I would have been inclined to find that it would not do so, although since we did not hear argument about this, I would have allowed submissions to be made before reaching a concluded view on the matter. The reason for my tentative view is that assuming that I am right in concluding that the claims of the parents fail, the only basis for invalidating the cap with respect to these children would be that their best interests had not been considered as a primary consideration. However, that is equally the case with children of other lone parents; the logic should be that the cap is invalidated with respect to all lone parents (as in substance the minority in *SG* thought), but that is not how the case was advanced. Indeed, the case was premised on the notion that there was no article 14 discrimination with respect to other children. There is an element of arbitrariness in treating these particular children more favourably than other children when the basis of their success is an alleged failing which applies generally. It also suggests that if in *SG* the children who were claimants had thought to frame a distinct article 14 claim of their own linked to article 8, article 3 UNCRC would have been in play and they would have been bound to succeed. If the outcome in *SG* turned on such a technical basis, I think that it should be for the Supreme Court to say so.

Respondent's notice

132. Mr Wise put in a respondent's notice in which he raised two points. Neither was pursued with much vigour at the oral hearing. The first was that the judge ought to have accepted that the test of manifestly without reasonable foundation has been modified to the extent that when applying the fourth element of the traditional proportionality test - broadly whether a fair balance has been struck between the interests of the rights of the individual and the community - it was for the court to apply that test to a more exacting standard than the manifestly without reasonable foundation test would permit. He relied upon certain observations of Lord Mance to that effect in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016 para.52 which were applied in the judgment of Lord Wilson, with which Lords Kerr and Hughes agreed, in *R(A and B) v Secretary of State for Health* [2017] UKSC 41, para.33. Even if, as Lord Wilson said, the fourth question was one which constitutionally "the court can answer for itself", I cannot envisage that it would fail to pay due regard to the considered view of the institution which is often better placed to answer that question than is the court. In any event, the short point here is that even applying that test, it does not alter the analysis I have adopted. The

problem for the claimants, in my view, is that the evidence did not sustain the inference that this cohort was in a significantly different situation from other lone parents so as to make it unreasonable not to subject them to different treatment. The proportionality question does not bear on that issue.

133. The second matter raised was that the judge did not consider a common law challenge to the imposition of the cap on these claimants. Given his conclusion, it was not necessary for him to do so although in view of my conclusion on the ECHR argument, it could in theory become relevant now. Suffice it to say that I cannot envisage how the common law would provide any greater protection than article 14 in the context of this case, and it was not explained how it might do so.

Conclusion

134. I would uphold the appeal. I do not in any way minimise the very real and substantial hardships which particular families face under this austere regime. But the Government takes the view that in the longer term it is part of a set of policies that will transform the culture of benefit dependency, help eliminate poverty, and improve the life chances of the most vulnerable children in our society. There are many individuals and groups who passionately disagree with that view and consider that the goal is unrealistic and that the price, in terms of the damage to families affected, is far too high, particularly where they have young children. Many have made representations to the Government in the strongest terms and have had some limited success in changing the detail of the regulations but not the overall principle. It is not for the judges to champion either side in that debate, or to permit their private political views to influence the decision. The principle that the courts should interfere in cases of controversial political or economic issues only if the particular policy is manifestly without reasonable foundation does no more than reflect the fact that for such decisions Government is primarily answerable to Parliament and not the courts. Even if that principle is not in terms to be applied with full rigour to the fourth element of the proportionality principle, there are sound institutional and constitutional principles why the courts should be reticent in setting aside decisions which Parliament has expressly reviewed and approved.

135. In this case the question is ultimately a narrow one. Are the circumstances of single parents with children under two sufficiently different from other lone parents as to require an exception to be made to the imposition of the benefit cap? Much of the material before the court has focused on the hardships suffered by households with young children. But those hardships are shared by other workless households, and indeed larger families will be likely to be affected more than smaller families, even if they have no children under the age of two. Evidence of hardship would be potentially relevant to a challenge to the imposition of the cap to lone families in general, but it is not now suggested that the cap is unlawful in its application to other lone parent households, only those with small children under the age of two. So the focus must be whether the particular difficulties which those parents face when seeking employment are sufficiently distinct to render it unreasonable not to make an exception for them. For reasons I have given, I do not accept that the problems are sufficiently proportionately disabling to these lone parents to make it unjust not to treat them differently. As for the children themselves, I do not accept that presenting them as claimants in their own right adds anything of substance to the discrimination

claims brought by their parents. In particular, their claims do not in my opinion engage article 3 UNCRC any more than they did in *SG*.

Lord Justice McCombe:

136. The subject matter of this case, and the legal history of the problem arising, are relatively simply described by Sir Patrick in paragraphs 1 to 9 above. There the simplicity ends. I am grateful to Sir Patrick also for setting out the relevant statutory and regulatory provisions and a summary of the Strasbourg jurisprudence. I will try to focus this judgment on a statement of the conclusions that I have reached in the simplest terms that I can achieve, given the extreme complexity of the issues. I have endeavoured to keep this judgment as short as possible, given that discussions have revealed that mine is to be a minority voice on the appeal.

137. I see it as our task to seek to apply the law as stated by, or to be derived from, the decision of the Supreme Court in *SG*, but with the shift of focus required by the different "cohort" of claimants on whose behalf the present claims are brought and the difference in nature of the discrimination alleged. I confess to having had some difficulty, as I believe we all have had, in extracting from the judgments in *SG* a clear sight of what the correct outcome in this case should be. In broad terms I agree with Sir Patrick's conclusion in the second sentence of paragraph 56 as to the effect of *SG* in its result. I agree too with his assessment of Lord Hughes's judgment upon the "non-engagement" of Article 3 UNCRC. For the reasons I shall explain, I am not confident of his assessment of Lord Carnwath's judgment on the point. More significantly for the present case, I am not clear as to what the majority opinion would be in respect of the claims made within the very different parameters of this present case. The decision in *SG* provides some pointers for us, but (as I see it) nothing in its *ratio decidendi* determines the outcome of this appeal.

138. Sir Patrick has written his own close analysis of the judgments in *SG*. However, I have found it helpful, given our differing views, in reaching my own conclusions on this appeal to look at the case independently.

139. The claim in *SG* was brought by three mothers and one child of each. The benefit cap in the 2012 regulations were challenged,

> "… [On] the grounds, inter alia, that the benefit cap was unlawful because (i) it discriminated against women and large families on grounds of sex, race, religion, age and "other status" (lone parents), contrary to article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms when taken together with article 8 and/or article 1 of the First Protocol to the Convention ("A1P1"); (ii) it breached article 8 of the Human Rights Convention and/or article 3.1 of the United Nations Convention on the Rights of the Child; and (iii) the Secretary of State had acted irrationally or unreasonably in failing to obtain relevant information about the impact of the scheme on lone parents escaping domestic violence and on those in temporary accommodation." (see [2015] 1 WLR 1449, 1453 G – H)

The claims were dismissed and I take gratefully from the headnote in the Weekly Law Reports (at p.1450 C – F) the crux of the decision as follows:

> "… [F]or the purposes of an article 14 claim the legislature's policy choice in relation to general measures of economic or social strategy, including welfare benefits, would be respected unless it was manifestly without reasonable foundation; that the view of the Government, endorsed by Parliament, that achieving the legitimate aims of fiscal savings, incentivising work and imposing a reasonable limit on the amount of benefits which a household could receive was sufficiently important to justify making the Regulations despite their differential impact on men and women, had not been manifestly without reasonable foundation; that although Convention rights protected in domestic law by the Human Rights Act 1998 could be interpreted in the light of international treaties that were applicable in the particular sphere, the United Nations Convention on the Rights of the Child was relevant only to questions concerning the Convention rights of children and not to a claim of alleged discrimination between men and women in the enjoyment of the property rights guaranteed by A1P1 ; that it followed that even on an assumption (per Lord Reed and Lord Hughes JJSC) or an acceptance (per Lord Carnwath JSC) that the Secretary of State had failed to show how the Housing Benefit Regulations 2006 were compatible with the article 3.1 obligation to treat the best interests of children as a primary consideration, such failure did not have any bearing on whether the legislation unjustifiably discriminated between men and women in relation to their enjoyment of A1P1 property rights; that it followed, further, that it would be inappropriate to substitute a test of non-compliance with article 3.1 of the UN Convention for the accepted test of manifestly without reasonable foundation; and that, accordingly, since on that latter test the discriminatory effect of the measure had been justified, there had been no violation of article 14 of the Convention read with A1P1."

140. The central point of the decision was that the claim of a breach of Article 14, when taken together with A1P1, failed because the method of achieving the legitimate aims of the Government in imposing the cap was not manifestly without reasonable foundation, notwithstanding the differential effect on women as opposed to men and any incompatibility with Article 3.1 UNCRC (if established).

141. The focus of the case was upon discrimination between female single parents and male single parents within the ambit of A1P1, as the headnote indicates. However, as Sir Patrick has said (in paragraph 21) the discrimination alleged here is of a quite different character. It is a "classic claim of *Thlimmenos* discrimination", i.e. it is argued that a differentiation ought to have been made for claimants of the present character (lone parents of children under two) from the main group of persons

affected by the cap because their circumstances are significantly different from those of the main group of persons affected by the cap.

142. The claims allege breaches of Article 14, when taken with Article 8 and A1P1. The focus in this case, however, has been strongly upon the Article 8 element. I have had difficulty in discerning how the majority of the Supreme Court in *SG* would have determined the present case with this very significantly different focus. Further, the arguments in *SG* shifted from those advanced at the hearing to those added by way of written submissions thereafter and this presents problems in this present case in dealing with questions arising under Article 8 of the ECHR.

143. It is clear that a majority found that the Secretary of State had failed to comply with Article 3.1 UNCRC (Lord Carnwath, Lady Hale and Lord Kerr). That did not save the day for the claimants, however, because Lord Carnwath, with the majority, was persuaded by post-hearing submissions that Article 3.1 did not assist an Article 14 claim when taken with A1P1.

144. Neither Lady Hale nor Lord Kerr refers in terms to Article 8. The core of Lady Hale's judgment seems to me to be that the UK's international obligations are to be taken into account, quite generally, in the interpretation and application of rights under the ECHR. At paragraphs 217 and 218, her Ladyship said this:

> "217. However, the international obligations which the United Kingdom has undertaken are also taken into account in our domestic law in so far as they inform the interpretation and application of the rights contained in the European Human Rights Convention, which are now rights in United Kingdom domestic law. There is no reason at all why those obligations should not inform the interpretation of the Convention right to the enjoyment of the substantive Convention rights without discrimination just as much as they inform the interpretation of the substantive Convention rights. ZH (Tanzania) [2011] 2 AC 166 happened to be a case about article 8 , as were H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening) [2013] 1 AC 338, and Neulinger 54 EHRR 1087 itself. The Strasbourg court has taken the UNCRC into account in construing other articles of the Convention, most notably article 6 in relation to the fair trial of juvenile offenders, in V v United Kingdom (1999) 30 EHRR 121.
>
> 218. For these reasons, echoing Maurine Kay LJ in Burnip [2013] PTSR 117, I agree that our international obligations under the UNCRC and CEDAW have the potential to illuminate our approach to both discrimination and justification. Whatever the width of the margin of appreciation in relation to the subject matter of a measure, the Strasbourg court would look with particular care at the justification put forward for any measure which places the United Kingdom in breach of its international obligations under another human rights Treaty to which we are party."

On the facts, Lady Hale's conclusion (at paragraph 229) (also quoted by Sir Patrick at paragraph 54 above) was this:

> "229. Viewed in the light of the primary consideration of the best interests of the children affected, therefore, the indirect discrimination against women inherent in the way in which the benefit cap has been implemented cannot be seen as a proportionate means of achieving a legitimate aim. Families in work are already better off than those on benefits and so the cap is not necessary in order to achieve fairness between them; saving money cannot be achieved by unjustified discrimination; but the major aim, of incentivising work and changing the benefits culture, has little force in the context of lone parents, whatever the age of their children. Depriving them of the basic means of subsistence cannot be a proportionate means of achieving it."

145. Lord Kerr agreed with Lady Hale: see paragraph 233. However, he went further as to the direct effect of Article 3.1 UNCRC, for reasons which he went on to explain. However, I do not think that I need to explore those further issues for the purposes of the present appeal. His Lordship was clear, however, that Article 3 had not been complied with. At paragraph 269 he said this:

> "269. Depriving children of (and therefore their mothers of the capacity to ensure that they have) these basic necessities of life is simply antithetical to the notion that first consideration has been given to their best interests."

146. Lord Carnwath found that the Article 3 test had not been passed. However, I have some difficulty in seeing whether or not he decided all the points arising upon the interplay of Article 14 of the ECHR, when taken together with Article 8. It may be that he considered that it was not necessary, for the purposes of that case, to do so (where the real issue in the end was as to the interplay between Article 14 and A1P1, not Article 8).

147. At the beginning of his judgment, Lord Carnwath identified four issues that had been agreed as requiring resolution in the case. Only issues (iii) and (iv) need trouble us. They were:

> "97. … (iii) Was the Court of Appeal wrong to have found that the discriminatory effects of the 2012 Regulations on lone parents were justified and lawful, and not contrary to article 14 (read with article 8 and/or article 1 of Protocol 1)? (iv) Was the Court of Appeal wrong to have found that the Secretary of State has complied with his obligation to treat the best interests of children as a primary consideration when implementing the benefit cap scheme? "

Lord Carnwath said little further about Article 8, in the context of Article 14, confining himself to this short passage at paragraph 99:

> "99. Article 8 was also mentioned under issue (iii), and was relied on by Mr Ian Wise QC for the claimants in his printed case. However, as I understood it, this was not by way of challenge to the Court of Appeal's rejection of the "free-standing" claim under article 8, which is consequently not one of the agreed issues for this court. Rather he relied on article 8 either as an alternative route into article 14, or as supporting his "best interest" claim under issue (iv). I note that article 8 was not relied on by Mr Richard Drabble QC for the Child Poverty Action Group. I have not been persuaded that either of Mr Wise's formulations adds anything of substance to the claim based on A1P1."

148. In this first part of the judgment, Lord Carnwath says this as to the relevance of Article 3.1 UNCRC:

> "100. It is important also to understand how the interests of children affected by the scheme may be relevant to the legal analysis, either under the Convention itself, or indirectly by reference to article 3.1 of the United Nations Convention for the Rights of the Child (" UNCRC ") (best interests of children as "a primary consideration"). As to the Convention, the children have no relevant possessions under A1P1 in their own right; nor are they a protected class under article 14. However, as Baroness Hale DPSC has said, at para 218, the disproportionate impact on women arises because they are responsible for the care of dependent children. Elias LJ said in the Divisional Court [2014] PTSR 23, para 62:
>
> "In this case there is no dispute that the rights of the adult claimants under A1P1 (the right to peaceful enjoyment of possessions) are affected by a reduction in the benefits paid to them. And although the child claimants have no A1P1 rights themselves, we agree with [the Child Poverty Action Group's] submission that it would be artificial to treat them as strangers to the article 14/A1P1 arguments. The benefits in each case are paid to the mother to enable her both to feed and house herself and to feed and house her children."
>
> I agree. Accordingly, in considering the nature of the admittedly discriminatory effect of the scheme on lone parents, and its alleged justification, the effects on their children must also be taken into account."

His Lordship noted that issue (iv) had been agreed by the Secretary of State in a form which raised directly the issue of compliance with Article 3.1 "without overtly questioning its legal relevance…". Thus, he said it seemed right to him to proceed on the basis that obligations under Article 3.1 were to be taken into account under the Convention. Lord Carnwath considered the facts on that issue and concluded (at paragraph 109):

> "109. Accordingly, as the submissions and evidence stood at the end of the hearing, my view was that, judged by those criteria, the matters relied on by the Court of Appeal fell well short of establishing compliance. The Treasury's long term objective of taking children out of poverty, laudable in itself, was no substitute for an evaluation of the particular impact on the children immediately and directly concerned, and their parents."

At paragraph 112, his Lordship said that at that stage he had been of the provisional view that, in their application to lone parents and their dependent children, the regulations were not compatible with Convention rights.

149. Thus, it can be seen that Lord Carnwath's comments upon the submissions of Mr Wise QC on Article 8 were made in this first part of the judgment leading to his provisional view at the end of the hearing. There then followed a consideration of the post-hearing submissions of the Secretary of State, summarised in six points, the first four of which have relevance for present purposes, as follows:

> "114. They summarised their submissions in the following six points: (i) article 3.1 of the UNCRC is a provision of an unincorporated treaty which may only be relied on to the extent that it has been transposed into domestic law; (ii) the European Court of Human Rights ("ECtHR") uses international law when determining the meaning of provisions of the Convention, in accordance with the Vienna Convention on the Interpretation of Treaties; (iii) article 3.1 of the UNCRC is, as a matter of principle and in accordance with Strasbourg authority, not relevant to the question of justification of discrimination under article 14 read with A1P1 . It has no role to play in determining the meaning of article 14 (read with A1P1 or otherwise), and does not inform or illuminate the question whether the differential impact on women of the benefit cap is proportionate; (iv) article 3.1 of the UNCRC does not supplant, dilute or compromise the Stec test (Stec v United Kingdom (2006) 43 EHRR 1017). …"

150. It will be seen that Article 8 is not mentioned again and Lord Carnwath proceeded to reach his different (post-hearing) conclusion that, although the Secretary of State had failed to comply with Article 3.1 on the facts, there was no connection between the international treaty obligation and the particular discrimination relied upon by the claimants. Thus, he agreed with Lord Reed and Lord Hughes that the claims must fail. His Lordship accepted the submission of Mr Sheldon QC for the Secretary of State, recorded at paragraph 129 as follows:

> "129. … As Mr Sheldon submits, even if article 3.1 had a role to play in illuminating article 14, this could only be where the alleged indirect discrimination, or differential treatment, was in respect of children. In the present case, by contrast, the allegation is of discrimination, not against children, but against their mothers. The children, it is said, will be treated the same

> whether their lone parents are male or female. With considerable reluctance, on this issue agreeing with Lord Reed JSC, I feel driven to the conclusion that he is right."

He continued at paragraph 130 and 131 in these terms:

> "130. In all the article 14 cases to which we have been referred to in this context there was a direct link between the international treaty relied on and the particular discrimination alleged: …
>
> 131. There is no such connection in the present case. The discrimination with which we are concerned under article 14 is in relation to women and their "possessions". Those concepts require no relevant "illumination" by way of interpretation. It is true that the discrimination in this case is related to their responsibilities as lone parents, and to that extent, as Elias LJ accepted, the children are not "strangers to the article 14/A1P1 arguments": [2014] PTSR 23, para 62. But that is a comment on the facts, not on the interpretation of the Convention rights. Indeed, as has been seen, it is the distinct interest of the children in the benefits as individuals that has reinforced my view of the breach under article 3.1. As Lord Reed JSC says at para 89, the fact that children are statistically more likely to be living with a single mother than with a single father is unrelated to the question whether the children's interests have been treated as a primary consideration as required by article 3.1 of the UNCRC."

151. Without descending into further detail, I think that it is clear overall that the judgments of Lady Hale and Lord Kerr, taken on their own, would require us to decide the present case in favour of upholding the decision of Collins J below and dismissing the appeal. Lady Hale and Lord Kerr would, I think, regard this case as being an even clearer case than *SG*. Equally, I am confident that the judgments of Lord Reed and Lord Hughes would require us to allow the Secretary of State's appeal. As for Lord Carnwath's approach, would he find that there was indeed a "link" or "connection" between the obligations imposed by Article 3.1 UNCRC and the discrimination (if such it be) in the present case? Having regard to the "considerable reluctance" with which he reached his conclusion in *SG*, I think he might well find such a connection. However, that does not provide us with a direct answer to the outcome of this appeal.

152. Where does that leave us now on the facts of the present case?

153. At paragraph 88, Sir Patrick sets out the first submissions of Mr Sheldon QC for the Secretary of State. He rejects those submissions for the reasons given in paragraphs 89 to 91. I agree with him on those points. I also agree with Sir Patrick that the judge was correct in deciding that the claims made fall "within the ambit" of Article 8, for the reasons given by him in paragraphs 93 to 97 above.

154. The remaining questions are whether there has been relevant discrimination in this case and, if so, whether it is justified. These are, of course, separate questions.

155. The judge found that there was a relevant *Thlimmenos* discrimination in failing to make a distinction between this cohort of persons affected by the cap and others so affected, although in paragraph 6 of his judgment he preferred to call it indirect discrimination. He was clearly of the view that the failure to distinguish this group was contrary to Article 14 of the Convention when taken with Article 8, and in the children's case Article 8, when construed in the light of Article 3 UNCRC: see paragraph 2 of his Order.

156. Thus, the judge found that this group had significant differences in circumstances from others affected. The grounds upon which the claimants sought to establish their distinct circumstances were summarised (from the extensive evidential materials before the court below) in the skeleton argument of the claimants' counsel before the judge, at paragraphs 59 and 60 in particular, as follows:

> "59. … [T]he impact upon the particular cohort bringing this challenge is particularly severe, since they are (i) more likely to be affected by the cap than couples with similarly-aged children, (ii) more severely affected as their the children are more likely to be profoundly impacted upon, and (iii) less likely to be able to escape it than others who do not have caring responsibilities for such young children:
>
> a. They are <u>more likely to be affected</u> by the cap: Ms Dewar, on behalf of the Gingerbread single parents' charity, notes that lone parents caring for a baby or toddler make up more than a third (35%) of all the households hit by the Revised Benefit Cap: at [3.1] of her Statement (HB/1//2/233) [Quoted below in this judgment]. This disproportionate effect may arise for a number of reasons: as the Defendant's own statistics indicate, and as the Defendant accepts, lone parents generally, and particularly those with pre-school age children, are more likely to be in workless households than other groups, and also because of a number of structural matters regarding how the cap is defined (it includes, for example, maternity allowance which is a benefit only available to mothers of children in their first year).
>
> b. As Professor Bradshaw explains, "the impact of poverty on health during the antenatal period, birth and infancy (in the first two years of life) is profound", Bradshaw at [5] (HB/1/2.221).
>
> c. Lone parents of such young children are also <u>less likely to be able to escape</u> the Revised Benefit Cap as the significant time spent committed to providing care to their young dependant children acts as a barrier to

> work (a point that is apparent from each of the witness statements provided by the adult Claimants in these proceedings). The cohort represented by the Claimant includes women in the immediate post-natal period. Lone parents of children under two years old are particularly disadvantaged by the fact that the Defendant's support system of providing free childcare hours to parents of pre-school age children only commences at age two: see the witness statement of Ellen Broome, Joint Chief Executive of the Family and Childcare Trust, at [5], (HB/1/2.371). The 2016 IA described the availability of a free childcare as a form of "mitigation" of the adverse effects of the Revised Benefit Cap, but conspicuously ignored the fact that it was unavailable to lone parents within the present cohort.
>
> d. Further, and tellingly, lone parents of children under two form a group that is <u>not expected</u> to find work, given the structure of the benefit system, and the lack of work conditionality for their benefits: see the discussion of "Conditionality" at [109]-[117] of Edson.
>
> 60. The present cohort is therefore in a very different position not only to that of couples with children aged two and under but also to that of one [sic] parents of two-year-olds and older."

I would add the point from Ms Broome's statement, made in the footnote to paragraph 59 c.; it is this:

> "As explained at [6] of Ms Broome's Statement, the "additional costs associated with childcare for the very youngest children, aged under two, mean that even if there is childcare available in the local area, low income parents may not be able to access it". Those additional costs arise, in particular, from regulations that require one qualified member of staff for every three children aged under two, compared to one qualified member for every <u>four</u> two years old and up to 13 children for every qualified adult staff member for three and four year olds (at [5])."

157. As I read paragraphs 27 and following of the skeleton argument of Mr Sheldon QC and Mr Pritchard before the judge below, the thrust of the argument against this ground of claim was not against the allegation that this was a group with significant different circumstances in play. The argument in paragraphs 30 to 32 concentrated upon the issue of these claimants having "other status". Two sentences in paragraph 34 were directed to the issue of discrimination:

> "The Claimants have not identified a comparator so that discrimination can be assessed. If the comparator is lone parents with children over 2, there is no real differential

> treatment, when one looks to see the childcare provision that can be made for both cohorts".

158. Like Sir Patrick, as I have already indicated, I would also reject the Secretary of State's argument on this issue, so far as it is based upon the alleged absence of identification of a relevant comparator (paragraph 34 of the same skeleton argument): see paragraph 89 of Sir Patrick's judgment and the statements of Lady Hale in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42 at paragraphs 23-28, pointing out that arguments devoted to identifying the precise characteristics of the appropriate comparator can be arid and unproductive.

159. After paragraph 34, the argument then shifted immediately to justification. After that section, the argument began its conclusion on Ground 1 of the claim (in paragraph 53) by saying,

> "Accordingly, whilst the Claimants are correct that some lone parents of children under two years of age face special barriers to securing work, many lone parents already work; in October to December 2016, around 1.22 million lone parents were in employment (67.9% in the UK and the witness statement of Mr Edson shows many lone parents with children under two years of age already work…" (Emphasis added).

(And see below as to the "67.9%" figure)

160. Much of the initial section of the same written argument before the judge was devoted to the Parliamentary scrutiny of the circumstances of lone parents, and distinctly those of lone parents with young children (especially at paragraph 19.2) and to arguing that any discrimination was justified.

161. I regret that I am unable to agree with Sir Patrick that the judge erred in finding a relevant *Thlimmenos* discrimination in this case. I can agree with Sir Patrick, however, that the decision in *SG* cannot be said, even by inference, to compel the rejection of the respondents' claims in this case (paragraph 101 above). In contrast, I do consider that the decision in *SG* gives some pointer to the answer for the reasons I have sought to explain.

162. I would not readily be inclined to depart from the judge's factual assessment of whether this group formed a relatively distinct cohort of adversely affected persons. Apart from the judge's careful summary of the evidence of these individual parents (paragraphs 23 to 26 of the judgment), his review of some of the more generic evidence (paragraphs 27 and 28), and his identification of particular features affecting families of lone parents with children under two (paragraphs 29 and 31), I bear in mind the comments of Sales LJ in *Smech Properties Ltd. v Runnymede BC* [2016] EWCA Civ 42 at paragraph 29 (followed in *Bowen v Secretary of State for Justice* [2017] EWCA Civ 2181) to this effect:

> "29. … Where an appeal is to proceed, like this one, by way of a review of the judgment below rather than a re-hearing, it will often be appropriate for this court to give weight to the assessment of the facts made by the judge below, even where

> that assessment has been made on the basis of written evidence which is also available to this court. The weight to be given to the judge's own assessment will vary depending on the circumstances of each particular case, the nature of the finding or factual assessment which has been made and the nature and range of evidential materials bearing upon it. Often a judge will make a factual assessment by taking into account expressly or implicitly a range of written evidence and making an overall evaluation of what it shows. Even if this court might disagree if it approached the matter afresh for itself on a re-hearing, it does not follow that the judge lacked legitimate and proper grounds for making her own assessment and hence it does not follow that it can be said that her decision was "wrong"."

163. The statistics referred to in paragraphs 111 to 113 of Sir Patrick's judgment do not persuade me to a different view from that taken by the judge. They were one part only of a large corpus of factual material that was before the judge.

164. The statistics adduced by the appellant were presented by Mr Edson, the relevant official in the Department. In his second witness statement, Mr Edson (at paragraph 53) sounds what seems to me to be a cautionary note to his figures. He says this:

> "53. My previous witness statement did not state nor imply that the official statistics showed that the original benefit cap encouraged people to work or reduced long term dependency on benefits. The official statistics show the total number of previously capped households that have moved into work. These statistics are not intended to show whether these households did so as a direct result of the benefit cap and it is accepted that some of these households may have moved into work anyway. However, these statistics do demonstrate the number of households that have found work – whether that is due to the cap or for other reasons – and that the number doing so has continued to increase over time. This shows (consistent with the findings stated at paragraph 134 of my previous witness statement) that it is possible for households affected by the cap, including lone parents, to move off the cap and enter employment."

The fact that people move off the cap does not seem to me, however, necessarily to justify their presence within it in the first place.

165. I think it is unwise to take the figures as determinative of the discrimination issue, without having regard to the fact that the judge had other detailed and practical evidence from Rebekkah Carrier (an experienced housing solicitor), Professor Bradshaw (Professor of Social Policy at York University), Laura Dewar (Policy Officer with a Single Parents' Charity - "Gingerbread"), Ellen Broome (Chief Executive of another charity in the field) and others touching upon this issue. The judge also referred to the evidence of Professor Maggie Atkinson who had been Children's Commissioner between 2010 and 2015.

166. On the respondents' side, on the statistics, as they point out in their written argument in this court (paragraph 25 c), there was evidence from Mr James Harvey, an expert economist, (based upon the appellant's own statistics) that the percentage of households comprising lone parents under two who have been able to move off the cap and into work is lower than the equivalent percentages for lone parents of two and above, and that the differential increases as the youngest child grows older.

167. In argument before us, the appellant made the following points:

> "29. Similarly, on the evidence before the Judge, couples with children aged less than 2 suffer more detriment under the benefit cap when compared with lone parents children aged less than 2 because both are subject to the same cap, yet couples have an extra adult to feed and clothe.
>
> 30. As D§13 the Judge refers to "lone parents with children under the age of two … are particularly badly affected by the cap because they are not reasonably able to work and thus escape the cap…" However, it is not clear what evidence was relied upon to make this assertion; the evidence before the Judge was that 67.9% of all lone parents (1.2 million; see Edson2 at [SB1/19/1-530]) were in work in October to December 2016, and around 40% of lone parents with children under two were in work in 2015 (Edson2, §32(a) [SB1/19/1-526])."

168. For my part, considering those points, I see force in the rival contention of the respondents that these submissions do not take properly into account (as, it may be said, the judge did) the specific difficulties identified by the adult respondents in their own evidence as to the difficulties in obtaining child care, including the higher cost and lower availability of such care for children under two. Further, as the respondents point out in argument, the "67.9%" and "40%" figures concern *all* lone parents and *all* lone parents under two. Neither figure, they argue, deals with the proportion of lone parents whose reliance on benefits is such that they are likely to be affected by the cap. For example, the figures seem to include lone parents who may have significant financial resources or other means of support: see respondents' skeleton argument in this court, paragraph 27.

169. One brings into mind, without repeating in print, the well-known saying about statistics, variously attributed to Mark Twain, Benjamin Disraeli and several others. The important point for now, however, is that the statistics were only one part of the case. One directs juries that while expert evidence deals with particular parts of cases in the criminal courts, they (the jury) receive all the evidence and it is on all the evidence that they must make their decision. Here the statistics were only one aspect of what appears to have been a relatively minor aspect of the case before the judge and only one part of a very large amount of written evidence for him to consider and evaluate.

170. Of equal significance was the wealth of material from witnesses with first-hand experience of the problems of parents within this particular class affected by the cap.

For example, Ms Dewar of Gingerbread said this in her evidence (paragraphs 3.1-3.5 and 3.7):

> "3.1 Lone parents with young children are disproportionately affected by the benefit cap. Lone parents caring for a baby or toddler make up more than a third (35 per cent) of all the households hit by the new, lowered benefit cap;
>
> 3.2 The problem of juggling work and childcare are the most acute for lone parents of those who have a baby or toddler. These problems are not only related to the cost of childcare but include the logistics of meeting the needs of the very young children and their older siblings;
>
> 3.3 The benefit cap represents a move to what is often called a 'work first' approach which encourages a move into work (any work) as quickly as possible, rather than supporting lone parents to return to the sort of work that best suits them and the care of their children, (for example having obtained training or voluntary experience which improves their work prospects or having crafted workable childcare arrangements) and which will be sustainable. Gingerbread considers that there has been insufficient consideration of whether or not those moving off the cap and into work are able to remain in work in the medium or long term;
>
> 3.4 In-depth interviews conducted by the government showed that lone parents who found work (under the previous cap) were more likely than those who did not to have children over four in school or nursery;
>
> 3.5 There is a shortage of part time job vacancies and these include vacancies which would be unsuitable for lone parents with young children as they include evening and overnight jobs. Just 8.7% of jobs which we looked at when we took a snapshot from the government's job brokering website were for part time work. Some of these jobs will have been for less than the required 16 hours needed to escape the cap, and some will require flexible working which is not compatible with paid childcare, or zero hours contracts which do not guarantee that the employee will qualify for working tax credit and are not compatible with arrangements for childcare; …
>
> 3.7 The government does not keep figures on the number of people who are pregnant and who are affected by the benefit cap. From Gingerbread's helpline calls we know that pregnant women are affected. Examples of calls from lone parents to our helpline affected by the benefit cap are included in the submissions to the Work and Pensions Committee: these are typical examples of calls which we receive. Gingerbread considers that, for the reasons set out above and in our

> submissions to the committee, parents with a young child are less likely to escape the cap than those where the youngest child is of school age. Lone parents with pre-school aged children are finding it difficult to find work or cheaper accommodation to escape the cap. Instead lone parents and their young children are becoming poorer and are at risk of homelessness."

Similar points are made by Ms Polly Neate of Women's Aid at paragraph 14 of her statement and by Ms Atkinson in paragraphs 87 and 88 of her statement. I take only some examples.

171. This was evidence indicating to me that the judge was entitled to reach the conclusion that he did. The statistical analysis was sophisticated and not one sided. The other significant evidence, to which I have referred, was also in play. It was based upon practical experience of real problems. That evidence (I venture to suggest) was also reflective of common-sense general knowledge of the difficulties of dealing with *very* young children on minimal resources which raw statistics cannot begin to meet.

172. I simply seek to emphasise that this court has not had anything like a full review of the evidential material and all that we have been doing in considering this appeal before has been "island hopping" over the "sea of evidence" on the subject, to invoke the terminology that was used by Lewison LJ in *Fage UK Ltd. v Chobani UK Ltd.* [2014] EWCA Civ 5 at [114]. The appeal in that case was after a trial on oral evidence, but the same applies, in my judgment, in a case where substantial written evidence has been deployed below which has not been reviewed in full in the appellate court: see again Sales LJ's judgment in *Smech* (supra).

173. For my part, therefore, I do not find it shown that the judge was wrong in his conclusion on this part of the case.

174. I turn to justification.

175. The Article 14 claim in this case is brought by four mothers and their children. I would not separate out the issues of discrimination and justification in the cases of the mothers on the one hand and the children on the other. It seems to me that the right approach, when dealing with a claim within the ambit of Article 8, is to have regard to the family unit as a whole: see *Beoku-Betts v Secretary of State for the Home Department* [2009] 1 AC 115. The problems of mother and child are joint problems and whether the Secretary of State should have made an exception for them seems to me to turn upon their joint circumstances in the lives that they are living together.

176. Sir Patrick and I take a different view of what the majority decision in *SG* was. I do not agree that the judgments of Lord Hughes and Lord Carnwath are in clear agreement on the question whether article 3 UNCRC was engaged even where the route to article 14 is via the ambit of article 8: c.f. Sir Patrick's paragraph 127 above. Indeed, in paragraph 129-131 of the judgment in *SG*, Lord Carnwath's agreement, as expressed, is with Lord Reed. There is no mention there of Lord Hughes' judgment.

177. It does not seem to me that any majority in the Supreme Court addressed the Article 8/Article 3 UNCRC argument to the extent of that issue being determinative of the

case before us. This is reflected in the headnote of the majority decision in the Weekly Law Reports, which seems to me to be accurate in making no mention of Article 8. I believe that Lord Carnwath decided the case solely by reference to the interplay between Article 3 UNHRC and A1P1, having regard to the post-hearing submissions. It does not seem to me that his short comments at paragraph 99 really touch upon the decisive point in his judgment, namely the absence of "connection" between Article 3 and the discrimination alleged. It seems, therefore, that we do not have a Supreme Court ratio covering the present point. However, for the reasons mentioned, once one turns paragraphs 129 to 131 of the judgment of Lord Carnwath into enquiring into a "connection" between Article 3 UNCRC and Article 8, the answer seems to me to be different and the balance of Supreme Court opinion shifts to the judgments of Lady Hale and Lord Kerr.

178. If this is right, I would agree with Sir Patrick (paragraph 130) that the judge was entitled to find that there had been a failure to comply with Article 3. As he says, this does not conclusively show that the cap could not be justified. On the facts of this case, however, I find that the judge was not wrong to hold that this would invalidate the cap. Once this important feature has fallen out of the appellant's evaluation (as the judge found that it did – see e.g. the last two sentences of paragraph 16 of the judgment), it seems difficult to show that the failure to make an exception for this category of persons has been shown by the appellant to be justified. Without that exercise having been carried out properly, it seems to me that the policy would become one "manifestly without reasonable foundation" in the circumstances of this case. I would not be deflected in so finding by the possibility, envisaged by Sir Patrick, that the cohort truly affected by the breach might be wider than the narrow group identified in these proceedings. Others may have difficulties of a similar type to claimants within this category, but that does not mean that a failure to make separate provision for this smaller category was justified, given the significant extra difficulties that the judge found that they had.

179. I am, of course, reluctant to reach this conclusion in view of the extensive debates in Parliament on these questions and the rejection of the "Thornberry" amendment which related precisely to this group. I am instinctively disinclined to question a decision of social and economic policy made by government and endorsed by Parliament and I would not do so unless persuaded, as I am, that the majority view of the Supreme Court when applied to this different cohort of claimants points me in that direction, even though this is more a matter of inference from what I perceive to be the majority opinions in the *SG* case than by way of *ratio decidendi*.

180. I am, however, also conscious of the role of the courts as identified by Lady Hale in *SG* (at paragraphs 159-160) as follows:

> "159. The benefit cap is, of course, quintessentially a matter of social and economic policy. In such matters, as Lord Hope of Craighead observed in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 381, it will be easier for the courts to recognise a discretionary "area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention". As Lord Reed JSC explains, the introduction of the cap was indeed

> extensively debated in Parliament and various amendments were proposed and resisted which would have mitigated the adverse effects with which we are here concerned. But the details of the scheme, including those adverse effects, were deliberately left to be worked out in Regulations. It is therefore the decisions of the Government in working out those details, rather than the decisions of Parliament in passing the legislation, with which we are concerned.
>
> 160. Furthermore, as Lord Hope went on to say in In re G (Adoption: Unmarried Couple) [2009] AC 173, para 48, protection against discrimination, even in an area of social and economic policy, falls within the constitutional responsibility of the courts:
>
> > "Cases about discrimination in an area of social policy, which is what this case is, 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."
>
> Therefore, even in the area of welfare benefits, where the court would normally defer to the considered decision of the legislature, if that decision results in unjustified discrimination, then it is the duty of the courts to say so. In many cases, the result will be to leave it to the legislature to decide how the matter is to be put right."

181. For these reasons, and not without hesitation, I would dismiss this appeal.

Sir Brian Leveson P:

182. I have had the opportunity of reading in draft the judgment prepared by Sir Patrick Elias and I agree with its conclusions and reasoning. Notwithstanding the contrary view expressed by McCombe LJ (which I have also seen in draft), I was unsure that a further lengthy judgment reiterating the same points made by Sir Patrick but undeniably expressed in different language would further the ultimate resolution of the case. Analysing (and seeking to reconcile or explain) the differences of approach of different judges can, in some cases, help to elucidate the law but, in the context of this case, travelling over ground not dissimilar to that in *SG*, I fear that it will only serve potentially to confuse or, at least, add a further layer itself requiring yet more analysis.

183. In the light of the hurdle which must be mounted before interfering with the decision of the Secretary of State ('manifestly without reasonable foundation'), with respect to the view expressed by McCombe LJ, I agree with Sir Patrick that the evidence before the judge did not justify that conclusion. In my judgment, it was open to the Secretary

of State to take the view that difficulties faced by lone parents with children under two were not such as sufficiently to distinguish that cohort from lone parents with older children, thereby warranting exemption in their case (but not lone parents with older children) from the rule. On the contrary, the aims of the policy (whether or not an observer might agree with it) justified treating them in the same way.

184. The effect of article 3 of the UNCRC (consequent on the finding that the facts fell within the ambit of the rights of the children under article 8 of the ECHR) is more problematic, not least because of the difficulty navigating through the decision in *SG*. In the event, again for the reasons explained by Sir Patrick, I do not consider that article 3 is engaged in this case any more than it was held to have been engaged in *SG*.

Appendix to the judgment of Sir Patrick Elias

The paragraphs (23-36) in the judgment of Collins J describing the circumstances of the four lone parent claimants.

23. DA was homeless living with her 4 year old son in a refuge in North London as a result of serious domestic violence from her husband which led to her having to leave her council flat. She is due to give birth in mid-June. When living in the refuge, she was not subjected to the cap since it does not apply to those victims of violence who have to live in a refuge. It was submitted that she was not able to be a claimant since she was not a lone parent with a child under two and was living in a refuge. That objection has not been seriously maintained since she will become subject to the cap when she gives birth on leaving the refuge. Furthermore, I was informed that she has now been given emergency accommodation for those who are homeless which costs £247 per week. She has investigated the possibility of private accommodation but has found, as is confirmed by her solicitor who has made a statement based on her experience of dealing with many clients who are homeless or suffering the effects of the benefit cap or the bedroom tax, that very few private landlords are prepared to accept tenants who depend on housing benefit particularly if they are capped. As must be obvious, when she gives birth she will not be able to work particularly as she wishes to breastfeed. Furthermore, the council has refused to allow her to join its housing list since she came from outside its area as she was fleeing violence and does not have the necessary four year residence in the borough. She has been informed that when capped she will have £217 per week available for rent. She has mental and physical problems as does her son. She is anxious to work when she can.

24. EA is a lone parent of three children aged 9, 8 and 18 months. Her youngest is also a claimant. She is a recovering drug user. She lives in Sussex in private rented accommodation. She was evicted from her previous accommodation in Brighton because her landlord wanted to sell the property and moved to cheaper accommodation having been unable to obtain assistance from the council. Having been subjected to the cap, there was a shortfall of £137.18 per week. She managed to obtain a DHP but was told by the council that she was expected to return to work by February 2017. She has managed to obtain further short term DHPs with short gaps in-between when she was forced to rely on food banks. Her latest DHP has been granted until 26 June 2017 and she has been told it will not be extended unless she applies for a personal independent payment. As a result of childhood abuse, she suffers from mental health problems. She attended her job centre but was not informed of the existence of the flexible support fund which is supposed to provide some support for those who are unable to find work. She wanted to return to college to complete her studies in order to improve her prospects of finding work but cannot do that so long as her youngest child needs her care. She has made enquiries of local childcare nurseries and child minders. Many did not take children under 2 and the minimum fee for those who did was £4.25 per hour which was impossible for her to meet. She is particularly affected by her inability to pursue studies to improve her future earning capacity.

25. KF has four children aged 10, 7, 5 and 1, the youngest being also a claimant. She has no support from the two fathers of her children. She lives in very unsatisfactory accommodation which needs repair and is too small. She worked until she was made redundant when pregnant with her first child since when she has not worked,

considering that she needed to look after her children, but intends to work when her youngest is able to receive childcare which she can afford. She had intended to work but her pregnancy, which was not intended, prevented it. She was capped in January 2017 with the result that there was a shortfall of £54 per week between her Housing Benefit and her rent. She has had great difficulty in obtaining a DHP. Her borough, Islington, requires an application for DHP to be made by a "specified partner", in her case her landlord. Why that requirement is made has not been explained but it undoubtedly created problems for her since her landlord sent the application to the wrong department. She was then informed, once the application had been properly made, that her application would not be successful if she did not engage with the work programme. The way in which she was treated caused her much distress, albeit she did obtain a DHP until 1 April 2017. After a gap, during which she had to cut back on food and only partly managed to make ends meet, she has received a DHP valid until 2 July 2017. She wishes to work, but has to be able to give proper care to her children.

26. WBA has four children, aged 17, 14, 13, 7 and 14 months, the youngest also being a claimant. The youngest child was conceived following a rape by her husband: she has indeed been the victim of an abusive relationship over the years. She has since February 2017 been living in suitable accommodation, but the cap has resulted in a shortfall of £151.76 per week. She was able to obtain DHPs but only for short terms and with no promise that they would continue. On having been granted a DHP on 20 April 2017, the council wrote a letter dated the same day saying it had been cancelled. The way she has been treated has distressed her. She wishes to work when she can.