

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2017

Before :

MR JUSTICE COLLINS

Between :

The Queen on the application of	<u>Claimants</u>
DA and others	
- and -	
Secretary of State for Work and Pensions	<u>Defendant</u>
-and-	
Shelter	<u>Intervener</u>

Mr Ian Wise, QC, Ms Caoilfhionn Gallagher, QC and Mr Michael Armitage (instructed by
Hopkin Murray Beskine) for the **claimants**
Mr Clive Sheldon, QC and Mr Simon Pritchard (instructed by **GLD**) for the **defendant**
Mr Martin Westgate, QC, Ms Shu Shin Luh and Mr Connor Johnston (instructed by
Freshfields Bruckhaus Deringer LLP) for the **intervenor**

Hearing dates: 17th and 18th May 2017

Judgment Approved

Mr Justice Collins:

1. This claim is brought by four lone parents and three of their children under the age of two. One of the claimants, DA, does not yet have a child under the age of two but is due to give birth in mid-June. The claim relates to the revised Benefit Cap which (among other exemptions) requires the parent in order to avoid the imposition of the cap to work at least 16 hours per week. The Benefit Cap was originally imposed by Sections 96 and 97 of the Welfare Reform Act 2012. These have been amended by the Welfare Reform and Work Act 2016. The material effect of the amendment was to reduce the annual limit for the receipt of welfare benefits from £26,000 per annum to £20,000 for those living outside of and £23,000 for those living within Greater London. The reductions were brought into effect by Regulations on 7 November 2016. The cap affects all benefit claimants, but there are different rates for couples, whether or not they have children, and lone parents with children.

2. The means whereby the cap is effected is by the reduction of housing benefit ‘by the amount by which the total amount of welfare benefits exceeds the relevant amount’ (Housing Benefit Regulations 2006/213, Regulation 75D). The relevant amount is the £23,000 or £20,000 referred to above.
3. A claim against the imposition of the original cap was brought in 2013. This went to the Supreme Court as R(SG and others) v. SSWP [2015] 1 WLR 1449. The claimants were the mothers and youngest children of three lone parent families. The grounds of the claim were that the changes to the Housing Benefit Regulations caused by the cap discriminated against women and large families, breached Article 8 of the European Convention on Human Rights (ECHR) and Article 3.1 of the United Nations Convention on the Rights of the Child (UNCRC) and there had been a failure to obtain sufficient information about the impact of the cap on lone parents escaping domestic violence and those in temporary accommodation.
4. The claim failed, but it is most important to analyse the decision since it is obviously crucial in determining this claim. The court dismissed the claim by a majority of three to two, but Lord Carnwath, who was one of the majority, did not entirely follow the reasoning of Lords Reed and Hughes, who formed the other two who decided that the claim should be dismissed. Lady Hale and Lord Kerr would have allowed the claim to succeed. It was accepted by all the members of the court that there had been indirect discrimination against women since many more women than men were lone parents.
5. A welfare benefit is a possession within the meaning of Article 1 of the First Protocol to the ECHR (A1P1). This 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.”

Any deprivation must accordingly be justified pursuant to the second sentence of A1P1. Article 14 of the ECHR deals with the need to ensure that rights and freedoms are enjoyed without discrimination. It can only be considered in conjunction with one or more of the substantive rights. It 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.”

6. In order for Article 14 to apply, there is no need to establish any particular interference with the right or freedom in question. It suffices that it is engaged, albeit the issue will only be likely to arise if the action which affects the rights or freedom does interfere with it. The ECtHR has adopted an approach in relation to Article 14 which asks the question whether there is a difference in treatment between those in analogous or similar situations. In Thlimmenos v. Greece (2000) 31 EHRR 12 the applicant, a Jehovah’s witness, who, because of his religious beliefs, had been convicted of failing to serve in the armed forces, complained that the rules governing

access to the profession he wished to pursue did not discriminate between convictions for offences committed exclusively because of religious beliefs and other offences. The court observed in paragraph 44:-

“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.”

This has sometimes been labelled ‘Thlimmenos discrimination’ but, as Lord Dyson MR observed in R(MA) v. SSWP [2014] PTSR 584, there is little if any difference between indirect and Thlimmenos discrimination. Any material discrimination which arises in this claim is indirect. It has not been and could not be argued that there is direct discrimination.

7. Before going any further, I should set out the material provisions of the primary and secondary legislation which deals with the cap. Section 96 of the 2012 Act as amended provides, so far as material for the purposes of this case, that “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, this 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” (s.96(2)). The ‘reference period’ means a period of a prescribed duration (s.96(3)). The manner whereby the cap is to be applied is to be set out in regulations (s.96(1)). Section 96(4) enables regulations to cover various matters in particular. Those include providing for exceptions (s.96(4)(c)). The 2016 amendments substituted subsection (5) and added subsection (5A) and (5B). (5A) sets out the sums which constitute the ‘annual limit’, namely £20,000 and £23,000. (5B) provides:-

“Regulations under subsection (5) [which deal with the ‘relevant amount’] may –

(a) specify which annual limit applies in the case of –

- (i) different prescribed descriptions of single person;
- (ii) different prescribed descriptions of couples.”

Section 96(10) specifies the welfare benefits which are within s.96. I need not cite the subsection for the purposes of this judgment. They include child benefit. Section 97 of the 2012 Act contains supplementary provisions which provide that any regulations under s.96 are subject to annulment in pursuance of a resolution of either House of Parliament. It also excludes any right of appeal against a decision to apply the benefit cap in accordance with regulation under s.96. Thus judicial review is the only possible remedy if a challenge is to be made.

8. Since the annual limit is now set out in the primary legislation, it cannot be challenged. Section 96A of the 2012 Act requires the defendant to review the sums specified in s.96(5A) at least once in each Parliament “to determine whether it is appropriate to increase or decrease any one or more of those sums”. Section 96A(3) requires the defendant on any review to take into account the national economic situation and any other matters he considers relevant. Any regulations implementing an amendment to any of the sums in s.96(5A) following a review must be approved by a resolution of each House of Parliament. While a review is not directly relevant to this case I refer to it only because of the reference to the need to have regard to the national economic situation which is obviously a highly relevant factor in the sums specified and generally.
9. The regulations applicable are the Benefit Cap (Housing Benefit and Universal Credit) (Amendment) Regulations 2016/909. Those regulations amend, amongst others, the Housing Benefit Regulations 2006/213. Regulation 75CA of the Housing Benefit 2006 Regulations (as inserted by the 2016 Regulations) deals with the determination of the relevant amount which involves dividing the applicable annual limit by 52. The sums of £23,000 and £20,000 apply because single parents with children are not regarded as single claimants since for benefit purposes they constitute a household. The cap is, as I have said, put into effect by a reduction of housing benefit in accordance with Regulation 75D “by the amount by which the total amount of welfare benefits [to which that household is entitled] exceeds the relevant amount”. In their skeleton argument, counsel for the claimants have helpfully set out what this can mean in real terms. Assuming a non-London household is entitled to £600 per week by way of benefits of which £200 is housing benefit, the sum of £600 will be reduced to £385, which is the relevant amount, namely £20,000 divided by 52. Since the rent of £200 will be likely to remain the same, the result is that there will only be £185 available for all other expenditure. It may be that this, because of calculations I do not need to specify, should be increased to £200.50.
10. Regulations 75E and 75F set out exceptions to the imposition of the cap. These include (75E(2)) where the claimant or partner is entitled to working tax credit, namely is working for at least 16 hours a week in the case of a lone parent, or 24 hours a week between them in the case of a couple. There is a further exception if a claimant or partner is out of work but has been in employment for at least 50 weeks out of the 52 weeks immediately preceding their last day of work in which case the cap will not be imposed for 39 weeks. This is subject to some further requirements which I do not need to identify since it cannot apply to any of the claimants.
11. The aims pursued by the benefit cuts were, as the court decided in SG, legitimate. They were three. First, there was the aim of securing the economic well-being of the country. This could be legitimate even if discriminatory provided that there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised: see for example Sidabras v. Lithuania (2004) 42 EHRR 6. Secondly, there was the aim of incentivising work. The third aim was to impose a reasonable limit on the amount a household could receive by way of welfare benefits. As Lord Reed observed (paragraph 66) the maintenance of public confidence in the welfare system so that recipients are not stigmatised or resented, is undoubtedly a legitimate aim.

12. There was extensive Parliamentary consideration of both Bills which were enacted as the 2012 and 2016 Acts. In addition, the Regulations which applied the cuts were also considered in the House of Lords following a motion of regret the effect of which was to require a debate and a possible vote. There was such a vote which rejected the motion which regretted the failure to have “made additional support available to those individuals affected by the benefit cap to find work.” The relevant extracts from Hansard have been produced, but Mr David Edson, who has since June 2016 been the team leader and lead official on the benefit cap policy, has set out in a statement the passages upon which reliance is placed. It is convenient to refer to his statement. The policy was said in SG to have been subjected to detailed and rigorous scrutiny and evidence was received from many organisations including the Children’s Commissioner, the Equality and Human Rights Commission, Gingerbread and Shelter. The nature of the Parliamentary scrutiny in relation to what became the 2012 Act is set out in detail in Lord Reed’s judgment in SG between paragraphs 27 and 45. I do not think it is necessary to repeat it in this judgment, but I shall have to refer to some of the matters raised and the ministerial responses.
13. The purpose of referring to the Parliamentary consideration is to identify the aims pursued by the legislation and the information relevant to the issue that I have to determine. Thus there is no breach of the Bill of Rights in that the purpose of the exercise is not to assess the quality of the reasons given by ministers. The legislation is to be regarded as the will of Parliament. 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 achieve the protection it is said to provide. The need to consider a particular group who are adversely affected is important and led me to decide in R(Hurley) v. SSWP [2016] PTSR 636 that there had been a failure to consider the effect on the disabled of the loss of family carers. That has led to an exclusion in the present regulations of family carers. As will become apparent, Mr Sheldon submits that Hurley is distinguishable since consideration was given to lone parents with children of all ages in the Parliamentary process.
14. In addition to the Parliamentary consideration, the Department published Impact Assessments and Equality Analyses, both leading up to the 2012 Act and subsequently for the 2016 Act. The latest Impact Assessment was produced in August 2016. The latest Equality Analysis was published in October 2016. I do not think it necessary to consider the earlier Assessments and Analyses since I am concerned with the alleged unlawfulness of the revised cap imposed by the 2016 Act and the Regulations made pursuant to the 2012 Act as amended by the 2016 Act.
15. The Equality Analysis contains the anticipated figures of those who are likely to be subjected to the revised cap and in addition there is evidence of the numbers of those in fact subjected to the previous cap. I am far from persuaded that precise figures are likely to be in any way determinative of these claims since lone parents with children under the age of two are but a small number in considering welfare benefits as a whole. I note that at least two judges in the Supreme Court would have decided that the inclusion of lone parents with children was incompatible with Convention rights

and so unlawful. Lady Hale considered that it was not shown that taking child-related benefits out of the cap as applied to lone parents would emasculate the policy objectives. If the smaller group of lone parents with children under two can succeed in persuading me that it would be incompatible with their Convention rights to include them I have no doubt that that would not emasculate the policy objectives.

16. It follows that I do not propose to go into the details of the numbers who are or are likely to be affected. That exercise is unnecessary since the only purpose of it would be to see whether a sufficient number would be affected so as to prejudice the overall policy. There has been a statement in 2014 that 41,000 households had entered into work so that they had not been or continued to be capped. It is accepted that that cannot show that all entered work because of the cap. It is not known how many would in any event have worked without the cap. The claimants have produced evidence from an expert economist which states that the figures relied on by the defendant and referred to in Mr Edson's statement are unreliable since they have not been evaluated in a proper manner. But it is for obvious reasons accepted that the cap will have encouraged some households, including lone parents, to work. 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.
17. The Department has provided what are described as data on the cap as at May 2016. This states that 76,200 householders had had their benefits capped between April 2013 and May 2016 but that only 20,100 remained capped. It was noted that most capped households included children. 13,300 or 66% of capped households were lone parents with children. 2,240 were lone parents with a child under the age of 1. No precise figure is given for those with a child under 2 but, judging from a graph produced, it would be approximately 5,000.
18. The analysis recognises that lone parents may find it harder to find work due to childcare responsibilities. It is said:-

“However, mitigations particularly supportive to women and lone parents have been put in place...including employment support, support for childcare costs, free childcare places and Discretionary Housing Payments.”

Employment support is said to include in liaison with local authorities support to find work and housing support. Childcare costs through Working Tax Credits are available covering 15 hours during term time for three and four year olds and two year olds who are most disadvantaged. Children under two are not covered, but there can be payment of 70% of childcare costs up to a limit of £175 per week for a single child and £300 for two or more children. From April 2016, this was increased to 85% in Universal Credit, again with limits, this time monthly amounts of £646.35 and £1,108.04 respectively. It is important that full costs are not payable for children under 2, since, as will become clear, for those such as the claimants living in or very close to poverty even relatively small sums can have a seriously damaging effect.

19. The analysis refers to impact on children coupled with what is called the Life Chances Legislation incorporated into the 2016 Act. This requires the defendant to produce annual reports on children in workless households and the educational attainments of children. This is, it is said, “because evidence shows those to be the two main factors leading to child poverty now and in the future (respectively). It is asserted that the cap is supportive of this legislation and of the best interests of children because this policy gives the incentive for people to make the choice to come into work.” The analysis on page 9 states:-

“However, the current benefit cap has been shown to be successful with more households looking for, and finding work. The new lower tiered cap aims to build on the success by strengthening the work incentive for households. In this way the number of children being in workless households could fall over time which is in their best interests.

It is not in the best interests of children to live in workless households. Children can have life chances and opportunities damaged as a result of living in households where no-one has worked for years and where no-one considers work as an option.”

While no doubt true, 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 2.

20. Since the cap is effected by reduction in housing benefit, the existence of Discretionary Housing Payments (DHP) is said to be an important safeguard. Those are available when a local authority considers that a claimant who is in receipt of housing benefit or universal credit requires financial assistance towards housing costs. There is an overall limit to the amounts available to local authorities and it is clear that those who live in London are the most likely to be affected by the cap. DHP can cover rent deposits or payments in advance if they are required. The Guidance produced by the Department, which local authorities must apply, states that the length of time over which a payment can be made is at the discretion of the local authority and there is no limit. A long term or indefinite award can be made. In relation to those subject to the benefit cap, it is said that the funding, which the government has provided for DHP, is specifically aimed at a number of groups who are likely to be particularly affected by the benefit cap. These include:-

Those in temporary accommodation

Individuals or families fleeing domestic abuse

Those with kinship care responsibilities

Individuals or families who cannot move immediately for reasons of health, education or child protection

Households moving to, or having difficulty in finding more appropriate accommodation

Those with dual liability for housing costs

Women within 11 weeks of the expected week of childbirth

Households with a child aged 9 months or under

21. DHP are provided for by Sections 69 and 70 of the Child Support Pensions and Social Security Act 2000. Section 69 empowers the defendant to make payments “by way of financial assistance (“discretionary housing payments”) to persons who:-

(a) are entitled to housing benefit or council tax benefit or both [or to universal credit] and

(b) appear to an authority to require some further financial assistance (in addition to the benefit or benefits to which they are entitled) in order to meet housing costs.”

Section 70 empowers the defendant to “make such payments as he thinks fit” in respect of DHPs. This has included payments to deal with those affected by the benefit cap and the so-called bedroom tax. Shelter has, for obvious reasons, concentrated on the housing difficulties and indeed likely homelessness created by the benefit cap. I shall deal with its evidence and submissions in due course after I have set out the material evidence of each claimant. Suffice it to say, that Shelter confirms from the experience of its Chief Executive, Mr Graeme Browne, the inability of DHP to meet the needs of those such as the claimants affected by the cap.

22. The claimants have produced statements which bring their situation up-to-date as at the end of April. The April statements have been admitted without objection from the defendant. In addition, there are further statements which seek to deal with issues raised by the defendant.

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.

27. The claimants' solicitor has made enquiries of the Residential and the National Landlord's Associations. The responses have confirmed what her experience had told her that private landlords are very reluctant to take on tenants who were capped and many would seek to evict such tenants. One way in which the defendant has suggested that persons capped can avoid the difficulties is to negotiate a lower rent. That suggestion has been described as laughable, an adjective with which I am inclined to agree. I suppose there may be landlords altruistic enough to reduce rent for needy tenants, but they will be a minute proportion. The suggestion is totally unrealistic.
28. The solicitor has also made enquiries of local authorities about their practices in dealing with DHPs. Of the 235 who responded, none had ever made a permanent award nor had any agreed to make a payment before a tenancy commenced. The money available is also needed for those affected by the bedroom tax and local authorities know that the amounts available are finite. Thus the reality is that DHPs do involve short term payments and 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 simply is not working with any degree of fairness.
29. The defendant relies, as we have seen, on the need to incentivise parents to work so that children do not suffer from living in workless families. It is difficult to see how that is realistic in relation to children under two. It is surely in their interests that they should have adequate food, shelter, warmth and care since deprivation of such will produce much greater harm. Evidence from Professor Maggie Atkinson, who was Children's Commissioner for England between 2010 and 2015, deals with the UNCRC, which has been ratified by all nations save the USA. The UK ratified in 1991 and so is committed to promote and protect children's rights. I shall deal with its effect on these claims in due course. Those in need of welfare benefits fall within the poorest families with children. It seems that some 3.7 million children live in poverty and, as must be obvious, the cap cannot but exacerbate this. The need for alternative benefits to make up shortfalls is hardly conducive to the desire to incentivise work and so not provide benefits. There is powerful evidence that very young children are particularly sensitive to environmental influences. Poverty can have a very damaging effect on children under the age of five.
30. Mr Sheldon reiterated Mr Edson's evidence that lone parents such as the claimants who face being capped can and should exercise choice just as families have to do generally. I am not impressed with this since I doubt anyone would choose to be a lone parent. Women in the position of the claimants are not lone parents by choice but because they have lost a partner who would share care with them, often from domestic violence. There is no question of real choice. It is no part of the cap policy to seek to limit the size of families or to persuade women to avoid having children: at least two of the claimants found the reference to choice offensive. I am not surprised.
31. Childcare for children under two is more expensive since children of that tender age need more one-to-one care. Equally, there are difficulties in finding nurseries or child carers who are prepared to take on such young children. Mothers are encouraged to breastfeed their children which makes it difficult if not impossible to enter work for the 16 hours needed to avoid the cap at least until an age when breastfeeding will no longer be needed. These are important factors relied on by the claimants in submitting

that the cohort of lone parents with children under 2 does have a special status which is outside that dealt with in SG. Mr Sheldon submits that there is no distinction that can properly be made from the decision in SG. My decision in Hurley was based on the failure to consider the position of those disabled who were dependent on family carers. There is, he submits, no such failure in this case and he relies on what was considered in the Parliamentary proceedings.

32. While the court has jurisdiction to exercise judicial review of regulations which have been subjected to detailed Parliamentary consideration, it is necessary to act with circumspection. In Bank Mellat v. HM Treasury (No 2) 2014 AC 700 at paragraph 44, Lord Sumption observed:-

“When a Statutory Instrument has been reviewed by Parliament, respect for Parliament’s constitutional function calls for considerable caution before the court will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliamentary review. This applies with special force to legislative instruments founded on consideration of general policy.”

The observations of Lord Bingham in R(Countryside Alliance) v. AG [2008] AC 719 at paragraph 45, where he said:-

“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.”

are material since, as Lord Reed observed in SG (paragraph 95), those observations are equally true of questions of economic and political judgments.

33. Mr Sheldon has relied on the consideration which was given in Parliament to the position of lone parents with children, including children under 2. In the Commons on 17 September 2015, Emily Thornberry, MP, then the shadow Minister of State for Employment, tabled an amendment which sought to exempt responsible parents of children under the age of two, including lone parents, from the cap. The response from the then minister was to state that the “vast majority of capped households who had found work included parents who had managed to balance their caring responsibilities with work as millions of working households did”. The minister continued:-

“Turning to lone parents with young children, at whom I think this amendment is most likely addressed, we believe that work is the best route out of poverty for households. Children can have their life chances and opportunities damaged by living in households in which no-one has worked for years and in which no-one considers work as an option. Lone parents need only work at 16 hours a week to become eligible for working tax credits and so become exempt from the cap.”

The minister went on to draw attention to the DHP provision which she said provided the most effective means of increasing incentives to work and promoting fairness, while ensuring that the most vulnerable were supported. The possibility of receiving at least 70% (now 85%) of childcare costs was also referred to for those on Universal Credit. The minister's response does not engage with the difficulties faced by those with children under two.

34. Reference has been made to the fact that parents of children under two were not required to look for work, although required to engage in work-focussed interviews once the child reaches the age of one. In the Lords, the minister, Lord Freud, in answering the point that it was unfair to impose the cap on those who were not required to seek work, stated on 21 December 2015:-

“There is a difference between having a specific provision that does not require people to work and having one that actually financially incentivises people to work. That is the difference. As the noble Baroness [Hollis] pointed out, we do not require anyone with a child under three to go to work, but people often go to work with a child much younger than that. When people look at this measure on balance, they may think that it is the appropriate thing for them.”

35. In the Lords on 25 January 2016, Baroness Lister referred to the absence of mitigation of the negative impact on children's rights and to the SG decision. She observed, with some force, that the analysis of the best interests of the children rested on the proposition that it was in the best interest of children to have parents in work. She pointed out that it was hardly in the best interests of the children when the review of the cap showed that over one third of those affected had had to cut back on household essentials. Lord Freud's response did no more than reiterate the view that parents in work were in the children's best interests and the levels of the cap would reinforce the message that work paid and that it was not fair for someone on benefits to be receiving more than many working households. It is difficult to see that this really engages with the problems facing lone parents with children under two. I have already referred to the evidence which has shown that the accounts given by the claimants are by no means exceptional and that the cap is having severely damaging effects on such parents.
36. I have not specifically referred to evidence from Gingerbread drawing attention to the problems of juggling work and childcare for parents of children under two and the shortage of part-time jobs which could be suitable. There is evidence from a chief executive of the Family and Childcare Trust of the cost of childcare, which is higher for those under two, and the requirement for upfront payments. More than 16 hours a week will be needed since travel times have to be taken into account and providers will not usually offer childcare except in half-day blocks. Evidence from the Chief Executive of the Women's Aid Federation raises concerns as to the impact of the cap on women and children who have suffered domestic violence. One problem has been bed blocking in refuges since leaving a refuge will mean that the cap is applied. In addition there is concern that the cap will mean that women remain and put up with domestic violence to avoid being capped when the husband or partner is in work. The witness makes the point that rape by partners is not uncommon and, if it leads to pregnancy, will often result in domestic violence.

37. There is very powerful evidence of the damaging effect of the cap on lone parents such as the claimants. But that cannot mean necessarily that unlawfulness is established. It was accepted in SG that the parents' rights under AIPI were engaged. That acceptance continues. Thus Article 14 of the ECHR is equally engaged. In considering ECHR rights, the ECtHR has relied on the UNCRC as an aid to interpretation. That the UNCRC can be taken into account was confirmed by a majority of the Supreme Court in SG. In particular, Article 3.1 was material. It provides:-

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

I do not need to go through the arguments about its application since a majority of the Supreme Court has decided that it does apply. There was in relation to the imposition of the cap no proper response to the concerns raised by the Children's Commissioner. I do not think that anything said in answer to the points raised in Parliament cures that defect. The advantage to children of having parents in work is essentially all that is relied on and it is difficult to see how that is material to children under two. Lord Carnwath at paragraph 125 makes the point that the benefits which are capped include those which are designed to meet the needs of the children in the household. He continued in paragraph 126:-

“The cap has the effect that for the first time some children will lose those benefits, for reasons that have nothing to do with their own needs, but are related solely to the circumstances of their parents. It is difficult to see how this result can be said to be consistent with the best interests of the children concerned.”

These observations are equally valid in relation to the amended cap. Mr Sheldon submitted that the opinions of the three justices on this were not part of the ratio of the case and so were not binding. Whether or not technically binding, they were decisions reached following full argument and it would be wrong for me not to follow them unless there were overwhelming reasons not to.

38. The test that has to be applied in considering whether any discrimination is justifiable is whether the difference in treatment is manifestly without reasonable foundation (MWRFF). That was confirmed as the correct test by Lady Hale in Humphreys v. HMRC [2012] UKSC 18 in relation to cases considering discrimination in respect of state benefits. Mr Wise submitted that that test has been revisited by the Supreme Court in a case concerning medical costs for asbestosis from Wales [2015] UKSC 3. I do not accept that that case, which concerned very different considerations, affects the approach I should adopt. But I do not need to go into detail since, as will become clear, application of the MWRFF 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 AIPI.

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 MWRFF 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.

40. I recognise that it is difficult to follow why Article 8 was not relied on in SG. It was raised but, as the judgment shows, was not pursued. It seems clear to me that Lord Reed's observations cannot survive the unanimous decision of the seven justices in MA. The bedroom tax produced indirectly the effect on private and family rights. So here, the effect of the cap means that the children and their parents have restrictions on what can be provided by way of housing, food and other things that an average child should have available. Further, as the ministers have said, it may be necessary to try to move to cheaper accommodation to avoid the effect of the cap so that there will be an upheaval for the family. I have set out the evidence of the damage to both family and private life which the cap has produced and will continue to produce. I am not in the least surprised that the Supreme Court in MA recognised that damage caused by a reduction in benefit will engage Article 8.
41. The claimants also relied on common law principles. Since I found in their favour on the grounds set out in this judgment, I have not thought it necessary to go into those arguments.
42. In the circumstances, I am satisfied that the claims must succeed. I will hear counsel on the appropriate relief which I should grant.
43. I would only add this. Whether or not the defendant accepts my judgment, the evidence shows that 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. Most lone parents with children under two are not the sort of households the cap was intended to cover and, since they will depend on DHP, they will remain benefit households. Real misery is being caused to no good purpose.