



JUSTIFYING DISCRIMINATION

The benefits cap was acknowledged to discriminate indirectly against women. A majority of the Supreme Court held it contrary to the UN Convention on the Rights of the Child. Despite this, the court held it compatible with the European Convention on Human Rights. Julius Komorowski explains why

The court in *R (SG) v Secretary for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449 held that the Benefit Cap (Housing Benefit) Regulations 2012 (SI 2012/2994) did not constitute unjustified discrimination against women contrary to article 14 of the European Convention, read with article 1 of Protocol 1 (“A1P1”). The decision

is important for when discrimination in securing human rights can be justified, and the relevance of human rights treaties other than the Convention.

The benefits cap

The Welfare Reform Act 2012, s 96, provided that regulations may be made to prescribe a cap to a claimant’s benefit entitlement, set by reference to average earnings net of tax and national insurance. Regulations were to prescribe which benefits counted towards the cap, though pension credit and state pension could not be included. Exceptions could be made so that certain categories of claimant were excluded altogether.

The 2012 Regulations fixed the cap at £350 a week for single persons without children, and £500 for couples and single parents. Those receiving certain benefits connected with illness or disability were excluded entirely, as were recipients of war pensions. A wide variety of benefits were to count towards the cap, including housing benefit, child benefit, child tax credit and income support. Where the cap was exceeded, a corresponding reduction was made to housing benefit.

ECHR and UNCRC

A1P1 of the Convention protects the right to property.

Article 14 of the Convention provides that enjoyment of the Convention rights is to be secured without discrimination on any

ground, including sex or other status.

The European Court of Human Rights has held that article 14 may be violated in the context of securing another human right, such as A1P1, even though there is no substantive violation of that other right. The complaint need only concern something that comes within the ambit of one of the substantive guarantees of the Convention. Further, article 14 includes a prohibition on indirect discrimination, that is the imposition of a seemingly neutral requirement that has a differential impact on persons with a certain status (e.g. women). Finally, the court has held that discrimination, whether direct or indirect, does not contravene article 14 where it occurs in pursuit of a legitimate aim and the means employed bear a reasonable relationship of proportionality to that aim. Thus, one might have justified discrimination.

Article 3 of the UN Convention on the Rights of the Child requires that in all actions regarding children, the best interests of

children shall be a primary consideration. The European Court has had regard to other human rights treaties – including the UN Convention – to shed light on the scope of the guarantees in the European Convention.

The challenge to the legislation

The claimants were single mothers seeking judicial review of the 2012 Regulations on the basis that they unjustifiably discriminated against the rights of women and thereby contravened their human rights.

According to an impact assessment published at the time the 2012 Regulations were laid before Parliament, 39% of affected households were likely to be couples with children, with 50% being single parents with children (11% being childless households). As single parents are predominantly women, this meant that far more women would be affected by the cap than men.

The UK Government accepted that a restriction on benefit came within the



➤ ambit of A1P1. It also accepted that the 2012 Regulations indirectly discriminated against women. The question was whether the discrimination was unjustified in contravention of article 14, read with A1P1.

Lady Hale and Lord Kerr opined that article 3 of the UN Convention had not been complied with, and this meant that the discriminatory effect of the cap could not be justified in terms of article 14 of the European Convention. Lord Kerr additionally opined that as a treaty concerned with human rights, the UN Convention was directly effective in domestic law.

Lord Carnwath also held that the UN Convention had not been complied with. But there was no majority to strike down the Regulations. Lords Reed, Carnwath and Hughes held that any breach of the UN Convention was irrelevant to the question under the European Convention.

The relevance of the UNCRC

The majority of the court observed that where the cap applied, the impact on children living with a single father was the same as that on children living with a single mother. Although a child's interests might be affected by the limitation on their mother's benefits, their interests were not part of the woman's right to be free from unjustified discrimination regarding her property.

Lady Hale and Lord Kerr disagreed. Lady Hale noted that with direct sex discrimination, one had to justify treating men differently from women. This was not true, though, with indirect discrimination. By its nature, men and women were treated the same; it was simply that a neutral measure more frequently affected one gender than the other. It followed that the measure was what required justification, not its differential effect. It therefore did not matter that a child of a single father was in the same position as a child of a single mother. Lord Kerr added that the children's best interests were linked to discrimination against single mothers, because the impact of the cap was inextricably bound up with a woman's capacity to fulfil her role as a mother.

As respects domestic law, Lord Kerr said that the reason why treaties entered into by the Government did not form part of domestic law was to protect the citizen from abuses of power. But this did not explain why the UK's treaty commitment to the protection of a particular human right should not be enforceable in domestic law. Standards so expressed were to be presumed to be the product of extensive and enlightened consideration. If the Government committed itself to a standard of human rights protection, it should be held to account by the courts to that standard.

Discussion

In my view, Lady Hale and Lord Kerr were wrong to say the UN Convention had any relevance to the article 14 issue. Lady Hale's view that with indirect discrimination,



This case illustrates the great care that must be taken in framing claims of discrimination under article 14 of the European Convention

justification is needed only for the measure itself, not its differential impact, would make indirect discrimination harder to justify than direct discrimination. Both the measure and its impact are relevant. The advantages of using a measure with disparate effect (rather than some other measure) should be balanced against the extent of the differential impact. Lord Kerr's comments overlook that a single father's benefits are bound up with his capacity to fulfil his parental role in a manner similar to those of a single mother.

Lord Kerr's identification of the reason why treaties are not part of domestic law was also in my view wrong. The simple reason is that they do not meet our definition of what law is, lacking any authority ultimately derived either from Act of Parliament or the common law. When it was decided to give effect to the European Convention in domestic law, this was done by Act of Parliament, in a sophisticated fashion after democratic debate. Executive ratification together with judicial dictum is no substitute for that.

Lord Kerr did not ground his approach in the doctrine of legitimate expectation. (That doctrine had been used in the past to justify reliance on treaties, with mixed success.) It seems to follow on Lord Kerr's approach that a

Government's treaty ratification would be binding on it in domestic courts without limit of time or circumstance. Could therefore the Government have been prevented from making a commencement order for s 96, or enacting any regulations whatsoever even where they did no more than give effect to its clear terms? When Parliament incorporated the European Convention it did so in a carefully limited manner. For example, s 6 of the Human Rights Act 1998 limits the powers of public authorities, but it provides that the Government cannot be compelled to introduce legislation to Parliament, nor can it be prevented from acting to give effect to primary legislation.

This case illustrates the great care that must be taken in framing claims of discrimination under article 14. Consider what would have happened if, instead of the impact on single mothers, the effect on children from large families had been considered (an argument of discrimination against large families was made in the Court of Appeal, but not pursued in the Supreme Court). Once the cap is reached, the addition of further children results in no additional benefit. Thus a family of five children might need to be supported on the same income as a family of three. A child in such a larger family is arguably discriminated against compared to other children. Framed in this way, the relevance of the UN Convention could hardly have been denied. The prospects would still be uncertain, as it is questionable whether being a member of a large family is a "status" within article 14. The framing of the discrimination issue was crucial, though, as had Lord Carnwath found the UN Convention to be relevant to the form of discrimination founded on, the result in SG would have been different. ①



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