Neutral Citation Number: [2014] EWCA Civ 156

Case No: C1/2013/3305

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**THE RIGHT HONOURABLE LORD JUSTICE ELIAS & THE HONOURABLE MR JUSTICE BEAN**
**[2013] EWHC 3350 (QB)**

**IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2014

**Before:**

**THE MASTER OF THE ROLLS**
**THE RIGHT HONOURABLE LORD JUSTICE LONGMORE**
and
**THE RIGHT HONOURABLE LORD JUSTICE LLOYD JONES**

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**Between:**

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| **THE QUEEN (ON THE APPLICATION OF SG & ORS (Previously JS & ORS))** | **Appellants** |
| **- and -** | |
| **THE SECRETARY OF STATE FOR WORK AND PENSIONS** | **Respondent** |
| **- and -** | |
| **1) CHILD POVERTY ACTION GROUP**<br>**2) SHELTER CHILDREN'S LEGAL SERVICE** | **Interveners** |

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**Mr Ian Wise QC, Ms Caoilfhionn Gallagher & Mr Sam Jacobs** (instructed by **Hopkin Murray Beskin**) for the **Appellants**
**Mr Clive Sheldon QC & Ms Karen Steyn** (instructed by **The Treasury Solicitor**) for the **Respondent**
**Mr Richard Drabble QC, Mr Tim Buley & Ms Zoe Leventhal** (instructed by **Herbert Smith Freehills LLP**) for the **Child Poverty Action Group**

**Mr Jonathan Manning & Ms Clare Cullen** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Shelter Children's Legal Service**

Hearing dates: 28 & 29 January 2014

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# Approved Judgment

**Master of the Rolls:** This is the judgment of the court to which each member has contributed.

1. This appeal relates to what is generally known as the "benefit cap" imposed by the Welfare Reform Act 2012 ("the Act") and the Benefit Cap (Housing Benefit) Regulations 2012 ("the 2012 Regulations") which were made thereunder. In broad terms the appellants say that the 2012 Regulations have been made in breach of articles 1 of the First Protocol ("A1P1") and 8 read with article 14 of the European Convention on Human Rights ("the Convention") because their rights as women not to be subjected to discrimination and their rights to family life have been infringed. The Secretary of State contends that the aim of the benefit cap is primarily to bring about a change in culture by incentivising people to work, thereby reducing what the Government believes is the debilitating effect of long term dependency on benefits. In addition, the Government believes that the cap strikes a fairer balance between the interests of taxpaying working households and those on benefits. Any interference with family life and any discriminatory impact of the benefit cap on women generally (and female victims of domestic violence who flee from their homes in particular) is therefore said to be justified and lawful. The Divisional Court upheld the arguments of the Secretary of State. The claimants now appeal. We adopt, with gratitude, the outline account of the legislation and the facts from the Divisional Court's judgment.

## The Legislation

2. The Act received Royal Assent on 8 March 2012. The cap is one of the major reforms which it introduces and is so called because it sets a cap to the amount of welfare benefits a recipient may receive. Section 96 of the Act introduces the concept of a "relevant amount" of prescribed welfare benefits: this constitutes the cap. Where the total entitlement to such benefits of a single person or a couple exceeds the relevant amount, their entitlement is reduced by the amount of the excess (section 96(2)).

3. The broad principles for determining the "relevant amount" are laid down in the primary legislation (section 96(6) to (8)). However, the precise manner of its calculation and the amount actually determined are to be specified in regulations (sections 96(4) and (5)). These regulations may make provision as to the benefits from which a reduction is to be made and may provide for exceptions to the application of the cap (section 96(4)(b) and (c)).

4. Section 96(6) to (8) provides as follows:

> "(6) The amount specified under subsection (5) [the "relevant amount"] is to be determined by reference to estimated average earnings.
>
> (7) In this section "estimated average earnings" means the amount which, in the opinion of the Secretary of State, represents at any time the average weekly earnings of a working household in Great Britain after deductions in respect of tax and national insurance contributions.

> (8) The Secretary of State may estimate such earnings in such manner as the Secretary of State thinks fit."

In fixing the relevant amount, therefore, the Secretary of State has to focus on the net average earnings of a working household, but he has a broad discretion how to determine that figure. He may also determine different caps for different cases: section 97(1).

5. However, when determining the amount, if any, by which the benefits exceed the cap, account is not taken of all benefits received by a beneficiary, for two reasons. First, the cap only applies to "any prescribed benefit, allowance, payment or credit" (section 96(10)). Therefore, if a benefit is not prescribed, it will not count in calculating the total benefits received for the purposes of imposing the cap. Moreover, section 96(11) specifies in terms that state pension and retirement pension cannot be prescribed as relevant welfare benefits. Second, (as we have already said) section 96(4)(c) provides for exceptions to be made to the application of the cap; welfare beneficiaries falling within the exceptions are outside the scheme altogether.

6. Section 97(3) and (4) provided that the statutory instrument containing the first regulations under section 96 could only be made when a draft had been laid before, and approved by resolution of, each House of Parliament (the affirmative resolution procedure). Subsequent regulations were to be subject to annulment in pursuance of a resolution of either House (the negative resolution procedure). The 2012 Regulations were the first regulations made under section 96. These were made on 29 November 2012 after the draft had been approved by affirmative resolutions of both Houses. The draft regulations were accompanied by an impact assessment and an equality impact assessment.

7. The 2012 Regulations insert a new Part 8A into the Housing Benefit Regulations 2006/213. Regulation 75G fixes the "relevant amount" under section 96(2) at £350 per week for a single claimant and £500 per week for all others. The latter figure represents a gross salary of £35,000 and a net salary, after deduction of tax and national insurance, of around £26,000.

8. There is a list in regulation 75G of the benefits which are deemed to be welfare benefits for the purposes of the cap. It includes child benefit, child tax credit and housing benefit, all benefits to which those in work are in principle entitled. The mechanism for giving effect to the cap is by deducting the excess of benefits over the "relevant amount" from housing benefit: see regulation 75D.

9. The 2012 Regulations provide for exceptions to the application of the cap. The effect of regulation 75E is to disapply the cap to working households. This is the result of providing that the cap does not apply where the claimant or the claimant's partner is entitled to working tax credit. They become so entitled, and are therefore exempt from the cap, by working at least 16 hours per week if a single parent or a disabled person, and 24 hours per week if a couple with children (provided that at least one of them works for 16 hours). The regulation also exempts those who have recently been in work by granting a 39 week period of grace from the last day on which the claimant or the claimant's partner was employed or engaged in work.

10. Regulation 75F provides that the cap does not apply where a person in the household is in receipt of certain specified benefits. The benefits specified are: employment and support allowance which includes a support component; industrial injuries benefit; an attendance allowance; a war pension; disability living allowance; a personal independence payment; and an armed forces independence payment. Regulation 75(C)(2) provides that, where the welfare benefit is housing benefit and the dwelling is "exempt accommodation", it shall count as nil in the calculation of the total amount of welfare benefits to which a person is entitled. Some women's refuges which take in women fleeing domestic violence fall into this category.

11. The cap was brought into force in April 2013 in four London boroughs and more widely later in the year. It was obvious from the outset that the introduction of the cap would immediately have severe consequences for claimants who had been receiving benefits substantially in excess of the relevant amount. The Government sought to mitigate the difficulties by providing additional funds to local authorities to make discretionary housing payments ("DHPs") as a transitional measure in hard cases. As the claimants' evidence points out, the budget for DHPs is limited for each year. Local authorities have the power to supplement the amount up to a certain limit but currently budgetary pressures are such that only a few (some 14% the Divisional Court was told) have chosen to do so.

12. The two items most likely to trigger the operation of the cap are housing benefit and the number of children in the family. Housing benefit reflects (but does not necessarily meet in full) the cost of housing, whether social or private. Accordingly, the cap will bear most heavily on those in receipt of benefit who live in areas where rental costs are high. In practical terms, this means that those who live in London or in the centre of other big cities where rents tend to be high will be most likely to be affected. It is a striking feature of the scheme - and lies at the heart of this appeal - that the cap applies equally to a childless couple in an area with cheap and plentiful social housing as it does to a lone mother of several children in inner London who is compelled to rent on the private market. But the aim of the scheme is in part to encourage those subject to the cap to go back to work or to move to different areas of the country where rents are cheaper and housing benefit correspondingly lower. The evidence from Shelter highlights the problems with the latter option such as the fact that many local authorities will give lower priority to those without a link to the area, the absence of available accommodation in many areas, and the fact that, where housing is available and cheap, this is because the area is generally deprived and is likely to suffer from high unemployment. Indeed, it was because of these problems that Shelter suggested that housing benefit should be excluded from the benefits taken into account when calculating the cap. But the Government did not accept that proposal; and the Secretary of State considers that Shelter has exaggerated the difficulties of moving to new areas.

## The claimants

13. There are now four claimants in these proceedings. They comprise the mother and youngest child of two families, each a single parent family. The claimants submit that because of their particular circumstances they will suffer harsh consequences as a result of the cap and they contend that many other lone parents will be similarly affected. We briefly set out the circumstances of each family recognising, as we do,

that a summary description of their difficulties may not adequately communicate the depths of the very real day to day anxiety and distress which they must feel.

*SG*

14. SG is a single parent mother living in the Stamford Hill area of the London Borough of Hackney. She has six children, three of them living with her. The youngest, a boy, was born in January 2010. She also has two daughters born in February 2005 and October 2006 who live with her. In addition she has three children aged between 12 and 17. The oldest, M, is a ward of court in foster care in Hackney. Her 12 year old son may return to live with her. He is at present with his father in Belgium, and she is applying to the family court in Belgium for an order under the Hague Convention that he should be returned to England.

15. The evidence filed on behalf of SG states that she left her husband in 2011. There was an unhappy history including allegations of physical and sexual abuse made against the father by M.

16. The property in which SG lives is a two bedroom flat rented from a private landlord. The boy shares a room with his mother and the other bedroom is for the two girls. Her total benefits prior to the application of the cap were £585.40 per week. At the time of the filing of her witness statement her landlord was about to increase the rent. If any of her older children were to return she would be entitled to an increase in child benefit and child tax credit, but would not in fact receive any additional money, since the increase would immediately be offset against her housing benefit. She would thus have to feed and clothe an extra child or two children without additional funds.

17. She secured part time work for 16 hours per week and became entitled to working tax credit. At the time these proceedings were instituted she was no longer employed, but was entitled to a 39 week grace period before application of the cap by virtue of regulation 75E. That expired on 29 November 2013. She has now been notified that her benefits will be capped and we have been told that an application for DHPs (which was pending at the time of the hearing below) has not yet been determined.

18. SG is an orthodox Jew. It is important to her to live in the Stamford Hill area for a number of reasons. The children, who are of school age, attend a local Jewish school. SG also wishes to be close to M's foster home. Kosher food is readily available in shops in Stamford Hill. Finally, she has a support network of family and friends in the area.

*NS*

19. NS is a single mother. She lives in the London Borough of Haringey. She has three children, all girls. The youngest, MS, was born in June 2010. The older girls were born in September 2001 and February 2003 respectively.

20. The evidence filed on behalf of NS states that she has been subjected to repeated incidents of sexual abuse and domestic violence by her former husband. She left the former matrimonial home on 27 December 2012 with her daughters and went first to the home of a relative and then to distant and very unsuitable emergency

accommodation. She is now back in the former matrimonial home, having obtained an occupation order from the Family Court against her husband in March 2013.

21. Her home is a two bedroom flat rented from a private landlord. She would be assessed by the local authority as requiring a three bedroom flat given that she has three daughters, but would prefer to stay in her present flat. For that and other reasons she does not want to move. The rent is £270 per week, paid directly by the housing benefit office to the landlord. The total of this housing benefit and her income support, child benefit and child tax credit payments was £550.44 per week. The application of the cap reduced this by almost exactly £50 per week. NS speaks limited English. She has not had a job before. She says that she cannot work because she has her three year old daughter to look after. Her solicitor points out that, if NS were living with her husband, he would receive working tax credit and the cap would not apply. However, no-one suggests that returning to her husband is a practical proposition. She has been awarded DHP until 31 March of this year.

22. In the case of each of these claimants, therefore, there are powerful reasons why the suggested ways of mitigating the effects of the cap are not appropriate: the sums are too great to bring their finances under control by prudent housekeeping; they say that for various reasons they are not in a position to work; and there are educational and/or cultural and support reasons why they do not want to move any distance from their current homes.

**The Issues**

23. Having heard Mr Wise QC for the appellants, Mr Drabble QC for the Child Poverty Action Group ("CPAG"), Mr Manning for Shelter and Mr Sheldon QC for the Secretary of State we consider that the principal issues that arise are whether the 2012 Regulations:

    i) unlawfully discriminate against (a) women generally or (b) women who are victims of domestic violence, in breach of article 14 read with A1P1;

    ii) infringe article 3(1) of the United Nations Convention on the Rights of the Child ("UNCRC");

    iii) unlawfully discriminate against families in breach of article 14 read with article 8 of the Convention;

    iv) infringe article 8 of the Convention as a free standing claim; and

    v) are unlawful at common law on the grounds of irrationality.

**Article 14 read with A1P1**

*Discrimination against women generally*

24. Article 14 of the Convention 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, political or other

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

25. It is conceded by the Secretary of State that the cap has a disproportionately adverse impact on women generally (a higher proportion of whom are in receipt of benefits). Lone parents (who are more likely to be on benefits than other members of the population) are disproportionately affected by the imposition of the cap and 92% of lone parents who have children living with them are women.

26. This is not a case of direct discrimination. It is either indirect discrimination or the kind of discrimination recognised by the ECtHR in *Thlimmenos v Greece* (2001) 31 EHRR 15 at para 44. For the purposes of this case, it does not matter which it is. Either way, the issue is whether the discrimination is justified: see paras 43 to 46 of *R (MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ [13].

*The relevant test for justification*

27. The relevant test (which is not in issue in these proceedings) is whether the discriminatory measure is "manifestly without reasonable foundation": see paras 49 to 52 in *MA.* This is a stringent test because decisions as to the criteria to be applied in the distribution of state benefits are an aspect of political and governmental life in which the court should be very slow to substitute its own view for that of the legislature or executive. That does not mean that such decisions are a no-go area for the courts. The reasons put forward in justification of discriminatory measures must be the subject of careful scrutiny by the courts. They may be found, on analysis to lack a reasonable basis: see per Lady Hale in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545 at para 22. If that is the case, the courts should not shrink from saying so and granting appropriate relief to those adversely affected.

28. It is relevant to the intensity of the court's review that the 2012 Regulations were approved by affirmative resolution in both Houses of Parliament and a number of the points made by the appellants in support of this appeal were identified and the subject of vigorous debate during the passage of the Bill through Parliament. The regulations have democratic legitimacy and should be afforded the additional respect which is customarily afforded to judgments about social policy which find expression in legislation: see *MA* at paras 57 and 82. It has been said (admittedly in a different context) that "broad social policy … [is] pre-eminently well suited for decision by Parliament": see per Lord Nicholls in *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 at para 51.

29. Mr Wise and Mr Drabble submit that little weight should be given to the fact of Parliamentary endorsement in this case because it was repeatedly stated by the Government during the debate in Parliament that the Bill was no more than a framework and that the details would be set out in the regulations. We do not consider that the point can be brushed aside in this way. First, the 2012 Regulations were approved by affirmative resolution of both Houses of Parliament. This factor alone is sufficient to require the court to give the regulations considerable weight. Secondly, however, there was, as we shall see, considerable debate on some of the detail of the Bill on points that are central to the issues raised on this appeal. For example, the Opposition sought unsuccessfully to introduce amendments to provide

that (i) the cap should be determined by reference to the average "income" (and not the average "earnings") of a working household (see paras [40 to 42] below) and (ii) housing benefit, child benefit and child tax benefit should be excluded from the cap (see paras 38 to 40 below). The Government's position on these fundamental points was made clear during the debates on the Bill and was reflected in the 2012 Regulations.

*Is the discriminatory effect of the 2012 Regulations against women generally justified?*

30. At para 92 of his first witness statement, Mr Robert Holmes of the Working Age Benefits Strategy Directorate of the Department of Work and Pensions says that the Government's specific aims in introducing the cap were (i) to introduce greater fairness in the welfare system between those receiving out of work benefits and tax payers who are in employment; (ii) to make financial savings where the cap applies and, more broadly, help make the system more affordable by incentivising behaviour that reduces long-term dependency on benefits; and (iii) to increase incentives to work.

31. He says that careful consideration was given to these aims in determining (i) the detailed policy design and particularly the level of the cap; (ii) the benefits to be taken into account in calculating the total entitlement to welfare benefits; (iii) the exemption categories; and (iv) the options available to people affected by the cap.

32. As regards the level of the cap, Mr Holmes explains at para 97:

> "The Government believes that linking the level of the cap directly to average earnings is the most transparent means of achieving its goal of increasing fairness between those out of work and receiving benefits and those tax-payers in work. The Government acknowledges that some households earning at the level of the average wage may have their income increased by in-work benefits such as Child Tax Credit or housing benefit. But calculating the level at which the benefits received by those who are not working by reference to in-work benefits would undermine the financial incentives the benefit cap provides for people to move into work. The benefit cap will only incentivise people on benefits to obtain work if it makes it more likely that a person's income will rise on entering work. Likewise, if the level of the benefit cap was based on the number of children in a household it would undermine the intention that there should be a clear upper limit to the amount of benefit families can receive."

33. As for the benefits to be taken into account, the Government's inclusion of child-related benefits within the cap was, as we have said, the subject of much debate during the passage of the Bill through Parliament. The Government successfully opposed an amendment to exclude them. Mr Holmes summarises the position at para 104 in these terms:

> "The Government argued that its exclusion would have undermined one of the key drivers for introducing the cap, that

> ultimately there has to be a limit to the overall amount of financial support that households in receipt of out of work benefits can expect to receive in welfare payments. Agreeing to exclude child benefit from the cap would have effectively resulted in there being no limit to the amount of benefit a household could receive. Further, Child Benefit, like other welfare benefits, is provided by the state and funded by tax payers and therefore with the aim of reducing welfare expenditure and reducing the deficit the Government believes it is right that it is taken into account along with other state benefits when applying the cap."

34. The question of exemptions was also the subject of much debate in Parliament. An example of the Government's approach is the way it dealt with the amendment that was tabled to exempt those in temporary accommodation. At para 114 of his statement, Mr Holmes says:

> "However, after careful consideration the Government rejected this. The very high levels of rents charged for people living in temporary accommodation act as a work disincentive and the Government is therefore keen that local authorities actively seek to secure accommodation that is suitable for the applicant to move to as quickly as is feasible. The Localism Act 2011 gives local authorities additional flexibility in this respect as it enables them to end the homelessness duty by placing people into suitable tenancies in the private rented sector rather than just the social rented sector as previously. In respect of the future arrangements for helping to meet housing costs for people in temporary accommodation through the benefit system, Ministers have consulted with representatives of local authority associations in Great Britain and expect to make an announcement in the near future."

35. Mr Holmes explains that the other options that were considered to be available to claimants included (i) negotiating a reduction in rent with landlords; (ii) moving to cheaper accommodation (people in work routinely base their housing choices on what they can afford and there is no reason why people who are not working should not take similar decisions); (iii) budgeting to reduce expenditure on non-housing items; and (iv) in the case of lone parents, exploring the possibility of securing child maintenance (since this is disregarded in benefit assessments, and income from this source would be additional to the cap).

36. Mr Drabble (supported by Mr Wise) criticises each of the three aims identified by Mr Holmes (para 30 above) which, in combination, are relied on by the Secretary of State as justifying the discriminatory effect of the Regulations. We need to deal with these in some detail.

37. Fairness as between taxpayers in employment and non-working households was repeatedly given as an important part of the justification for the cap by Mr Grayling (the relevant Minister of State in the Department) speaking for the Government during the debates in the House of Commons. The main focus of the way that he put it in

Parliament can be seen from the statement that he made on 17 May 2011 to the Public Bill Committee (col 952):

> "The primary objective is to tackle the culture of welfare dependency by setting a clear limit to what people can expect from the benefits system. It is important that the system is fair and that it is seen to be fair to the taxpayers who pay for it. It is not reasonable or fair for households receiving out-of-work benefits to have a greater income from benefits than the net average weekly wage for working households. Many working people have to cope with difficult circumstances, and that have to live within their means."
>
> "The clause is not primarily a cost-saving measure. It may save costs, but fundamentally it is about creating a more credible welfare system. It is about tackling the culture of welfare dependency in the country by setting a clear limit to what people can expect to receive from the benefits system. It is very much about fairness. Fairness applies in both directions here. Fairness also applies to taxpayers who pay for the system. We do not believe that it is reasonable or fair that households getting out-of-work benefits should receive a greater income from benefits than the average weekly net wage for working households. That is the core principle that we are seeking to put in place here.
>
> I do not believe that we can or should write into an enabling clause in primary legislation all the different caveats that have been brought forward this afternoon. We need to work through the preparation of the regulations so that we get it right. There will clearly be further debate about the impact of the decisions that we make and about the detail of the regulations that we bring forward. What I am asking the Committee to back in the clause is simply the mechanisms to have that discussion, a discussion in which all members of the Committee are welcome to participate and to share their concerns so that we get it right."

38. Mr Drabble makes the point that there was extremely limited discussion of the levels of "in-work" benefits, and hence the level of *income* differentials that would be created between those subject to the cap and working households on median earnings. We accept this, but it is material to the weight that we should give to the fact that the 2012 Regulations were approved by Parliament that there was discussion on the question whether the cap should be fixed by reference to the estimated average *earnings* or estimated average *income* (ie earnings plus in-work benefits). Ms Buck (for the Opposition) moved an amendment that, after the word "earnings" in the Bill, there should be inserted the words "plus in work benefits which the average earner might expect to receive". She said that this amendment was necessary because it was necessary to compare "like with like" and "for the cap to have any credibility, households that fall foul of the cap should be compared with the income, not the earnings, of comparable households".

39. Mr Grayling acknowledged:

> "That our proposed level for the cap is lower than the total income of someone who is receiving in-work benefits while earning the average wage, but surely we should be ensuring that people are better off in work……..[W]e are not setting the cap at an absurdly low level. There has to be a dividing line."

40. If the aim was solely to ensure that the cap did not exceed the average earnings *and* benefits of those in work, then this amendment would have been accepted. But it was not accepted.

41. Mr Drabble submits that the cap does not achieve the aim of ensuring parity of income between those who are in work and those who are not in work (and CPAG has produced tables to support this). He also submits that, if the aim is to achieve fairness by ensuring that non-working households do not receive more in benefits income than those in work receive specifically in earnings (regardless of how much additional income working people receive by way of benefits), that is not a legitimate aim.

42. At para 94 of its judgment, the Divisional Court said:

> "Mr Drabble makes a good case for submitting that there will be a number of cases under this policy where it is simply untrue to say that those subject to the cap will face essentially the same problems as many in work. But we do not accept his thesis that this demolishes the fairness objective which is a central plank of the whole policy. First, whilst it is true that the fairness concept has sometimes been justified by relying on the notion that those on benefit should face difficult decisions of the kind facing those in work, that will often in fact be the case. Second, the concept of fairness described by Mr Holmes recognises that there is no complete equivalence between the two precisely because of the impact of benefits on the income of those in work but that the other objectives of incentivisation and cost-saving justify adopting that principle. The Secretary of State is claiming no more than that the scheme in a general sense strikes what he considers to be a fair balance between the interests of working tax payers and those who, for one reason or another, cannot obtain work and rely on benefits. That may be described as a broad political concept of fairness; and in our view the scheme is consistent with it."

43. Mr Drabble submits that "fairness" here is emptied of all content as a legitimate aim. We do not agree. A broad concept of fairness as between those who are in work and those who are not in work is a legitimate aim. It reflects a political view as to the nature of a fair and healthy society. It is true that in some passages of Hansard, Mr Grayling is recorded as saying that the Government's objective was to ensure that those out of work were *not* better off than those in work; and in other passages that the objective was to ensure that those in work *were* better off than those out of work. But the evidence of Mr Holmes is clear. One of the aims was to increase incentives to

work and this would only occur if the cap made it more likely that a person's income would rise on entering work: see para 32 above. We do not consider that it was the Government's aim to strive to do no more than achieve parity of income between those in work and those not in work. It was well understood by Parliament that it was the aim to make it financially *more* attractive to be in work than not to be in work. That is why the amendment to which we refer at para 38 above was rejected.

44. As for the aim of achieving budgetary savings, Mr Drabble submits that, although this is a legitimate aim in itself, it cannot justify a measure which impacts disproportionately on women as opposed to men. He also contends that the measure will not lead to any significant savings. This latter contention is disputed by the Secretary of State. We are in no position to adjudicate on this issue. We should add that the Government has made it clear that the cap is not primarily a short-term cost-saving measure. But it believed that the change in welfare culture which the cap is intended to bring about will itself result in long-term savings. This is a political judgment which it was entitled to make.

45. Mr Drabble's main point in relation to the aim of achieving budgetary savings is that cost alone cannot be used to justify the discriminatory effect of the cap. He relies on *Ministry of Justice v O'Brien* [2013] 1 WLR 522 (a direct discrimination case). At para 69, the Supreme Court said:

> "Hence the European cases clearly establish that a member state may decide for itself how much it will spend upon its benefits system, or presumably upon its justice system, or indeed upon any other area of social policy. But within that system, the choices it makes must be consistent with the principles of equal treatment and non-discrimination. A discriminatory rule or practice can only be justified by reference to a legitimate aim other than the simple saving of cost."

46. We accept that, if the sole reason for discriminating against women was to save money, this would not justify the discrimination. We also accept the submission of Mr Drabble that the reasoning in *O'Brien* cannot be confined to cases of direct discrimination. Although *O'Brien* was concerned with direct discrimination against part-time workers, the cases relied on by the court at paras 64 to 70 of its judgment involved indirect discrimination.

47. Mr Sheldon relies on two Strasbourg decisions in support of the proposition that article 14 discrimination can be justified on budgetary grounds. In *Andrejeva v Latvia* (2010) 51 EHRR 28, the discrimination in question was that the claimant had a reduced pension entitlement based solely on her non-Latvian nationality. The court accepted that the justification put forward for the discrimination, namely the protection of the country's economic system, was broadly speaking a legitimate aim. It then considered whether there was a reasonable relationship of proportionality between the legitimate aim and the means employed in pursuance of it. Very weighty reasons were required before a difference in treatment based exclusively on the ground of nationality would be justified. In other words, there was no hard and fast objection in principle to a discriminatory measure made in order to make financial

savings if that was necessary and reasonable for the purpose of protecting a state's economic system.

48. The second authority is *Hoogendijk v Netherlands* (2005) 40 EHRR SE22. Mr Sheldon relies on this as showing that, even if the aim of making fiscal savings cannot justify differential treatment when looked at alone, it can provide justification when considered in conjunction with other legitimate objectives. This was an admissibility decision concerning an allegation that a statutory income requirement had an indirect discriminatory effect on married and divorced women who were incapacitated for work and for that reason was in breach of article 14 read with A1P1. The question was whether there was a reasonable and objective justification for the requirement. The court noted (p 207) that the requirement had been introduced into the scheme in order to remove the discriminatory exclusion of married women from it while seeking to keep the costs of the scheme within acceptable limits. The court accepted that this constituted a reasonable and objective justification.

49. We consider that it is apt to apply the approach adopted in *Hoogendijk* in the present case.

50. On analysis, the third aim of the cap identified by Mr Holmes, namely the incentivisation of work, is an aspect of the fairness aim. Mr Drabble submits that it does not justify the discriminatory impact of the cap on women. He says that there is no suggestion in the Government's case that there is a particular need to incentivise work amongst women as opposed to men. It is most unlikely that the income of a single person without a dependent child who is on benefits and not in work will be affected by the cap. The cap, therefore, gives such a person no additional incentive to work. By contrast, single parents (who are predominantly women) bear the brunt of the effect of the cap. Moreover, the cap impacts more harshly on precisely those groups within the non-working population for whom work is least likely to be an option. At the very least, work is not an equally realistic option for lone parents on benefits with children under the age of five as it is for single persons on benefits without children.

51. The Secretary of State is of the view that out-of-work households as a general class do need greater incentives to work. Mr Sheldon draws attention to the written evidence that Shelter submitted in relation to the government's Universal Credit proposals to the Work and Pensions Committee:

> "Shelter has long argued that for many benefits claimants**,** work does not pay**.** This is because households claiming housing benefit and other benefits face a steep withdrawal of benefit whenever their income increases. We welcome the fact that the government has recognised this problem and is taking a proactive approach to tackle it. "

52. This accords with the view of the Secretary of State that a cap on benefits is needed to send a clear message that work pays. The Government accepted that the cap should not be applied to certain groups of people on the basis that it was not reasonable to require them to work or to incentivise them to work. But he considers that lone parents can in principle work and they should therefore be incentivised to work. They are in fact given incentives to do so.

53. The core aim of the cap was to change what the Government had identified as the welfare dependency culture. Central to its thinking was the idea that, in order to change that culture, it was necessary to ensure not only that those who are able to work should not be better off being on benefit than in work but also that they should be better off in work than on benefit. This was the essential political objective that Parliament clearly endorsed. Various amendments were proposed during the debates which, if accepted, would have resulted in the scheme being more benevolent to non-working households and therefore less effective to achieve the broad objective of the legislation. We have already referred to the rejection of the proposed amendment to make the working household comparator "income" rather than "earnings". There were also proposed amendments to exempt among others (i) those not subject to a requirement to work; (ii) those in temporary accommodation; (iii) housing benefit; (iv) child benefit, (v) child tax benefit. In rejecting these, Mr Grayling said (col 951):

> "The reality is that the measure has to apply across the spectrum….In policy terms, we have indicated a number of areas where we would make exceptions or where we would not include benefits in the benefit cap. This set of reforms should apply across the board, and we have made provision for that…..the impact of the amendments would be to totally change that. They would write off significant parts of the welfare spectrum in terms of the people who would be excluded from these measures. In effect, the amendments would make it impossible to implement a benefit cap that would be even remotely credible in the eyes of the public."

54. One way of reducing, if not eliminating, the differential impact of the cap on women would have been to exempt housing benefit, child tax credit and child benefit from the cap. Proposed amendments to achieve this were rejected by the Government and Parliament because, as Mr Grayling said, each of them "undermines the fundamental principles that underpin the cap, namely that there must be a limit to the amount of benefit a household can receive, and that work should pay"; and the three amendments "would effectively destroy the core principle of the benefit cap" (cols 975 and 976). He had earlier said that "the problem with the amendments is that the cap would apply to almost no-one" (col 953).

55. It was therefore a necessary part of the scheme which was designed to bring about the change that the Government wished to make that child-related benefits (which more women receive than men) would be included in the cap. The scheme was not aimed at discriminating against women. If it had been, it would not have been justified. The justification lies in the Government's fundamental objective of changing the welfare dependency culture. In our judgment, that is a reasonable basis for the cap.

56. The case is analogous to *Hoogendijk.* It has not been suggested that there was another way of achieving this fundamental legitimate objective which would not also have had a differential adverse impact on women. If child-related benefits had been excluded from the cap, its discriminatory effect on women generally would have been reduced or eliminated altogether. But the scheme would have been seriously emasculated, if not completely destroyed and the cap would have failed to bring about the culture change which lies at the heart of the policy. This is the point that the Divisional Court made at para 84 of its judgment:

> "The Secretary of State also points out that if the difficulties highlighted by the claimants were to be eliminated by removing from the cap the benefits which can be claimed by those at work (as CPAG have suggested fairness requires), the result would be, in effect, to make the cap irrelevant in almost all cases. It would bite in very few cases indeed and would to all intents and purposes involve the effective dismantling of the policy."

57. In summary, we reject the submissions of Mr Drabble and Mr Wise largely for the reasons advanced by Mr Sheldon and accepted by the Divisional Court. The three aims identified by Mr Holmes were legitimate aims for the Government to set as to how it should distribute state benefits. The Secretary of State has justified the discriminatory effect of the cap on women generally. It is not manifestly without reasonable foundation. In reaching this conclusion, we give considerable weight to the fact that (i) the cap is an aspect of social policy on the distribution of state benefits; (ii) the essential controversial issues were debated in Parliament; and (iii) the 2012 Regulations were approved by affirmative resolutions of both Houses.

*Discrimination against victims of domestic violence*

58. Mr Wise also submits that the cap impacts adversely on women because it affects victims of domestic violence particularly harshly and they are predominantly female. The cap has adverse effects on their ability to access a women's refuge or other temporary accommodation, since it is more likely to apply if (i) dual housing payments are made, (ii) the family is in temporary accommodation (which is expensive in London and other urban centres), or (iii) the family is in women's refuge accommodation (the cost of which is also high).

59. The Divisional Court dealt with this issue at para 73 of its judgment as follows:

> "One particular difficulty they face is that the Housing Benefit Regulations 2006 provide that housing benefit can be paid temporarily on two homes where a claimant is fleeing violence, while steps are taken to exclude the abuser and protect the claimant on her return to the property. Such dual payments would be liable to be caught by the cap. The government is, however, alive to the problem. The 2012 Regulations attempt to meet it by providing that housing benefit which pays the rent for a claimant in "exempt accommodation" is to be ignored; and the intention was to cover women's refuges. Lord Freud, the Parliamentary Under-Secretary who introduced the regulations, conceded in a letter in April 2013 that the definition of exempt accommodation has been too narrowly drawn and that some *bona fide* refuges are not within it (although there is a dispute about how many). The intention is to widen the exemption and consideration is being given to doing that. It may be that if this issue is not satisfactorily resolved a future claimant will seek to challenge by way of judicial review the inclusion of rent payable for her refuge accommodation in the benefit cap. But none of these claimants

> falls within that category. It is therefore unnecessary to decide in this case whether being a victim of domestic violence is an "other status" within Article 14. We will only observe that the answer is not obvious, not least because in an area of law where bright line rules are inevitable, there may be very real problems of definition."

60. Mr Wise submits that the court should not have refused to deal with this issue. He says that, although none of the appellants was in a women's refuge or other temporary accommodation when these proceedings were issued, they were "victims" for the purpose of section 7 of the Human Rights Act 1998 because they ran the risk of being directly affected by the cap. NS had twice left an abusive, violent relationship and spent time in emergency accommodation, twice in a women's refuge and once in other temporary accommodation. Mr Sheldon submits that there was and is no claimant before the court who has been adversely affected by the cap as a result of fleeing from domestic violence. The Secretary of State accepts that such cases are possible, but says that DHPs can be made by local authorities to persons who are in temporary need of help to escape from domestic violence. He also says that there is no evidential basis for concluding that the cap has a disproportionate adverse impact on victims of domestic violence.

61. We consider that, for the reasons it gave, the Divisional Court was entitled to refuse to decide whether the cap had a disproportionate adverse impact on the victims of domestic violence. But since we heard full argument on the issue, we think that we should make some observations about it.

62. Where an individual leaves her home as a result of violence in that home or by a former family member, it is possible to obtain housing benefit for both that home and the accommodation to which she moves: see regulation 7 of the Housing Benefit Regulations 2006/312. Regulation 75C of the 2012 Regulations provides that, where a dwelling is "exempt accommodation" within the meaning of para 4(10) of the Housing Benefit and Council Tax Benefit (Consequential Provisions) Regulations 2006/217, the housing benefit paid should be counted as nil when the cap is applied. So far as material, "exempt accommodation" is defined in para 4(10) as meaning accommodation which is provided by a specified body "where that body or a person acting on its behalf also provides the claimant with care, support or supervision". Mr Wise points out that many women's refuges do not provide care, support and supervision. It is clear, therefore, that a substantial number of women's refuges are not "exempt accommodation". In such cases, the dual payments made are liable to be caught by the cap.

63. The Government recognised that this was a problem. Lord Freud, the Minister for Welfare Reform, wrote to a number of interested parties on 4 April 2013 noting that it had been brought to the Government's attention that "much of the existing provision does not meet the precise definition of supported 'exempt' accommodation" and that this had, understandably, caused concern amongst the providers. He said:

> "We would like to make clear our intention to protect providers [of supported accommodation] from any unintended consequences. For example, we wish to protect refuges and hostels where care is provided by or arranged through a

> 'managing agent' rather than the landlord. Such arrangements may not meet the precise definition of exempt accommodation but in all other ways the provision is identical to that which does.
>
> Due to the legislative constraints it is not possible to put a solution in place for April. However, officials are working closely with other government departments and key stakeholders to develop workable solutions, through a change to the definition or other means, without increasing current spend …
>
> Proposals will be brought forward at the earliest opportunity."

64. In his second witness statement, Mr Holmes says that the Department is also exploring the feasibility of introducing, in the longer term, a localised scheme to provide housing support for this type of accommodation. No proposals for change have yet been made. As things currently stand, therefore, dual payments are available to those in any form of accommodation and are liable to be caught by the cap unless it falls within the definition of "exempt accommodation". The Government recognises that the definition should be expanded. Mr Wise submits that para 73 of its judgment shows that the Divisional Court was under the incorrect impression that dual housing payments for those who have fled domestic violence are payable only to those in refuges. But as we understand it, the real thrust of the submission of Mr Wise is that refuges which do not provide care, support and supervision are not treated as "exempt accommodation".

65. As the Divisional Court said, the Government intends to widen the definition of "exempt accommodation". It will have to decide how far it should go. It will have to decide whether to include within the definition refuges which do not provide care, support or supervision. It is a matter of some concern that, despite the statement in April 2013 that proposals would be made to amend the definition of "exempt accommodation", no proposals have yet been published. Nevertheless, it seems to us that the fact that the Government intends to change the regulations in order to meet some or all of the criticisms that have been made is a cogent reason why it would not be appropriate for the court to grant relief to the appellants. If the changes are not made or such changes as are made are considered to be insufficient, then a challenge can be made to the amended regulations. Our reluctance to grant relief in the present circumstances is reinforced by the fact that neither of the adult appellants has been in receipt of double payments as a result of having to flee from domestic violence.

*Conclusion on article 14 read with A1P1*

66. For the reasons that we have given, we are satisfied that the cap does not violate article 14 (read with A1P1) in relation to women generally and we are not willing to hold that it violates article 14 (read with A1P1) in relation to victims of domestic violence.

**UN Convention on the Rights of the Child (UNCRC)**

67. An argument which featured prominently in the submissions of Mr Wise on justification in relation to article 14 (as well as in relation to article 8 which we deal with below) was that the Secretary of State failed properly to have regard to the interests of children.

68. Article 3(1) of the UNCRC 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."

69. The Divisional Court held that, notwithstanding the fact that the UNCRC is an international convention which has not been incorporated into our domestic law, the court should nevertheless have regard to it as a matter of Convention jurisprudence: see *Neulinger v. Switzerland* (2010) 28 BHRC 706, cited by Baroness Hale in *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] 2 AC 166 at para 21. This has not been challenged by the Secretary of State on this appeal.

70. Mr Wise submits that the Divisional Court misdirected itself in its approach to this issue. He says that it considered that the best interests of the child were merely a factor to be considered and that the question was whether there was "any failure [by the Secretary of State] to appreciate the impact on children of [the] policy" (para 49). Mr Wise submits that it is insufficient that the Secretary of State merely considered the interests of children when devising and implementing the cap: there is no evidence that he treated the best interests of children as a primary consideration.

71. In support of this submission, Mr Wise relies, in particular, on para 26 of the judgment of Lady Hale in *ZH* where she said that the decision-maker should first identify what the best interests of children require before assessing whether any other considerations outweigh them. She later said:

> "In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations" (para 33).

72. The Divisional Court accepted that there was no evidence that the Secretary of State had approached the matter in this structured way (para 46). However, it considered that he did not need to do so. It drew attention to passages in three judgments in the Supreme Court in *H(H) v. Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338 which reject the notion that there is any obligation on the decision-maker to adopt such a tightly structured approach: see per Lord Mance at para 98; Lord Judge C.J. at para 125; and Lord Wilson at para 153. Lord Mance explained the obligation as follows:

> "This means, in my view, that such interests must always be at the forefront of any decision-maker's mind, rather than that they need to be mentioned first in any formal chain of

> reasoning or that they rank higher than any other considerations" (para 98).

73. We respectfully agree that there is no obligation on a decision-maker in this context to address conflicting considerations of public policy in any particular order. At para 46 of its judgment, the Divisional Court said that all that was necessary was to "give appropriate weight to the interests of children as a primary consideration in the overall balancing exercise". We agree. Furthermore, when paragraph 49 of the judgment of the Divisional Court is considered in its entirety, it is clear that it did not limit itself to a consideration of whether there was any failure to appreciate the impact of this policy on children.

74. There was before the Divisional Court ample evidence that the Secretary of State did have regard to the interests of children as a primary consideration. The following examples will suffice:

(1) The Treasury Spending Review of October 2010 made clear that a principal objective of the Government was to raise children out of long term poverty (para 1.54).
(2) The Impact Assessment of 16 February 2011, quoted at length by the Divisional Court at para 48, shows that the Government was keenly aware of the impact the benefits cap would be likely to have on children.
(3) The Equality Impact Assessment of March 2011 again emphasised that an objective of the proposal is to reverse "the disincentive effects and detrimental impacts of benefit dependency on families and children" (at para 5). It acknowledged that the cap would affect large families with several children and stated that the Government was looking at ways of easing the transition for families and providing assistance in hard cases. There was further acknowledgement of the particular position of children of single mothers (para 27).
(4) The first witness statement of Mr. Holmes demonstrates that the Parliamentary debates focussed time and again on the interests of children.
(5) The Impact Assessment of 16 July 2012 addressed the grace period and the availability of DHPs to provide short term relief to families who might have to adapt their circumstances because of the effects of the cap. It also revised its assessment of the number of children likely to be affected by the cap (para 14).

75. We consider that it is plain on the basis of this evidence that the rights of children were, throughout, at the forefront of the decision-maker's mind.

**Article 8 of the Convention**

76. At the hearing before the Divisional Court, article 8 of the Convention was relevant in two ways:

(1) The claimants submitted that article 8(1) was engaged and that this enabled them to rely on article 14; and
(2) The claimants made a further, free-standing submission that the cap was an unjustified interference with their article 8 rights.

77. Article 8 provides:

> "(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."

## Homelessness and the effect of the cap

78. A question that has been raised in this appeal is whether those who cannot pay their rent because of the application of the cap would become homeless and whether, if they did, the local authority would be obliged to house them. This is relevant to the impact of the cap on families in particular and thus has a particular bearing on the article 8 argument.

79. We accept that it is possible that some tenants, particularly tenants of private sector property may find that, as a result of the application of the cap, they are unable to pay their rent, are evicted and become homeless. It is impossible to predict how many recipients of benefits will be affected in this way. Mr Manning for Shelter submits that a large number of people in London and the South-east may find themselves in such a position. The relevant local authority will then have to treat them as homeless and become under an obligation to re-house them if it is satisfied that (i) they are eligible for assistance; and (ii) they have a priority need and it is not satisfied that they have become homeless intentionally: see section 193 of the Housing Act 1996. The Divisional Court said (para 53) that it seemed to it:

> "inconceivable that an applicant, whether already housed or seeking housing, could properly be regarded as intentionally homeless where the rent has become unaffordable simply through the application of the benefit cap. Moreover it would no longer be reasonable to expect them to remain in the accommodation. There will of course be cases where the question arises whether the reduced income resulting from the application of the cap is the real reason for being made homeless but that does not affect the principle."

The court also pointed out that it had already been held in the Administrative Court that a local authority which owes an applicant a full housing duty does not discharge that duty by offering accommodation that is not affordable: see *R (Best) v Oxford City Council* [2009] EWHC 608 (Admin).

80. Nevertheless, Mr Manning and Mr Wise submit that this statement of the legal position understates the uncertainties and difficulties that are faced by tenants who are rendered homeless in such circumstances. The particular concern relates to the question whether a tenant who is unable to pay the rent because of the impact of the cap is intentionally homeless. A decision by a local authority that a tenant has

become intentionally homeless can only be challenged by means of an internal review and then, on the usual public law grounds, by way of an appeal on a point of law to the county court. Such a decision is, therefore, difficult to challenge successfully. If (as might well be the case) there are parallel or concurrent causes of homelessness any one of which could legitimately give rise to a finding of intentional homelessness, the local authority is entitled to make such a finding: see *Noel v Hillingdon LBC* [2013] EWCA Civ 1602 and *Viackiene v Tower Hamlet LBC* [2013] EWCA Civ 1764.

81. These decisions, however, make it clear that the ultimate question is: what is the real or effective cause of the homelessness? In many cases that will not be a particularly difficult question to answer. But however difficult it may be, the Housing Acts have entrusted the decision to the local authority. Mr Manning's complaint that factual findings are only challengeable on public law grounds is a disguised assertion that local authorities may (unappealably) get the facts wrong. He puts the point in a grander way by saying that the question of homelessness

> "is conditional and contextualised by … the wide jurisdiction of the authority, the broad range of matters which can legitimately be taken into account by the authority and the extremely narrow right of challenge that exists."

As the Divisional Court said (para 54), the bottom line is that the local authority will retain an obligation to find some accommodation which the family can afford. This may mean that the accommodation offered is not where the family would like to be, but neither this nor the fact that it may be difficult to challenge a local authority decision is a reason for holding that the cap is unlawful.

**Article 14 read with article 8**

*Is article 8(1) engaged?*

82. The Divisional Court stated its conclusion on whether article 8(1) was engaged at para 69:

> "We would be inclined to accept that the imposition of the cap does have sufficient impact on the enjoyment of family life to bring it within the ambit or purview of Article 8, particularly given the relatively liberal way in which the Strasbourg Court applies that test. It can therefore trigger the Article 14 obligation. But in our opinion, in the circumstances of this case at least, Article 8 adds nothing to the argument based on A1P1. The test of justification would be the same, as the Court of Appeal considered that it was in similar circumstances in *Swift v. Secretary of State for Justice* [2013] EWCA Civ 193, paras. 24-31."

83. The position of the appellants appears to be that the Divisional Court was (i) wrong to conclude that article 8(1) is not engaged; alternatively (ii) wrong to decline to decide whether it is engaged. But the court said that it was inclined to accept that the imposition of the cap *does* engage article 8(1). It certainly did not decide that it does not. It considered that it did not need to come to a firm conclusion on this issue

because it was common ground that A1P1 was engaged and that this triggered article 14. In its consideration of article 14, the Divisional Court correctly held that the test applicable on the issue of justification was whether the measure was manifestly without reasonable foundation. That test was applicable whether article 14 applies by virtue of article 8 or A1P1.

84. The appellants submit that article 8 is engaged in a number of ways. They criticise the Divisional Court for applying a narrow test with "an unduly and extraordinarily high threshold" in that it considered only whether the impact of the benefit cap is such as to make it impossible for family life to continue. They further submit that the Divisional Court failed to consider the other aspects of article 8 relied on by them. The Secretary of State reserves his position on the question of engagement of article 8. He accepts that he has to justify the discriminatory effect of the measure pursuant to article 14 when read with A1P1 and accordingly submits that the question whether article 8 is engaged is of no consequence in relation to this discrete complaint of discrimination.

85. We consider that article 8 is engaged by the cap, at the very least in that aspect of article 8 which confers a right to respect for private and family life. The Secretary of State accepts that the cap may place families in a position where they are unable to remain in their existing accommodation. One of its aims is to force persons who are out of work and in receipt of benefits to take decisions as to how they can live within the means of the capped benefits they receive. As a result, many families will be forced to find cheaper accommodation. In particular, it may be necessary for them to move away from areas of high cost accommodation and, therefore, away from the existing support networks provided by their wider families and friends. Although we have seen little evidence as to the actual effect of the cap in this regard to date, we were shown a memorandum in which an official in the Department for Communities and Local Government estimated that the operation of the cap could result in an additional 20,000 families being accepted by local authorities as homeless and requiring to be accommodated. In these circumstances, we consider that the measure does have a sufficient impact on the enjoyment of private and family life to engage article 8 in the sense that it falls within the ambit of the provision.

*Breach of article 8 (read with article 14)*

86. Although article 8 is engaged, the article 14 claim must be rejected for the same reasons as we have given for rejecting the claim of violation of article 14 (read with A1P1) in relation to women generally.

**The free-standing claim of breach of article 8**

87. The Divisional Court considered the assertion that article 8 was infringed to be "an ambitious submission". In rejecting it, the court said that article 8 does not recognise a right to be provided with a home. It also concluded that article 8 did not impose a positive obligation to provide welfare support in cases such as those before the court. It examined the facts of the case of MG (who was a party to the proceedings and initiated an appeal which she has since withdrawn). The effect of the cap on her was more severe than in the other cases. Nevertheless, the court concluded that the circumstances of MG's case fell well short of demonstrating a breach of article 8.

88. Mr. Wise criticises the Divisional Court's approach to article 8(1) on the following principal grounds:

(1) It failed to consider the risk of loss of one's home as a result of the cap.
(2) It applied too high a test in relation to interference with family life: article 8 is capable of giving rise to a positive obligation to provide support, in particular where the absence of, or limit to, such support interferes with the family unit.
(3) It failed to give proper effect to article 3 of the UNCRC.

We have already dealt with (3) at paras 67 to 75 above. It calls for no separate consideration here.

*Risk of loss of home*

89. Mr. Sheldon submits that there is in reality no link between the cap and a home and that it does not give rise to a denial of housing. He contends that, while the cap operates by reducing the amount of housing benefit payable, the appellants' housing needs are still provided for after application of the cap: we consider the homelessness issue at paras 78 to 81 above. In reality, he says, it is their receipt of other benefits and thus the extent of their disposable income after application of the cap that is adversely affected.

90. Even if one sets to one side the fact that the mechanism by which the cap is given effect is the reduction of housing benefit (a benefit which is intended to be used to pay all or part of the recipient's rent), it seems to us that the substance of the measure has a direct link with the ability or inability to retain a home. As we have seen, the intention is to force recipients to make hard decisions about their priorities for spending. It is clearly contemplated by the Secretary of State that in many instances the result will be that recipients and their families will be compelled to leave the homes they presently occupy. In these circumstances, the interposition of such a constrained choice by the recipient does not, in our view, break the link between the operation of the cap and the recipient's home.

91. More fundamentally, however, article 8 does not generally require the state to provide a home. In *Chapman v. UK* (2001) 33 EHRR 18 the European Court of Human Rights observed:

> "It is important to recall that Article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many person who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision" (at para 99).

92. Similarly, in *R (Carson) v. Secretary of State for Work and Pensions* [2003] EWCA Civ 797; [2003] 3 All ER 577 Laws L.J. observed:

> "[I]t is in my judgment important to recognise that on the Strasbourg learning art 8 does not require the state to provide a home: see *Chapman v. UK* (2001) 10 BHRC 48 at 72 (para. 99); nor does it impose any positive obligation to provide financial assistance to support a person's family life or to ensure that individuals may enjoy family life to the full or in any particular manner: see *Vaughan v. UK* App no 12639/87 (12 December 1987, unreported), *Anderson and Kullmann v. Sweden* (1986) 46 DR 251, *Petrovic v. Austria* (2001) 33 EHRR 307 at 319 (para. 26)" (at para 26)."

93. The recent decision of the Strasbourg court in *Winterstein v. France* (application no. 27013/07, 17 October 2013), on which the appellants rely, is not inconsistent with these statements. This case concerned the eviction of a community of travellers from a site which they had occupied for between five and thirty years. The court observed that the principle of proportionality required that particular consideration be given to the consequences of the eviction and the risk of their becoming homeless. The court pointed out in that regard that numerous international and Council of Europe instruments stressed the need, in cases of forced eviction of Roma or travellers, to provide the persons concerned with alternative accommodation (at para 159). It went on to hold that there had been a violation of article 8 in the case of those applicants who had requested alternative accommodation on family sites. However, nothing in this decision is inconsistent with the principle stated by the Strasbourg court in *Chapman* (at para 99), cited above, which was expressly affirmed by that court in *Winterstein* (at para 159).

*Interference with family life*

94. Although article 8 does not in general impose a positive duty to provide support such as housing or welfare benefits, it may do so exceptionally in extreme cases, in particular where the welfare of children or the disabled is at stake. Thus in *Marzari v. Italy* (1999) 28 EHRR CD 175 the applicant, who suffered from metabolic myopathy and was recognised as one hundred per cent disabled, contended that his article 8 rights had been infringed by the failure of the state to provide him with a suitable flat. The Strasbourg court dismissed the claim as inadmissible. It observed that, although article 8 does not guarantee the right to have one's housing problems solved by the authorities, a refusal to provide such assistance to an individual suffering from a severe disease might in certain circumstances raise an attack under article 8. However, it considered that no positive obligation for the local authorities to provide the applicant with a specific apartment could be inferred from article 8 (at pp. 179-80).

95. Some idea of the extreme nature of the circumstances required to give rise to such a positive duty is provided by *R (Bernard) v. Enfield LBC* [2003] LGR 423. The family unit in that case included Mrs. Bernard, who was severely disabled following a stroke, her husband who was her carer and their six children. Sullivan J. considered that they lived in deplorable conditions and held that the local authority had failed to discharge its duty under section 21 of the National Assistance Act 1948 to place the family in suitable accommodation. He concluded, on balance, that the conditions in which they were forced to live were not sufficiently severe to constitute a breach of article 3. However, he considered that their living conditions, which he found made it virtually

impossible for them to have any meaningful private or family life, gave rise to a breach of article 8.

96. The issue was considered by this court in detail in the appeals reported as *Anufrijeva v. Southwark LBC* [2004] QB 1124. The court observed:

> "We find it hard to conceive … of a situation in which the predicament of an individual will be such that Article 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage Article 3." (para 43)

It then went on to explain that "where the welfare of children is at stake, article 8 may require the provision of welfare support in a way which enables family life to continue" (para 43). It was on this basis that it considered that Sullivan J. was correct to accept in *Bernard* that article 8 is capable of imposing on a state a positive obligation to provide support.

97. The issue came before this court again in *R (G) v. Lambeth LBC* [2012] PTSR 364, where all the above authorities were considered. Wilson L.J. noted that, although it had envisaged the possibility, the Strasbourg court had never held that a failure of the State to provide financial or other support to a person represented a violation of article 8 (para 34). The court applied *Anufrijeva* in dismissing the appeal founded on article 8.

98. Mr. Wise draws attention to the observation of Sedley L.J. in *Mohammed v. Home Office* [2011] 1 WLR 2862 that *Anufrijeva* was a decision on its facts and that it "should not therefore be regarded as being of any real assistance in determining what a claimant must show to establish an article 8 claim" (para 10). However, we do not read this observation as in any way diminishing the force of the statements of principle by this court in *Anufrijeva* and subsequently in *G*. It is clear from these authorities that the threshold for a positive obligation to provide welfare support under article 8 is set at a very high level.

99. Mr. Wise submits that the case of each of the appellants falls within the exceptional category of cases where article 8 imposes a positive obligation to provide benefits. He submits that in these cases the reduction in benefits would interfere with the family unit. In some instances, family life would not be able to continue at all. Thus, in the case of SG he submits that the absence of support would threaten her ability to have her son or daughter return to live with her. If she were to move away from the area, this would adversely impact on her ability to maintain her relationship and regular contact with her vulnerable daughter. In the case of NS, he submits that there is an ongoing risk to the family unit given that she is at risk of having her children removed from her in the event of contact with her husband.

100. We agree with the Divisional Court that it is a premature and pessimistic assumption to conclude that in some instances family life would not be able to continue. Even in the case of MG, which was the most extreme of the three before the court, the claimant's position has been improved by the receipt of DHPs and by the fact that she has secured a reduction in her rent. Moreover, we agree with the Divisional Court's view that, even if in an individual case the cap causes such extreme consequences as

to give rise to a breach of article 8, it would not necessarily follow that the scheme itself requires amendment.

101. Mr Wise further submits that the operation of the cap would reduce each of the appellant families to a state of destitution or one approaching destitution. Here he draws attention to the extent of the reduction in benefits received in each case as set out in the tables helpfully prepared by CPAG. Although the appeal of MG has now been withdrawn, it is helpful to continue to include it in the analysis because it is common ground that it is the most extreme of the three cases.

(1) MG is a single mother who has four sons living with her. Before the imposition of the cap MG's total weekly benefit income was £746.81, which included housing benefit of £395.50. Following the imposition of a cap of £500, the disposable weekly income after paying rent is £104.50 (whereas previously it was £351.31).
(2) NS is a single mother who has three sons living with her. Before the imposition of the cap NS's total weekly benefit income was £550.44, which included housing benefit of £270. Following the imposition of a benefits cap of £500, the disposable weekly income after paying rent is £230 (whereas previously it was £280.44).
(3) SG is a single mother who has three children living with her. Before the imposition of the cap SG's total weekly benefit income was £585.40, which included housing benefit of £300. Following the imposition of a cap of £500, the disposable weekly income after paying rent is £200 (whereas previously it was £285.44).

102. Mr. Wise draws a comparison between these figures and the sums the appellants would receive pursuant to section 95 of the Asylum and Immigration Act 1999 if they were asylum seekers or failed asylum seekers with dependent children. Payments under section 95, we are told, do not include housing for which other arrangements are made. Furthermore, those receiving benefits under section 95 would not have to incur the utilities costs which the appellants have to meet. Nevertheless, a comparison can be made:

(1) MG would receive weekly benefits of £260.78 under section 95. This compares with her actual disposable weekly income, after application of the cap, of £104.50.
(2) NS would receive weekly benefits of £202.82 under section 95. This compares with her actual disposable weekly income, after application of the cap, of £230.
(3) SG would receive weekly benefits of £202.82 under section 95. This compares with her actual disposable weekly income, after application of the cap, of £200.

103. We would observe that a principal aim of the cap is to cause the recipients of benefits to change their position and improve their finances, for example by finding cheaper accommodation, finding work, seeking child support maintenance or making other economies. Thus MG has found cheaper accommodation, although the parties before us dispute whether that is in fact attributable to the effect of the cap.

104. Mr. Wise describes the level of payments made under section 95 as the "destitution threshold". However, the whole purpose of the payments made under section 95 is to relieve the recipients from destitution. Under section 95(1) the Secretary of State is

empowered to provide support for asylum seekers who appear to him to be destitute or to be likely to become destitute within a prescribed period. Thus it can be seen that in the cases of NS and SG the disposable weekly income after the imposition of the cap is roughly equal to the level which it has been determined is sufficient to relieve persons from destitution. In the case of MG it fell considerably below that level until she found cheaper accommodation.

105. We have no doubt that some families will suffer hardship as a result of the application of the cap. The cap will bear particularly harshly on larger families and single parents. However, having regard to the sums which are available to the appellants on a weekly basis, we are in total agreement with the Divisional Court that the circumstances of these three families (including MG's family) do not approach the level of destitution. Accordingly we conclude that the appellants fall well short of demonstrating a breach of article 8.

106. In the light of these conclusions, issues of justification do not strictly arise. Earlier in this judgment we stated our conclusion that the test of justification under article 14 in the circumstances of this case is whether the choice made is manifestly without reasonable foundation. We consider that the same test would have to be applied to a free-standing claim under article 8 (see *Swift v. Secretary of State for Justice* [2013] 3 WLR 1151 at paras 41 and 42) and with the same result.

**Irrationality**

107. Finally, it is submitted on behalf of the appellants that the Secretary of State's decision to introduce the cap was irrational. It is not suggested that the legislative scheme is perverse in the *Wednesbury* sense. It is, however, submitted that the Secretary of State failed to gather sufficient information to ensure that his decision was properly informed with respect to the difficulties of those fleeing domestic violence and of those living in temporary accommodation. In support of this submission the appellants have made detailed written submissions explaining how the Secretary of State failed to gather relevant information concerning dual housing payments and women's refuges, both of which are relevant to the position under the cap of victims of domestic violence, and concerning temporary accommodation. Furthermore, it is said that the Divisional Court erred in concluding that there was evidence on which it could properly be concluded that the Secretary of State was well acquainted with these issues.

108. This head of claim is founded on *Secretary of State for Education and Science v. Tameside MBC* [1977] AC 1014 where Lord Diplock considered that the question for the court was whether the Secretary of State had asked himself the right question and had taken reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly (at p. 1965B). In that case the Secretary of State was required to act quasi-judicially in determining whether the local authority had acted unreasonably. It was clearly necessary that, before he took his decision, he should be fully informed in relation to that subject matter. However, we have difficulty in seeing how this principle can be applied to the circumstances of the present case where the Secretary of State introduced a Bill in Parliament which was debated in great detail in both Houses before receiving the Royal Assent, and then adopted secondary legislation which was itself debated in Parliament before being approved

by affirmative resolution. As Mr. Sheldon puts it, the principle of the cap, the detailed policy of the cap (including exclusions) and the level of the cap were all subjected to detailed Parliamentary scrutiny. Moreover, as Lord Sumption observed in *Bank Mellat v. HM Treasury* [2013] 3 WLR 179 (at para 44):

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

109. In our view there is no room in the particular circumstances of this case for the application of the *Tameside* principle.

## Overall conclusion

110. We recognise that the cap is a controversial statutory measure which will cause hardship to some (possibly many) people who are on benefit. It was well understood by Parliament and the Government that this would be the case. The legislation was carefully calibrated to produce a scheme which was judged by both of them to strike a fair balance between all members of society, in particular between those who are in work and those who not. The Government recognises that the scheme may need to be modified in the light of experience. At para 218 of his first statement, Mr Holmes says:

> "There will be a full evaluation of the benefit cap which will explore its effectiveness and analyse the appropriateness of the policy design and delivery model. The evaluation will inform any decisions on whether the cap would benefit from any changes to its structures or delivery."

111. Meanwhile, the cap in its present form reflects the political judgment of the Government and it has been endorsed by Parliament after considerable debate. It is not the role of the court to say whether it agrees with this judgment or not. The court's sole function is to rule on whether the cap is lawful. On the main issue of whether it unlawfully discriminates against women (including victims of domestic violence) and families, the question is whether the cap is manifestly without reasonable foundation. For the reasons that we have given, we are satisfied that the cap plainly does have a reasonable foundation. For these and the other reasons that we have given in this judgment, the appeals must therefore be dismissed.