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The Benefit cap and Infliction of Poverty: R (DA and Others) v Secretary of State for Work and Pensions

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In *R (DA and Others) v Secretary of State for Work and Pensions* [2019] UKSC 21 (hereinafter *DA and Others*) the Supreme Court considered whether the revised benefit cap under the Welfare Reform and Work Act 2016 unlawfully discriminates against lone parents and/or their young children, contrary to Articles 8, 14, and Article 1 of Protocol 1, of the European Convention on Human Rights (ECHR), and in breach of the UK's international obligations under Article 3 of the UN Convention on the Rights of the Child (UNCRC). In a meticulously drafted majority judgment by Lord Wilson, the Court dismissed the appeal by a majority of 5-2, finding that the revised benefit cap was justified as it was not manifestly without reasonable foundation (MWRF). This case note will summarise the findings of the Supreme Court and ultimately raise the following question: can the infliction of poverty on individuals, in the way that the revised benefit cap does, ever be justified?

The benefit cap, introduced originally by section 96(1) of the Welfare Reform Act 2012, created an annual limit of welfare benefits to which a household was entitled. The original cap introduced in 2013 set that limit at £26,000 (to reflect the average net earnings of a household in Britain). Following the general election in 2015, however, the Conservative government, in line with their manifesto,

revised the cap via the 2016 Act to create a new, reduced annual limit of £23,000 for households in Greater London and £20,000 outside London. Certain benefits (such as carer's allowance) are excluded from the cap, and single people, including lone parents, are exempt if they work 16 hours or more a week. The appeals in *DA and Others* were brought on behalf of lone parents with children under school age who had their benefits reduced as a result of the revised cap.

While Lord Wilson's majority judgment was careful not to make wider comments about cuts to welfare benefits, the case must be seen in the context of nearly a decade of austerity. These cuts have had a disproportionate impact on women and especially minority women (Women's Budget Group 2017, 2018; Fawcett Society 2012; Trades Union Congress 2015), and have also come under intense academic fire for how they have amplified the vilification of welfare benefit recipients, lone mothers in particular (Emejulu and Bassel 2017, Lammasniemi 2017). The fact that women, and single mothers, have been disproportionately affected by austerity measures – most notably, the severe financial impact of the benefit cap –, has been recognised by the Supreme Court in previous rulings, most notably *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16. Despite similarities to earlier cases, *SG* in particular, *DA and Others* differs from earlier rulings by explicitly addressing – and accepting that – these measures have pushed the appellants, and many in their position, into poverty.

The overarching argument put forward by the appellants was that the reduction in the cap had unlawfully discriminated against them as lone parents of young children, who were not able to work due to childcare obligations and as young children of those lone parents. The appellants' argument that welfare benefits, and the deprivation caused by their reduction, came within the remit of Article 8 was uncontroversial and accepted by all Judges. The majority also accepted that each of the four classes of claimants has a separate status for purposes of Article 14, as lone parents of children aged under two / under five; and as children of lone parents aged under two / under five. Following the *Thlimmenos v Greece* (2000) 31 EHRR 12 principle, the appellants argued that due to their status they should have been treated differently from those whose situation was relevantly different from them (for example, those who were able to work), and that failure to do so was a violation of their ECHR rights, and in relation to the children, also a violation of Article 3 of the UNCRC. Lord Wilson held that while the

Thlimmenos principle applied, the government's justification for not treating the appellants differently was not MWRF. Furthermore, he concluded that 'by a narrow margin' the government did not breach Article 3 of the UNCRC as it had evaluated the impact of the revised cap on young children.

The government maintained that the revised cap had three main aims that justified discrimination: (1) to improve the fairness of the social security system and increase public confidence; (2) to make fiscal savings; and (3) to incentivise work. Lord Wilson accepted the sparseness of evidence that the gap had met any of its aims, and furthermore, noted that the lack of free childcare was counterproductive to the final aim. In her dissenting judgment, Lady Hale rejected the government's justifications, focusing on the importance of care and the well documented long-term impact of growing up in poverty. Lord Kerr, also dissenting, stated that it was simply not feasible for the appellants to enter the employment market without provisions for free childcare and other forms of support. Despite a wealth of evidence demonstrating that there are structural barriers faced by lone mothers, particularly those of BAME and/or lower socioeconomic backgrounds, when attempting to enter the employment market, those barriers have not been addressed by the government, implying that the measures are fundamentally more punitive than incentivising.

One of the key disagreements was on the correct test to be applied in cases assessing whether the adverse effects of economic policies can be justified. After careful consideration Lord Wilson, in agreement with Lords Carnwath and Hodge, concluded that the proper test in such cases is to assess whether the measures are MWRF. Lady Hale, in her dissenting judgment, instead focused on 'striking a fair balance', as does Lord Kerr. He explicitly rejected the use of MWRF standard in domestic courts, arguing that it had been developed by the European Court of Human Rights 'to promote the proper application of the margin of appreciation' (para. 169). In a departure from his position in *SG*, Lord Kerr stated that the more appropriate test to apply in such cases is to consider if the government has established that 'there is a reasonable foundation for its conclusion that a fair balance has been struck' (para. 179). Applying a different test, the dissenting Judges, Lady Hale and Lord Kerr, came unsurprisingly to the opposite conclusion.

The focus on which is the correct test to apply, while of significance, clouds a much more pertinent point of whether measures that inflict poverty can ever be justified. Poverty and its short and long-term impacts and causes are both impliedly and explicitly referred to throughout the judgment. Days after the judgment, Philip Alston, UN Special Rapporteur on extreme poverty and human rights, published his final report on poverty (Human Rights Council, 2019). The damning report describes the Department of Work and Pensions' approach to welfare cuts as 'punitive, mean-spirited and often callous' and highlights the harmful impact that austerity measures, including the benefit cap, have had on women (and single mothers in particular), calling the reformed welfare system 'a digital and sanitized version of the nineteenth century workhouse'. The damaging impact of the benefit cuts is inescapable. The relationship between austerity, childhood poverty, and the long-term negative impacts of such poverty in terms of health, education, and social citizenship have been well documented (see, for example Ridge 2013, Lambie-Mumford and Green 2017; Child Poverty Action Group 2017). Lord Wilson acknowledged this fact when referring to testimonies of women who spoke about going hungry and without heating in order to be able to feed their children (para. 37).

In his judgment, Lord Wilson asked 'does the revised cap inflict *poverty* on those subject to it?', and concluded that based on the evidence presented, it does, and it does so by pulling a family 'well below the poverty line' (emphasis in original, para. 33). Faced with overwhelming evidence to demonstrate the causal link between benefit cuts, childhood poverty and deprivation, the question is not, therefore, whether the revised benefit cap inflicts poverty. It is clear that it does. A more urgent question is: can the state ever justify inflicting extreme poverty and hunger on those who are dependent on it? The Supreme Court disappointingly answers that question in the affirmative.

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