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## **Welfare, Anti-austerity and Gender: New territory for the Human Rights Act**

By Laura Lammasniemi

### *Introduction*

The aftermath of the global financial crisis has brought about a variety of austerity measures including unprecedented cuts to the existing welfare system in the UK. Simultaneously there has been increased condemnation, if not vilification, of welfare claimants in the tabloid press and a variety of reality TV series such as Channel 4's *Benefits Street*, a TV series set in a street in Birmingham where the majority of residents are said to receive welfare benefits. This has coincided with a series of high profile and controversial challenges to various austerity measures in the courts using the Human Rights Act (HRA). This chapter shows that benefits claimants are often represented collectively in overwhelmingly negative light. This representation fails to take into account the gendered nature of the welfare state and the disproportionate impact the cuts have had on women. The chapter argues that the HRA has provided an avenue for women to challenge these discriminatory cuts but in turn this has led to the claimants in these cases being framed as undeserving and the HRA itself attacked.

While rarely acknowledged in mass media, the disproportionate impact of austerity measures enacted since 2010 on women has been recognised by feminist commentators<sup>1</sup>, leading rights organisations and unions,<sup>2</sup> and by even the government's own consultations and equality assessments.<sup>3</sup> Yet, the government has insisted that these measures were necessary to introduce 'long-term positive behaviour change' and reduce dependency on

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<sup>1</sup> Penny Griffin, 'Crisis, austerity and gendered governance: a feminist perspective' (2015) 109 *Feminist Review* 190; Rebecca Bramall, *The Cultural Politics of Austerity: Past and Present in Austere Times* (2013 Palgrave Macmillan).

<sup>2</sup> TUC, 'The impact on women of recession and austerity' (11 March 2015) <https://www.tuc.org.uk/economic-issues/equality-issues/gender-equality/equal-pay/impact-women-recession-and-austerity> accessed 01 August 2016; and Fawcett Society, 'Where's the Benefit: an independent inquiry into women and Jobseeker's Allowance' (February 2015) [www.fawcettsociety.org.uk/our-work/campaigns/independent-inquiry-women-jobseekers-allowance/](http://www.fawcettsociety.org.uk/our-work/campaigns/independent-inquiry-women-jobseekers-allowance/) (24 July 2016).

<sup>3</sup> Department for Work and Pensions (hereinafter DWP) 'Benefit cap: Equality Impact Assessment' July 2012. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/220153/eia-benefit-cap-wr2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220153/eia-benefit-cap-wr2011.pdf) accessed 12 April 2014.

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welfare benefits.<sup>4</sup> There have been a number of challenges on human rights and equality grounds on the austerity measures from cuts to services,<sup>5</sup> legal aid cuts<sup>6</sup> and specific welfare benefit cuts such as bedroom tax<sup>7</sup> and benefit cap.<sup>8</sup> While spending cuts have had disproportionate impact on women, this chapter will focus on cuts to welfare benefits, the bedroom tax and benefit cap in particular, to demonstrate how the ECHR have been used to challenge the recent austerity measures on the grounds of gender discrimination. The HRA and the ECHR do not explicitly contain socioeconomic rights but since the enactment of the HRA the courts have had the power to hear judicial review challenges on public authority decisions and scrutinise secondary legislation including those concerning welfare benefits and socioeconomic rights more broadly.<sup>9</sup>

In stark contrast to tabloid and conservative press, the left-wing press has focused on the detrimental impact of the cuts to individuals and the society more broadly.<sup>10</sup> This chapter, however, focuses mainly on the media sources with widest circulation such as *The Sun* and *Daily Mail* that represent welfare claimants negatively. The chapter draws an explicit link between these negative portrayals and the HRA, situating the HRA as means of facilitating these ‘undeserving’ claims and claimants. This chapter argues that the media representations and continued attacks on the HRA in the context of welfare, have framed benefits claimants as ‘bad’/non-productive citizens who are not as worthy of state protection and same rights as ‘good’ citizens are. Although this is often exaggerated, and ignores the legal position and the way that the HRA is used in these cases, it has nevertheless contributed to the perception that the HRA helps ‘undeserving individuals’, a phenomenon which is examined in chapters nine and ten of this book.

The chapter begins by examining the representation of benefits claimants in the media. It highlights the collective and stereotypically negative representation of benefits claimants to examine how these representations have constructed the unemployed as unworthy of human rights protection and socioeconomic rights as an undesirable extension of the existing human rights framework. It then moves on to discuss the role of the HRA in scrutinising welfare benefits and the judicial challenges on austerity measures under the HRA and how this then feeds in to arguments that the HRA should be repealed.

### *The case against the rights of ‘benefit scroungers’*

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<sup>4</sup> DWP, ‘A Welfare State Fit for the 21st Century’ (23 January 2014) <https://www.gov.uk/government/speeches/a-welfare-state-fit-for-the-21st-century> accessed 01 August 2016.

<sup>5</sup> *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin).

<sup>6</sup> See, *R (Law Society) v Legal Services Commission* [2010] EWHC 2550 (Admin) (2010) 107(40) LSG 22; *Allan Rutherford LLP v Legal Services Commission* [2010] EWHC 3068 (Admin).

<sup>7</sup> *R (Rutherford and others) v SSWP* [2016] UKSC 58.

<sup>8</sup> *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16.

<sup>9</sup> Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Hart 2009) 320.

<sup>10</sup> Jen Birks, ‘Moving life stories tell us just why politics matters’: Personal narratives in tabloid anti-austerity campaigns’ (2016) *Journalism* 1.

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In the United Kingdom national mass circulation daily newspapers have a privileged political position. Broadcasters are required by law to be politically neutral but the newspapers have historically been quite reactionary enjoying a degree of editorial independence unmatched in Western Europe. From the 1980s onwards new production methods and ownership led to the market in Daily newspapers diminishing, but moving more to the right and at the time of writing around 70% of all newspapers are considered right wing or right leaning.<sup>11</sup> The newspaper media is a significant political player and is highly instrumental in shaping both other sources of media and public attitudes in general. The conservative press, such as the *Daily Mail* and *The Telegraph*, have long attacked the idea of socioeconomic rights and applauded government efforts to cut welfare spending.<sup>12</sup> The *Daily Mail* has frequently identified ‘criminals and those who refuse to work’ as the main beneficiaries of the HRA<sup>13</sup> whereas *The Telegraph* has attacked ‘welfare aristocrats’ and voiced their support for welfare cuts.<sup>14</sup>

In 2011, then Prime Minister David Cameron set up a Bill of Rights Commission to assess the current human rights framework and to explore the idea of creating a domestic Bill of Rights to replace the HRA. The Bill of Rights Commission did not recommend repeal of HRA but building on European Convention on Human Rights (ECHR) to create a stronger human rights framework that would include protections for socioeconomic rights.<sup>15</sup> When the Bill of Rights Commission published their 2012 report<sup>16</sup> recommending an expansion of the current human rights framework to include socio-economic rights, the recommendation was widely dubbed ludicrous and different variations of the headline ‘spongers/jobless can sue for benefits’ featured in the tabloid press.<sup>17</sup> The tabloid media response to the Bill of Rights Commission recommendations was overwhelmingly negative and in particular, their proposal to introduce socioeconomic rights has not been warmly welcomed. Furthermore, conservative

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<sup>11</sup> YouGov Survey, British press ‘most right-wing’ in Europe (February 2015), available at <https://yougov.co.uk/news/2016/02/07/british-press-most-right-wing-europe/> accessed 20 September 2016. See also, Adrian Bingham and Martin Conboy, *Tabloid Century: The Popular Press in Britain, 1896 to the Present* (Peter Lang 2015)

<sup>12</sup> Telegraph View, Welfare reforms are sensible and right, *The Telegraph* (London 24 August 2015) <http://www.telegraph.co.uk/news/politics/11819645/Welfare-reforms-are-sensible-and-right.html> accessed 01 August 2016.

<sup>13</sup> James Slack, ‘The human right to claim benefits: Jobless could sue for better payments under controversial plan’, *Daily Mail* (London 12 July 2012) <http://www.dailymail.co.uk/news/article-2172260/The-human-right-claim-benefits-Jobless-sue-better-payments-controversial-plan.html> accessed 01 August 2016.

<sup>14</sup> Bruce Anderson, ‘Only David Cameron has the guts to tackle the welfare aristocrats’, *The Telegraph* (London 11 April 2010) <http://www.telegraph.co.uk/news/election-2010/7575961/Only-David-Cameron-has-the-guts-to-tackle-the-welfare-aristocrats.html> accessed 01 August 2016.

<sup>15</sup> Commission on Bill of Rights, ‘A UK Bill of Rights: Choice before Us’, volume 1 (December 2012) <http://webarchive.nationalarchives.gov.uk/20130128112038/http://justice.gov.uk/about/cbr> accessed 20 July 2016.

<sup>16</sup> Ibid.

<sup>17</sup> Anil Dawar, ‘Spongers can sue to claim benefits’ *Daily Express* (13 July 2012) <http://www.express.co.uk/news/uk/332520/Spongers-can-sue-to-claim-benefits> accessed 2 August 2016; James Slack ‘The human right to claim benefits: Jobless could sue for better payments under controversial plan’ *Daily Mail* (12 July 2012) <http://www.dailymail.co.uk/news/article-2172260/The-human-right-claim-benefits-Jobless-sue-better-payments-controversial-plan.html#ixzz4LXjEv2rr> accessed 2 August 2016.

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politicians such as Dominic Raab MP, who later served as the Parliamentary Under Secretary of State as Minister for Human Rights, argued that the Commission should have recommended the scaling back of rights culture as extending current human rights laws would be undesirable and undemocratic, because it would give judges control over social policy.<sup>18</sup> In the following year, the Labour Party also examined the possibility of expanding on existing human rights framework to include socio-economic rights, and again the tabloid and conservative press including *The Telegraph* dubbed the plans as “scroungers charter” that would give further rights to those who already have too much.<sup>19</sup>

The representation of benefits claimants in the press has been perhaps even more striking than the direct attacks on their ‘human rights’. Talking about the impoverished neighbourhood in the Glasgow, Stephen Glower for the *Daily Mail* wrote:

“We might be back in the Depression and the early 1930s, were it not for the baseball caps, tracksuit bottoms and trainers which the inhabitants - all of them white - wear. They shuffle listlessly down the street, or gather to have a smoke outside the numerous pubs. Some of the younger women are grossly fat, but the older men are thin, almost emaciated. Their faces look pallid and unhealthy, and they usually don't have any teeth, false or otherwise.”<sup>20</sup>

The ‘poor’ in such articles are nearly always referred to as ‘they’, a unified group which is subjected to collective and reproachful representation. The benefits claimants are associated with lack of care for their appearance or health with frequent references to smoking, drinking and overeating or lack of basic (dental) hygiene as demonstrated by the above quotation.

If the jobless man is frequently represented as an owner of a Stafford terrier dog, smoking outside a job centre wearing a tracksuit, the jobless women are represented as working class single mothers.<sup>21</sup> Most women who are in receipt of welfare benefits or tax credits are in part-time or low paid employment yet women in tabloids are presented as jobless, working-class single mothers.<sup>22</sup> Jobless single mothers are rarely represented in positive way and often described with reference to their implied promiscuity, laziness and questionable parenting

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<sup>18</sup> Roger Smith, ‘The Good, the Bad, and the Ugly’, *New Law Journal* (12 July 2012) <http://www.newlawjournal.co.uk/content/good-bad-ugly> accessed 24 July 2016.

<sup>19</sup> Patrick Hennessy, ‘Labour's 'secret plan' to make claiming benefits a human right’, *The Telegraph* (London 13 July 2013) <http://www.telegraph.co.uk/news/politics/labour/10178148/Labours-secret-plan-to-make-claiming-benefits-a-human-right.html> accessed 01 August 2016.

<sup>20</sup> Stephen Glower, Is Glasgow East going to be New Labour's graveyard? *Daily Mail* (London 23 July 2008) <http://www.dailymail.co.uk/news/article-1037387/Is-Glasgow-East-going-New-Labours-graveyard.html#ixzz4I9Inettp> accessed 01 August 2016.

<sup>21</sup> Hannah Hamad, ‘Fairy Jobmother to the Rescue: Postfeminism and Recessionary Cultures of Reality TV’ in Diane Negra and Yvonne Tasker (eds) *Gendering the Recession* (Duke University Press 2014) 240.

<sup>22</sup> Malgorzata Paprota, ‘The Chantelles of Benefits Britain: Collective representations of the clients of the welfare state in conservative British press (2008-2012)’ (2015) 39(2) *Lublin Studies in Modern Languages and Literature* 179.

skills or values. Talking about underage pregnancies, “a fable for our tragically degraded times”, the *Daily Mail* went on to say that “the length and breadth of this country there are many Chantelles, having sex and often getting pregnant while under age”.<sup>23</sup> The representation of single mothers frequently highlight their ‘inappropriate’ sexuality by focusing on teenage pregnancies or children from multiple partners. They are also subject to moral and physical scrutiny that is not applied to other groups and often depicted as overweight or overly sexualised.<sup>24</sup>

Against this backdrop, benefits claimants have a very particular image in the public consciousness. The emergence of reality TV series such as *Benefits Street* and *Fairy Jobmother* has reinforced this image and sent out a message that benefit dependency is a choice rather than a necessity. Hannah Ahmad has argued that series such as *Fairy Jobmother*, a reality TV series about an employment expert finding employment for the unemployed, reject the notion that any “hurdles cannot be surmounted by individual willpower regardless of any social inequities or power imbalances in play”.<sup>25</sup> They have brought about new era of individualism that focuses on the transformative power of paid work. These series and disparaging press articles about benefits claimants, single mothers in particular, imply that staying home is a lazy choice and that domestic labour is not work. Paid work is traditionally viewed not only as important to individual well-being but also it is a way for an individual to contribute to the society and in turn receive social rights and welfare when in need.<sup>26</sup> The representation of the benefits claimants has changed following the financial crisis in 2008 and in recent years this has escalated with paid work being increasingly viewed as an obligation of a good citizen – and failure to engage in paid work as a sign of a bad citizen. A failure to contribute to society through paid work has seen benefits claimants framed as ‘scroungers’, less worthy citizens. The press and recession-related reality TV series have collaboratively reconstructed negative stereotypes of those on benefits and reinforced class constructions.<sup>27</sup> Simultaneously they have created divisions between good citizens versus bad citizens; those worthy of state protection and human rights and those not worthy.

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<sup>23</sup> Melanie Philips, ‘Alfie, Chantelle and the sheer madness of sex education that teaches nothing about morality’ *Daily Mail* (London, 16 February 2009) <http://www.dailymail.co.uk/debate/article-1146083/MELANIE-PHILLIPS-Alfie-Chantelle-sheer-madness-sex-education-teaches-morality.html#ixzz4I9JrZOsq> accessed 01 August 2016.

<sup>24</sup> For instance, see Lucy Waterlow, ‘Single mother on benefits uses her £20K-a-year handouts to fund her dreams of becoming a plus-size burlesque dancer called Chazabelle’ *Daily Mail* (London, 25 May 2016) <http://www.dailymail.co.uk/femail/article-3608489/Single-mother-benefits-dreams-new-life-burlesque-dancer.html#ixzz4IFzBYuKW> accessed 01 August 2016.

<sup>25</sup> Hamad (n 22) 225.

<sup>26</sup> Ruth Lister, ‘The dilemmas of pendulum politics: balancing paid work, care and citizenship’ (2002) 31(4) *Economy and Society* 520.

<sup>27</sup> Laura Paterson and others, ‘Negotiating stance within discourses of class: Reactions to *Benefits Street*’ (2016) 27(2) *Discourse & Society* 195.

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The welfare state has been deeply gendered from its inception and remains so but these negative representations do not take into account these gendered dimensions.<sup>28</sup> From 2010 onwards the overhaul of the welfare benefits has been at the core of the government's socioeconomic policies with the overall aim of reducing the amount of people reliant on welfare benefits. The government's equality impact assessments recognise that women, single mothers in particular, are the main recipients of housing benefit and therefore, restrictions to housing benefit and the total amount of welfare benefits households can receive will have an disproportionate impact on women.<sup>29</sup> Despite criticism and mounting judicial challenges, the gender disparity in the administration of these policies has not been sufficiently addressed in subsequent policies.<sup>30</sup> Universal credit, a single monthly payment merging existing benefits and tax credits an individual or a household are entitled to, will be implemented across the United Kingdom by the end of 2017 but has faced criticism, much like previous cuts, particularly from feminist commentators for its failure to take into consideration the disproportionate impact it would have on women.<sup>31</sup> Universal credit is payable to a household, rather than individuals, meaning that women, particularly women in migrant communities, might lose or be excluded from financial control within their families due to language barriers and lack of knowledge on how to access welfare benefits.<sup>32</sup> The universal credit, therefore, seriously undermines women's financial autonomy.

### *European Convention on Human Rights and socioeconomic rights*

Traditionally, the scrutiny of social welfare has been considered to be subject to democratic accountability rather than judicial accountability. Judges have been reluctant to allow judicial review challenges on social and economic policy due to judicial deference – particularly so if the policy had been in the manifesto of the governing party thereby securing some form of democratic endorsement. Lord Scarman summarised the traditional view on courts and review of spending cuts in *R v Secretary of State for the Environment ex p. Nottinghamshire County Council*:

“... [I] cannot accept that it is constitutionally appropriate, save in very exceptional circumstances, for the courts to intervene on the ground of ‘unreasonableness’ to quash guidance framed by the Secretary of State and by necessary implication approved by the House of Commons, the guidance being concerned with the limits of

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<sup>28</sup> Pat Thane, *The Foundations of the Welfare State* (2<sup>nd</sup> edn, Routledge 1996) chapter 7.

<sup>29</sup> DWP (n 3); TUC (n 2); Fawcett Society (n 2); DWP, ‘Social sector housing under-occupation – equality impact assessment’ (June 2012) <https://www.gov.uk/government/publications/social-sector-housing-under-occupation-equality-impact-assessment> accessed 12 April 2014.

<sup>30</sup> Women's Budget Group, ‘The impact on women of the 2016 Budget: Women paying for the Chancellor's tax cuts’ (April 2016) <http://wbg.org.uk/budget-analysis/2016-assessments/> accessed 12 November 2016.

<sup>31</sup> Griffin (n 1).

<sup>32</sup> Kalwinder Sandhu and Mary-Ann Stephenson, ‘Layers of inequality – a human rights and equality impact assessment of the public spending cuts on black, Asian and minority ethnic women in Coventry’ (2015) 109 *Feminist Review* 109.

public expenditure by local authorities and the incidence of the tax burden as between taxpayers and ratepayers. Unless and until a statute provides otherwise, or it is established that the Secretary of State has abused his power, these are matters of political judgment for him and for the House of Commons. They are not for the judges or your Lordships' House in its judicial capacity.”<sup>33</sup>

This has since been confirmed in various judgments, most recently in the 2015 Supreme Court ruling *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions*, discussed in the next section, when Lord Reed rejected arguments for alternative and more proportionate cap on welfare benefits and said that decisions as to the level and content of the cap were “a matter of political judgement” rather than a question for the judiciary.<sup>34</sup> He held that in applying *Stec v United Kingdom*<sup>35</sup> he courts should consider that “certain matters are by their nature more suitable for determination by Government or Parliament [rather] than by the courts”.<sup>36</sup> Lady Hale, in contrast, argued that discrimination was a constitutional issue and said that “even in the area of welfare benefits, where the court would normally defer to the decision of the legislature, if that decision results in unjustified discrimination, then it is the duty of the courts to say so”.<sup>37</sup> She reiterated this point during the proceedings of *R (A) (AP) (Appellant) v Secretary of State for Work and Pensions* where she said that discrimination claims as well as deciding what is a matter for the courts or the Parliament is a matter of constitutional law, thereby, within the remit of the court.<sup>38</sup> Ellie Palmer has further argued that particularly since the enactment of the HRA there has been “a clear disagreement” between senior judges how deference should be exercised but the concept of deference has shifted significantly in cases of social policy in particular.<sup>39</sup>

Challenges to austerity measures, or social policy more broadly, on purely economic grounds are still unlikely to succeed but case law from recent years demonstrates that cases that can “effectively marshal human rights arguments are more likely to succeed in justifying interference by the courts”.<sup>40</sup> It is commonly accepted that welfare benefits fall within the remit of the ECHR. On the face of it, the ECHR does not include a right to social security, yet, from the early days of the ECHR individuals have brought challenges dealing with social security rights in front of the European Court of Human Rights (ECtHR), and previously the European Commission on Human Rights.<sup>41</sup> The most frequently invoked Articles of the

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<sup>33</sup> [1986] AC 240, [247C–H].

<sup>34</sup> [2015] UKSC 16, [69].

<sup>35</sup> (2006) 43 EHRR 47.

<sup>36</sup> [2015] UKSC 16, [92].

<sup>37</sup> *Ibid*, [160].

<sup>38</sup> Supreme Court hearing (29 Feb 2016, afternoon session) available at <https://www.supremecourt.uk/cases/uksc-2016-0025.html>.

<sup>39</sup> Palmer (n 9) 175.

<sup>40</sup> Thom Dyke, ‘Judicial Review in an Age of Austerity’ (2011) 16(3) *Judicial Review* 202.

<sup>41</sup> Klaus Kapuy, ‘Social Security and the European Convention on Human Rights: How an Odd Couple Has Become Presentable’ (2007) 9 *European Journal of Social Security* 221.

ECHR in the social welfare claims have been Article 8 (the right to respect for private and family life) and Article 1 of the Protocol 1 (A1P1) which provides:

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

These Articles of the ECHR have been either invoked alone or frequently in conjunction with Article 14 (the prohibition of discrimination). Case law from the ECtHR has not always been consistent on the application of the A1P1 in relation to welfare benefits but in *Gaygusuz v Austria*<sup>42</sup>, the court held that a social security claim based on contributions constitutes a pecuniary right for the purposes of A1P1. In *Stec v United Kingdom*, the ECtHR took this further and said that it would be “artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Article 1 of Protocol No. 1”.<sup>43</sup> Furthermore, the Court confirmed the role of A1P1 protecting welfare rights and said that where “an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. I to be applicable”.<sup>44</sup> While the courts have been reluctant to engage with cases that deal purely with social policy or economic decisions, the case law shows that welfare cuts are justiciable because of the human rights implications of the cuts. The HRA has therefore provided a way for individuals most affected by the cuts to welfare benefits to challenge the relevant regulations, and a majority of these challenges, as discussed in the next section, have been based on discrimination claims on the grounds of gender and disability.

### *Judicial challenges on gender grounds*

This section examines the case law particularly on the benefit cap and bedroom tax and demonstrates that gender discrimination has become the core of many of the judicial review challenges to cuts to welfare benefits. The case of *SG and others v SSWP* was the first Supreme Court ruling to consider the legality of the benefit cap, a limit on total amount of welfare benefits an individual or an household can receive, and whether it amounted to a

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<sup>42</sup> (1996) No 17371/90.

<sup>43</sup> (2006) 43 EHRR 47, [50].

<sup>44</sup> *ibid*, [51].

violation of human rights under the ECHR.<sup>45</sup> The total amount of benefits was fixed under the Benefit Cap (Housing Benefit) Regulations 2012 (the 2012 Regulations) so that it reflected the salary of an average single person/family in UK but the cap was since further reduced and subsequently applied equally to single and two parent families, regardless of the size of the family or living costs.<sup>46</sup>

In *SG and others v SSWP* it was not argued that the cap itself was a violation of A1P1 per se but rather that it constituted a violation when read together with Article 14 as it indirectly discriminated against women. All five Supreme Court judges agreed that the cap put women at a disadvantage but disagreed by a narrow margin whether the discrimination was justified due to legitimate aims. Providing the lead judgment, Lord Reed recognised the gendered implications and disparity but concluded that the Secretary of State's aims of ensuring the economic well-being of the country, incentivising work, and imposing a reasonable limit on the total amount of welfare benefits per household were legitimate, and proportionate.<sup>47</sup> The dissenting rulings from Lady Hale and Lord Kerr argued that the discriminatory impact on women could not be justified, and therefore the measures amounted to violation of Article 14. Lady Hale also expressed concern over the severity of the measures and stated that:

“the prejudicial effect of the cap is obvious and stark. It breaks the link between benefit and need. Claimants affected by the cap will, by definition, not receive the sums of money which the state deems necessary for them adequately to house, feed, clothe and warm themselves and their children.”<sup>48</sup>

Both Lady Hale and Lord Kerr discussed the wellbeing of the mother and her children as intertwined, therefore, recognising the importance of caring labour. Decades of feminist scholarship has established and analysed the existence gendered and caring labour and arguably, the failure of welfare policy to recognise care of young children as ‘productive’ undervalues such labour.<sup>49</sup> Under the austerity policies, women are expected to participate in the work force in similar way to men and the enforcement of cuts to welfare benefits have not taken into account that women are more likely to already be participants in unpaid caring and gendered labour. The policies have not also taken into difficulties in securing quality child care, or the desire of some women to care for their young children. The infrastructure of

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<sup>45</sup> Benefit Cap (Housing Benefit) Regulations 2012 (SI 2012/2994) (the 2012 Regulations) amending the Housing Benefit Regulations 2006 (SI 2006/213) regulations 75B, 75D and 75G. The Regulations list welfare benefits as out-of-work benefits, child benefit, child tax credit and housing benefit.

<sup>46</sup> DWP (n 3).

<sup>47</sup> [2015] UKSC 16, [63-66].

<sup>48</sup> *ibid* [180].

<sup>49</sup> See, Eileen Boris, *Home to Work: Motherhood and The Politics of Industrial Homework in the United States* (Cambridge University Press 1994); Eileen Boris and Rhacel Salazar Parreñas (eds) *Intimate Labors: Care, Sex, and Domestic Work* (Stanford University Press 2010); Abigail Gregory and Jan Windebank, *Women's Work in Britain and France: Practice, Theory and Policy Women's* (Palgrave Macmillan 2000); Ruth Lister, “Reforming welfare around the work ethic”: new gendered and ethical perspectives on work and care’ (1999) 27(2)Policy & Politics 233.

welfare support is often crucial for single parents' entry into the job market and access to paid work.<sup>50</sup> The stigmatization and marginalisation of jobless single mothers is counterproductive, undermining the aims of the government policies.

The court in *SG and others v SSWP* also considered the stigmatisation of benefits claimants in the media, and Lord Reed was of the view that the benefit cap was consistent with government aims to restructure the welfare system and also argued that these measures were necessary in order to restore public confidence in the welfare system. The attacks on benefits claimants and media reports stigmatising non-working households have, as discussed above, have distorted public perceptions on the nature and the scope of the welfare system. Lord Reed made reference to the media representations of benefits claimants and said that public confidence in the welfare system has to be restored so that the “recipients are not stigmatised or resented”.<sup>51</sup> He further argued that the reform was legitimate to “reflect a political view as to the nature of a fair and healthy society” implying that cuts would give an impression of a less generous, and therefore fairer, welfare system.<sup>52</sup> He framed the benefit system as “the means by which society expresses solidarity with its most vulnerable members”.<sup>53</sup> The focus on vulnerability and who is most worthy is similar to the way claimants of human rights claimants are often framed as worthy or unworthy of state protection, which is discussed further in chapter 10, where Frederick Cowell explores the relationship between undeserving claimants and the structure of the law itself.

Like the benefit cap, the bedroom tax, which involves a reduction of up to 25% in claimants' entitlement to the housing benefits where they live in social housing that is deemed to have one or more spare bedrooms, has been challenged in courts on gendered and disability grounds.<sup>54</sup> In a key ruling on the bedroom tax, *R (MA) v Secretary of State for Work and Pensions*<sup>55</sup>, it was held that the scheme as a whole discriminated against disabled persons but the policy was not manifestly without reasonable foundation and so the discrimination was objectively and reasonably justified. It would, therefore, be necessary to decide on the particular facts of each case whether a claimant had been discriminated under the provision. Following *MA*, in a joint appeal case of *R (Rutherford and another) v Secretary of State for Work and Pensions; R (A) v Secretary of State for Work & Pensions* the Supreme Court held that the bedroom tax was discriminatory against a family of a severely disabled child who needed a spare bedroom for overnight care and an adult couple who could not share a bedroom due to disabilities.<sup>56</sup> In the earlier stage in Court of Appeal, the Court of Appeal had also upheld a discrimination claim by *A*, a female victim of serious domestic violence who lived in accommodation adapted to her family's needs under the sanctuary scheme, part of

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<sup>50</sup> Jane Lewis (ed.) *Lone Mothers in European Welfare Regimes* (Jessica Kingsley 1997) 141.

<sup>51</sup> [2015] UKSC 16, [66].

<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.*

<sup>54</sup> Introduced under the Housing Benefit (Amendment) Regulations 2012.

<sup>55</sup> [2014] EWCA Civ 13

<sup>56</sup> [2016] UKSC 58.

the same proceedings.<sup>57</sup> The claimant, A, had been a subject of exceptional levels of violence by her former partner and after being allocated a three bedroom house, it had been adapted to her heightened security needs and for instance, a ‘safe’ room. The Court of Appeal recognised that requiring her to give up accommodation that met her specific needs and relocate, could have put the claimant and her child’s wellbeing at risk and concluded that it constituted a violation of Article 14 as it discriminated her as a female victim of domestic violence. On appeal, the majority of Supreme Court judges did not accept this and decided that sanctuary scheme cases should be decided on case by cases basis but no exemption should be made for those who are victims of gender-based violence and living in sanctuary scheme.<sup>58</sup> In the dissenting ruling, Lady Hale and Lord Carnwarth focused solely on victims of gender-based violence. Lady Hale argued that those living in sanctuary schemes should be exempt from the bedroom tax. Furthermore, she argued that public authorities should better take into account the needs of victims of gender-based violence in order to “make better decisions”.<sup>59</sup>

Similarly, to the claimant in A, both the claimants in the *SG and others v SSWP* had been victims of domestic violence and argued that the benefit cap forced them to move to cheaper areas, further away from their support networks and communities that were essential to them and their children. In *SG and others v SSWP*, Lady Hale noted that:

“the greater the need, the greater the adverse effect. The more children there are in a family, the less each of them will have to live on. ... This prejudicial effect has a disproportionate impact upon lone parents, the great majority of whom are women, and is also said to have such an impact upon victims of domestic violence, most of whom are also women.”<sup>60</sup>

Victims of domestic violence are often housed in temporary accommodation, which is relatively expensive and so the benefit cap had a disproportionate effect on women who are victims of domestic violence and were attempting to leave abusive partners. The government recognised the impact of the cap to victims of domestic violence after the challenge in *SG and others v SSWP* and amended the Regulations so that ‘specified accommodation’, a wide range of accommodation provided for vulnerable people that is exempt from the cap, now also includes the women's refuges.<sup>61</sup> Although the Supreme Court ruling in *SG and others v SSWP* was disappointing in that it failed to condemn the gender discrimination inherent in the measures, the challenge was still effective as it forced the government to amend the Regulations so that women’s refuges and temporary accommodation for victims of domestic

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<sup>57</sup> [2016] EWCA CIV 29.

<sup>58</sup> [2016] UKSC 58, [63-66].

<sup>59</sup> [2016] UKSC 58, [80].

<sup>60</sup> [2015] UKSC 16, [180].

<sup>61</sup> Housing Benefit and Universal Credit (Supported Accommodation) (Amendment) Regulations 2014 (SI 2014/771).

violence are excluded from its scope. The courts have, therefore, provided an important scrutiny of these measures and merely the right to bring challenges under HRA has brought significant changes.

While the association of HRA and benefits claimants in negative light by the mass media has been constant, particularly since the financial crisis in 2008, it has not been as forthright as for instance in the case of foreign criminals or terror suspects. The coverage of HRA related judicial review challenges has also not been consistent and rulings that allow for more controversy have received far more media attention. When the courts have found no violation of ECHR such as *SG and others v SSWP* the rulings have not been as widely reported or commented on in the tabloid press. In contrast, successful cases that have evoked HRA to challenge the austerity measures, have been framed largely in a negative light and used to directly attack the HRA. In 2012, Court of Appeal ruled in the case of *R (Reilly) v Secretary of State for Work and Pensions* that the ‘Back to work’ scheme, which required people who were in receipt of jobseekers allowance to work for free, was unlawful as the Regulations had failed to provide enough detail about the scheme in the wording.<sup>62</sup> The claimants also argued that the scheme was in conflict with article 4(2) of the ECHR which provides, subject to exceptions, that “no one shall be required to perform forced or compulsory labour”. The Court of Appeal, and later Supreme Court, rejected the Article 4 claim yet the case was widely discussed in relation to the HRA and for instance, the *Daily Express* reported the proceedings as “Yet another farce from the hated Human Rights Act”.<sup>63</sup> Ian Duncan Smith, then Secretary of State of Work and Pensions, accused the claimants of “pathetic” use human rights laws and called them “job snobs”.<sup>64</sup> Cait Reilly, the applicant, and her attempt to use HRA to challenge the scheme came under intense scrutiny and direct attacks by the press.<sup>65</sup> Much of the reporting on the case was focused on Reilly as an individual and the seemingly ‘inappropriate’ use human rights law in a negative way, comparing the claim to ‘real’ human rights claims such as “like being incarcerated in a Nazi prisoner of war camp”.<sup>66</sup>

The Reilly case was largely framed as an example of rights inflation used to describe how both human rights law and welfare provisions had been stretched too far. Reilly herself was described as an undeserving recipient of welfare and human rights protection. Freedom from

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<sup>62</sup> [2013] EWCA Civ 66. Supreme Court upheld the ruling in *R (Reilly & Anor) v Secretary of State for Work and Pensions* [2013] UKSC 68.

<sup>63</sup> Stephen Pollard, ‘Yet another farce from the hated Human Rights Act’ *Daily Express* (London 13 January 2012) <http://www.express.co.uk/comment/expresscomment/295319/Yet-another-farce-from-the-hated-Human-Rights-Act> accessed 29 August 2016.

<sup>64</sup> Ian Duncan Smith, ‘The delusions of X Factor and sneering job snobs who betray the young’ *Daily Mail* (London 20 February 2012) <http://www.dailymail.co.uk/debate/article-2104022/The-delusions-X-Factor-sneering-job-snobs-betray-young.html#ixzz4M8YejuMk> accessed 29 August 2016.

<sup>65</sup> Graeme Archer, ‘You’re a geologist, Cait Reilly – which planet are you and your lawyers on?’ *The Telegraph* (London 15 February 2013) <http://www.telegraph.co.uk/finance/jobs/9873470/Youre-a-geologist-Cait-Reilly-which-planet-are-you-and-your-lawyers-on.html> accessed 29 August 2016.

<sup>66</sup> Jan Moir, ‘A human right not to stack shelves? She’s off her trolley’ *Daily Mail* (London 13 February 2012) <http://www.dailymail.co.uk/debate/article-2086000/Cait-Reilly-Human-right-stack-shelves-Poundland-Shes-trolley.html#ixzz4M8ZfN7VD> accessed 29 August 2016

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discrimination is essential part of ECHR and a right that is considered to be one of the most important rights by the UK general public.<sup>67</sup> In the abstract, the support for freedom from discrimination and even the welfare state seems to be well received. Yet, in practice female benefit claimants such as Reilly and their attempts to enforce rights under HRA have faced a far more hostile reaction.

### *Conclusion*

The chapter has examined the persistent attacks against benefits claimants, and showed how single mothers in particular have been vilified in mass media. Along with disparaging press reporting, reality TV series have emphasised the transformative power of paid work and in turn, belittled unpaid domestic and caring labour that women engage in on a daily basis. These representations of unworthy recipients of welfare payments have enabled unrepresented cuts to welfare benefits along with wide-ranging austerity measures.

The impact of the cuts to those who are dependent on welfare payments have been profound, particularly so for single mothers who find themselves unable to provide adequate care for their children. Since the cuts to welfare benefits were introduced child poverty has risen rapidly, and it is estimated that by 2020 child poverty is set to rise by 50%.<sup>68</sup> The HRA has provided crucial tools for individuals and pressure groups to challenge not only individual decisions but also the measures more broadly. While the courts have been reluctant to interfere with purely economic policies, claims based in gender and disability discrimination have been allowed. Even if the courts have not declared the measures themselves discriminatory and a violation of ECHR, the human rights challenges to bedroom tax and benefit cap by victims of domestic violence have led to a change in law and policy – demonstrating the importance of subjecting these measures for judicial review using the HRA.

Currently, nearly all challenges to the austerity measures have been brought under HRA or the Equality Act 2010 and it has proven a particularly important avenue for women who have been disproportionately impacted by the cuts. Lady Hale has repeatedly argued that discrimination is a constitutional issue so challenges on discriminatory austerity measures should be allowed. Yet, as demonstrated by case law, the courts continue to be reluctant to engage with socioeconomic policy so without the HRA most of these judicial review challenges would not have been allowed. This is unlikely to change. Furthermore, the reaction to the Bill of Rights Commission's recommendations on the inclusion of socioeconomic rights as part of the human rights framework demonstrate that it would be highly unlikely that such extension would come into existence were a British Bill of Rights

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<sup>67</sup> Peter Kellner, 'Analysis: which human rights matter most?' (YouGov, 30 March 2016) <https://yougov.co.uk/news/2016/03/30/which-rights-matter-most/> accessed 20 November 2016.

<sup>68</sup> Institute of Fiscal Studies, 'Child and working-age poverty in Northern Ireland over the next decade: an update' (2014) Briefing Note (BN154), <http://www.ifs.org.uk/publications/7448> accessed 28 July 2016.

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be introduced to replace the HRA. This would mean that those most marginalised in the society, would have little remedy to challenge the decisions that impact their lives.