Neutral Citation Number: [2018] EWHC 864 (Admin)

Case No: CO/3806/2017

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 20/04/18

Before :

MR JUSTICE OUSELEY

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Between :

SC, CB, CC & CD and 11 children	**Clai**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	
- and -	
THE LORD COMMISSIONERS OF	**First Defe**
HER MAJESTY'S TREASURY	**S**
- and -	**Defe**
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Third Defe**
- and -	**Inte**
EQUALITY AND HUMAN RIGHTS COMMISSION	

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MR RICHARD DRABBLE QC AND MR TOM ROYSTON

(instructed by **THE CHILD POVERTY ACTION GROUP**) for the **Claimants**

MR JAMES EADIE QC AND MISS GALINA WARD

(instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **Defendant**

MISS HELEN MOUNTFIELD QC AND MR RAJ DESAI

(instructed by **EHRC**) for the **Intervener**

Hearing dates: 6 and 7 February 2018

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Judgment Approved

MR JUSTICE OUSELEY :

1.
This case concerns the introduction of a limit to the number of children in respect of whom child tax credit and its replacement, universal credit, is payable. That limit, subject to a few exceptions, is two; hence the change is dubbed the “two child rule” or the “Policy,” which was how the Defendants described the legislation. I shall refer to the legislative changes as the two child provision.

2.
S9 of the Tax Credit Act 2002 and s10 of the Welfare Reform Act 2012 were amended to bring that maximum into effect for child tax credit and universal credit respectively. The amending provisions are ss13 and 14 of the Welfare Reform and Work Act 2016, the 2016 Act.

3.
The Claimants comprise three families in different circumstances, all in receipt of child tax credit, each with a third or subsequent child born on or after 6 April 2017, for whom no child tax credit is now payable. They seek a declaration under s4 of the Human Rights Act 1998 that the amending primary legislative provisions in ss13 and 14 of the 2016 Act are incompatible with the ECHR. First, the Claimants contend that the legislation breaches article 8, the right to private and family life, and article 12, the right to marry and found a family. Second, and whether or not those rights are breached directly, they contend that article 14, the non-discrimination provision, is breached, when taken with any of articles 8, 9, the right to freedom of thought, conscience and religion, 12 and article 1 of the First Protocol (A1P1), the right to peaceful enjoyment of possessions.

4.
The Equality and Human Rights Commission, EHRC, appearing as Intervener, supported the Claimants with particular reference to the United Nations Convention on the Rights of the Child, UNCRC, and other international instruments.

5.
The Claimants also seek a declaration that the power to make exceptions by regulation to the general two child limit for child tax credit and universal credit has been exercised irrationally in relation to one exception, and the regulations, or part, should be declared to be ultra vires. The power to make exceptions by regulation is contained in s9(3B) of the Tax Credits Act 2002 and s10(4) of the Welfare Reform Act 2012. The Child Tax Credit Regulations 2002 S.I. No. 2007 and the Universal Credit Regulations 2013 S.I. No. 376 were amended by the Child Tax Credit (Amendment) Regulations 2017 S.I No. 387 and the Social Security (Restriction on Amounts for Children and Qualifying Young Persons) Amendment Regulations 2017 S.I. No. 376. For convenience these together have been called the 2017 Regulations. The 2017 Regulations are said to be irrational in relation to the exception in respect of non-parental caring arrangements, because whether a child looked after by two adults, who are not his parents, natural or adoptive, became their responsibility before or after a second child was born to those two adults, affects whether the exception applies so as to enable child tax credit, or its replacement universal credit, to be payable for whichever is the third child.

6.
As the legislation affects both children and “qualifying young persons”, without any separate issues arising between those two groups, the parties have referred to “children” as covering both. I shall adopt that convenient course.

7.
The parties have also focussed their submissions on changes to child tax credit rather than on its replacement, universal credit. I shall focus this judgment likewise. The statutory provisions are

complicated enough, the issues are the same; nothing turns on the particular wording and what goes for one, goes for the other.

The legislative provisions

8.
S8 Tax Credit Act 2002, TCA, makes child tax credit, CTC, payable to the person or persons who are "responsible" for the child.

9.
S9 sets out how the maximum rate at which the responsible person is entitled to CTC is to be calculated. It provides as follows, as amended by s13 of the 2016 Act, leaving aside the particular provisions for disabled children which do not arise here:

"9(2) The prescribed manner of determination must involve the inclusion of –

(a) an element which is to be included in the case of every person or persons entitled to child tax credit who is, or either or both of whom is or are, responsible for a child or qualifying young person who was born before 6 April 2017,

(b) an element in respect of each child or qualifying young person for whom the person is, either or both of them is or are, responsible, …

(3) The element specified in paragraph (a) of subsection (2) is to be known as the family element of child tax credit and that specified in paragraph (b) of that subsection is to be known as the individual element of child tax credit ….

(3A) Subsection (3B) applies in the case of a person or persons entitled to child tax credit where the person is, or either or both of them is or are, responsible for a child or qualifying young person born on or after 6 April 2017.

(3B) The prescribed manner of determination in relation to the person or persons must not include an individual element of child tax credit in respect of the child or qualifying young person unless –

(a) he is (or they are) claiming the individual element of child tax credit for no more than one other child or qualifying young person, or

(b) a prescribed exception applies.

(4) The prescribed manner of determination may involve the inclusion of such other elements as may be prescribed.

(5) The prescribed manner of determination –

(a) may include provision for the amount of the family element of child tax credit to vary according to the age of any of the children or qualifying young persons or according to any such other factors as may be prescribed,

(b) may include provision for the amount of the individual element of child tax credit to vary according to the age of the child or qualifying young person or according to any such other factors as may be prescribe…"

This case is not about the family element of CTC.

10.
The manner prescribed for the determination of CTC is in Reg. 7 of the 2002 Regulations, as amended by the 2017 Regulations. This provides:

"7(2A) Where the claimant, or either or both of the joint claimants, is or are responsible for a child or qualifying young person born on or after 6 April 2017 ("A"), the maximum rate referred to in paragraph (2) shall not include an individual element of child tax credit in respect of A unless –

(a) the claimant is, or joint claimants are, claiming the individual element of child tax credit for no more than one other child or qualifying young person; or

(b) an exception applies in relation to A in accordance with regulation 9."

11.
The 2003 Regulations, as amended by the 2017 Regulations, provide for exceptions to the two child provision, in each case allowing for an additional amount of CTC to be payable for a third or subsequent child, in the following circumstances:

(i)
Multiple births (apart from one child in that birth): regulation 10;

(ii)
Adoption (where the adopted child was, or would otherwise be, in Local Authority care): regulation 11;

(iii)
Non-parental caring arrangements (including formal and informal arrangements), and where a child is born to a child aged under 16 for whom the claimant is responsible: regulation 12;

(iv)
Non-consensual conception (including where the child was conceived in the context of a controlling or coercive relationship): regulation 13.

In each case, it is the third or subsequent child in the family that must fulfil the criteria for the exception to apply.

12.
Reg. 9(5) of the CTC Regulations 2017 provides that the order of the children within the household is to be determined by reference to the following date in relation to each child, taking the earliest date first:

(i)
where the claimant, or at least one of the joint claimants, is the child's parent or step-parent (in either case, other than by adoption), the child's date of birth;

(ii)
in any other case, the date on which the claimant, or either or both of the joint claimants, became responsible for the child.

I quote from the Defendant's Skeleton Argument which is more immediately understandable than the Regulation itself.

13.

However, as R12 is the exception directly at issue, I set it out:

“12(1) This regulation applies in relation to A if the claimant or at least one of the joint claimants –

is a friend or family carer in relation to A; or

is responsible for a child or qualifying young person who is a parent of A.

(2) But this regulation does not apply in relation to A if the claimant, or at least one of the joint claimants, is –

a parent of A; or

a step-parent of A.

(3) In this regulation, “friend or family carer” means a person who is responsible for A and -

is named, in –

a child arrangements order under section 8 of the Children Act 1989, or

a residence order under article 8 of the Children (Northern Ireland) Order 1995, as a person with whom A is to live;…

(h) has undertaken the care of A in circumstances in which it is likely that A would otherwise be looked after by a local authority.”

The omitted subparagraphs relate to various forms of guardianship or similar

arrangements in Northern Ireland and Scotland.

14.
The application of the two child provision to children born on or after 6 April 2017 was set out in the 2016 Act itself. No family would suffer a cash loss from its existing benefits, so long as the parents remain responsible continuously for a given child and remain continuously entitled to benefit in respect of that child, disregarding gaps of less than six months. The change to entitlements affects new claims for universal credit after 31 January 2019, made in respect of a third or later child born before 6 April 2017. Subject to sequencing provisions, it applies to a third or later child if those are new claims in respect of that third or later child. A person is not entitled to UC merely because at some earlier time they were responsible for a third child born before 6 April 2017. The detail is explained in paragraphs 11 – 14 of the Defendants’ skeleton argument.

The individual Claimants

15.
The Claimants are the adults and their children for which they are responsible whether now entitled to CTC or not. The first adult Claimant, SC, lives with her three youngest children. Her three older children were taken into care in 2007. Her youngest child was born on 11 July 2017. Before his birth, her income consisted of £138.10 fortnightly in income support, £115.19 weekly CTC and £34.40 in child benefit, a weekly total of £218.64. Her rent is paid in full by housing benefit, and she receives council tax support. Following the birth of her youngest child, her income has increased by £13.70 per week in additional child benefit, which she says goes on nappies. She has social services and immediate family support to help her look after these children. She has put her name down for a three-bedroom council house for which, in her present circumstances, the rent would be paid in full

from housing benefit. SC states that she is “making ends meet”; she “manages but it is not easy,” with some support from her youngest child’s father, though she has never asked him for any. The father of the first of these three children is dead. The second and third of the three were not planned; the second was the result of a one-night stand with a stranger. It is the other children who miss out on things, such as summer clubs at school, at the moment. But she was not sure how she would make the same amount of money provide for three rather than two children, as the youngest gets older. She cannot take the contraceptive pill because it is incompatible with her epilepsy medication; the coil caused bleeding and anaemia. So she is dependent, for protected sex, on the man using a condom. She has a moral, but not religious, objection to abortion.

16.
The second adult Claimant, CB, has five children, the youngest of whom was born on 19 April 2017. She was in an abusive relationship with the father of the first four, but she had eventually been able to end it. She was on the pill at the time the fifth child was conceived. The father was a friend but not in a relationship with her. Before her youngest child’s birth, she was earning an average of £25 per week working from home in a self-employed enterprise she had started in 2016. She enjoyed the fact that this had enabled her to move “off benefits on to working tax credits”; and gain the sense of providing for her family. She plans to return to this self-employed enterprise. She was also receiving working tax credit and CTC totalling £300 per week, (approximately £225 of this would be CTC) and would have received £61.80 in child benefit for her four children, making a total of £386.80 per week. After the birth of the fifth child, as at the date of CB’s statement, she was in receipt of maternity allowance of £140.98 per week, in place of the money she had previously earned from her business. Her tax credits had not increased from £300 per week but her child benefit had increased to £75.50. Her total weekly income before housing costs at that time was therefore £516.48 from which she was required to pay £68.82 towards her rent (her income being too high to receive full housing benefit as she would have done previously). Her income after housing costs would therefore have been £447.66 per week. CB stated that she is “budgeting to the best of my ability” but that the children were aware of the tight financial situation and lose out by not being able to go away on holiday or have birthday parties at external venues or their choice of food. The cost of school uniforms had been met out of money intended for the youngest child. She said that she was unaware of the “two child rule” when she became pregnant, but that because she was on the pill, knowing it would have made no difference to her behaviour. She had an ethical objection to abortion, and so the father’s refusal in consequence to provide more than a one-off payment of £100 in support for his child, did not lead to a termination. She would need a larger house, was unsure of when or whether she would get it, but some housing benefit would still be payable.

17.
CC and CD are an unmarried couple who live together with CC’s daughter from an earlier marriage, CD’s grandson (born in 2013) and their own child who was born in August 2017. CD’s grandson lives with them pursuant to a contested child arrangements order made by the family courts in February 2016. A cancer scare in 2016 contributed to their decision to have a child together. CC did not know of the “two child rule.” Before the birth of their child, both CC and CD were in work. Their combined income from employment was around £28,000 per annum. They were claiming CTC as a couple. Whilst CC is not now earning following the birth of their child, their tapered entitlement to CTC (based on two child elements) and working tax credit (if any) will have increased. Although CD’s grandson lives with them under a non-parental caring arrangement, they were not entitled to a child element for their own child as their grandson was not the third child to join the family. CC describes the family’s situation as “just about managing financially but it is tight”. It is the extras for the

children and family outings which have stopped. If their own child had been born before CD's grandson joined them, they would have been entitled to a child element for him, as the third child. CC states that HMRC explained that she could give up responsibility for the cared-for child, claim CTC for their own and then take up responsibility for him again: CTC for all three. She could not go along with such disruption, and gave up the CTC claim for him so as to be able to claim it for their own daughter. But, in whichever sequence the cared-for child became their responsibility, the local authority has not had to fund his care.

The legislative background: the pre-existing system

18.
S1 of the Tax Credit Act 2002 abolished an array of benefits and credits including those amounts of income support and income-based job seeker's allowance which were "prescribed as part of the applicable amount in respect of a child or young person". The "applicable amount" was the level at which support was cut back. It is those "amounts", "prescribed as part of the applicable amounts" in respect of a child, which were replaced by CTC through the 2002 Act. But the level at which the benefit in respect of children was paid, where there was no other income, was the same under each system. So, although under the CTC system the amount payable in CTC reduced with other income, where there was no other income, the amount payable was still as much "subsistence" as the previous addition to income support or jobseeker's allowance had been. The current point where CTC entitlement is affected by other income, where benefit is not the family's only income, is £16,105. The equivalent figure for WTC, whether on its own or in addition to CTC, is £6,420.

19.
The change introduced by the 2002 Act was not intended to affect the factors which gave support to a family with no other income. It was intended to affect the relationship between income and benefits, which was also related to personal tax allowances. Complex changes were devised in an attempt to smooth the relationship as people wished to obtain work or higher pay but not to lose income overall.

20.
The 2002 Act system was summarised by Baroness Hale of Richmond JSC in Humphreys v Revenue and Customs Commissioners [2012] UKSC 18 at [3 – 5]. She contrasted the previous system "when child additions to subsistence level benefits were divided on a week by week basis with the present system where benefit is payable, on a means-tested but not subsistence basis, irrespective of the work status of the parents". I quote the rest directly here;

"4. Child tax credit and working tax credit were introduced by the Tax Credits Act 2002. Child tax credit replaced the separate systems for taking account of children's needs in the tax and benefits system. Previously, people in work (or otherwise liable to pay income tax) might claim the children's tax credit to set off against their income. This was administered by tax authorities. People out of work (or otherwise claiming means-tested benefits) might claim additions to their income support or income-based jobseeker's allowance to meet their children's needs. This was administered by the benefits authorities. Under the new system, a single tax credit is payable in respect of each child, irrespective of whether the claimant is in or out of work, and is administered by Her Majesty's Revenue and Customs. Child tax credit is like income support and jobseeker's allowance, in that it is a benefit rather than a disregard and it is means-tested, so that the higher one's income the less the benefit, until eventually it all tapers out altogether. But in several other respects, including the "light touch and non-stigmatising" way of measuring income, calculated for the year ahead based on the previous year's income, with a balancing exercise at the end of the year, it is like a tax allowance. As

the Government explained, in The Child and Working Tax Credits: The Modernisation of Britain's Tax and Benefits System, (April 2002), para 2.3:

"The child tax credit will create a single, seamless system of support for families with children, payable irrespective of the work status of the adults in the household. This means that the child tax credit will form a stable and secure income bridge as families move off welfare and into work. It will also provide a common framework of assessment, so that all families are part of the same inclusive system and poorer families do not feel stigmatised."

5. Child tax credit is, of course separate from and additional to child benefit, which (at that time) was a universal flat rate benefit available to everyone with children, and also administered by the revenue."

She also said at [30]:

"The rule is also linked to the move from tax allowances and social security benefit into a "seamless" tax credit system.

The ideal of integrating the tax and social security systems, so as to smooth the transition from benefit to work and reduce the employment trap, has been attractive to policy makers for some time. The introduction of child tax credit (and working tax credit) was a step in that direction."

21.
There is a useful briefing paper dated 10 April 2017 entitled "The Two Child Limit in Tax Credits and Universal Credit" in the House of Commons Library. It introduces the existing system as follows:

"Tax credits – the Child Tax Credit and the Working Tax Credit – were introduced in April 2003…

Tax Credits comprise:

•
Child Tax Credit (CTC), payable to people with children. Along with universal Child Benefit, it provides a single system of financial support for families with children, whether in or out of work. It also replaced the additions for children that were payable with benefits such as Income Support and income-based Jobseeker's Allowance.

•
Working Tax Credit (WTC), payable to people in low-paid work, including those without children. Those with children may be able to get help with childcare costs via the childcare element of the Working Tax Credit.

People may receive the CTC, or the WTC, or both. Tax credits are claimed on a family rather than an individual basis, so that for couples the incomes and circumstances of both partners will be taken into account.

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Tax credits are means-tested; i.e. the amount received depends on income, so that in general the amount received tapers away as income increases.

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For families with children, their maximum tax credit award (i.e. before taking account of any reduction due to the taper) is calculated by adding together different elements (together with WTC, if applicable):

•
A single **family element**, worth £545 a year; and

•
Individual elements for each child or qualifying young person (QYP)

The standard amount of the individual element of CTC is currently £2,780 a year, but a higher rate of £2780 plus either £3175 or £4,465 is payable where the child or QYP is disabled or severely disabled respectively (2017 – 18 rates)."

22.
Mr Drabble QC for the Claimants drew my attention to the passages, cited from Humphreys, to support a theme of his submissions that the levels of weekly benefit payable before the 2002 Act were properly described as "subsistence levels" benefits, albeit not meaning the level required to prevent destitution, as for instance with an asylum seeker. The statutory scheme assumed that there was no surplus from it which could be diverted to meet other costs, or amounts which could be diverted from other benefits in reduction of it.

23.
In Burnip v Birmingham City Council and another [2012] EWCA Civ 629, Henderson J said:

"33. In broad terms, HB (Housing Benefit) is a weekly welfare benefit which is intended to help people on low incomes to meet the cost of their rent. Like income support and council tax benefit, it is an "income-related benefit" within Part VII of the 1992 Act: see section 123(1)(d). The amount of HB, as explained below, depends on the relationship between a claimant's actual income on the one hand, his "applicable amount" (a statutory prescribed amount representing what the claimant is taken to need to live on) on the other hand, and the rent which he has to pay.

44. Against this detailed background, can it be said that the wider benefits context provides an objective and reasonable justification for the discrimination against Mr Burnip which we have found to be established in relation to the amount of his HB? In my judgment, the following considerations strongly suggest a negative answer to this question.

45. First, I think it necessary to draw a clear distinction between the benefits which Mr Burnip was entitled to claim for his subsistence, and those which he was entitled to claim in respect of his housing needs. His incapacity benefit and disability living allowance were intended to meet (or help to meet) his ordinary living expenses as a severely disabled person. They were not intended to help with his housing needs… It would therefore be wrong in principle, in my judgment, to regard Mr Burnip's subsistence benefits as being notionally available to him to go towards meeting the shortfall between his housing-related benefits and the rent he had to pay."

24.
The 2016 changes are then referred to in section 2 of the House of Commons Briefing Paper as follows, so far as material;

"As a result of the provisions – now in the Welfare Reform and Work Act 2016 –

•

A family will only be entitled to an individual element for more than two children if they were claiming for more than two children who were born before 6 April 2017. New births after that date will not qualify for an individual element (with **certain exceptions** – see below)….

•
The restriction on the individual element is on a "rolling basis" so that, for example, if the eldest child reaches the age where they no longer qualify for CTC, and there is a third child in the family born on or after 6 April 2017, that child will qualify for the individual element.

•
The £545 family element will not be included in new awards from 6 April 2017, but will continue to be included in awards for families entitled to CTC who are responsible for child born before that date

Corresponding changes are made to the child element of Universal Credit to achieve the same policy intent."

25.
Mr Drabble produced a note illustrating how CTC was both a subsistence benefit and a means tested benefit where its maximum amount payable, which sufficed as the family's only income in respect of the particular need it met, would be reduced where the family had other income. I add that child tax credit, CTC, is not to be confused with children's tax credit, which plays no part in this debate.

26.
Mr Eadie QC for the Defendants emphasised the array of benefits which would be unaffected by these changes. Housing benefit would not be reduced because of the CTC changes, and if the family required a larger property because of the third or further child, housing benefit would still be payable in respect of the larger accommodation. Child benefit would still be payable for all children. Child care costs, which can be substantial, would be payable for all children. Additional amounts payable under CTC and UC for children with disabilities would continue. Child care was payable both as eligible child care costs through the working tax credit and universal credit for two or more children, as well as the free child care equivalent for three and four year olds, plus discretionary assistance for those working below 16 hours per week in certain circumstances. Free school meals would continue to be provided. A number of other benefits would also continue to be paid because the recipient received UC or CTC or other means tested benefits, many of which were not related to the number of children in the household or their order of arrival. These could range from the pupil premium, free prescriptions and healthy start vouchers to other forms of discretionary payments.

The background to the 2016 changes: the policy and debates

27.
The grounds of challenge mean that the justification for the legislation, and any discrimination, and its proportionality need to be considered. This requires me to set out something of the policy and debates behind the 2016 Act.

28.
Mr Higlett, the team leader in the DWP's Universal Credit Policy Team, gave evidence as to the passage of the legislation, the reasons put forward for it and the debates about it. He has had responsibility for the policy as it relates to universal credit since before the 2015 summer budget.

29.

Although the Defendants in these proceedings are necessarily Government ministers, this case is very largely about primary legislation and therefore about decisions made by Parliament.

30.
The rationale for this policy, as now embodied in the 2016 Act, is set out in Mr Higlett's witness statement. The two child provision was seen as part of a package of reforms "which address major structural problems in the system of working age benefits and also support a much broader, cross-government effort to reduce the fiscal deficit….". He highlighted the cost whereby previously, with automatic adjustment of entitlement with family size, an out of work family with six children could receive up to £17,225 a year in CTC alone. In 2015/16 around 870,000 households in receipt of tax credits had three or more children costing almost £10 billion. Total expenditure on tax credits in that year was £28.5 billion. In 2017 at the spring budget, this change was forecast to save almost £2 billion in 2021 – 22. It was intended to encourage parents "to think carefully about whether they can afford to support additional children. Encouraging parents to reflect carefully on their readiness to support an additional child is likely to have a positive effect on overall family stability."

31.
The background context for the policy was a declared priority commitment in the Conservative Party manifesto for the 2015 General Election to find £12 billion from welfare savings on top of the £21 billion "already delivered".

32.
The summer 2015 budget report executive summary referred to the budget's objective of putting economic security first. It would ensure "economic security for working people by putting the public finances in order…It sets out bold reforms on tax and welfare and introduces a National Living Wage so we move Britain from a low wage, high tax, high welfare economy to a higher wage, lower tax, lower welfare economy." The aim was to eliminate the budget deficit, and to run a budget surplus to bring down the national debt while increasing spending on defence and the NHS. This would include taking action to reward work, and to back aspiration by reforming the welfare system to make it more affordable and fairer to the tax payer who pays for it. The summer budget on 8 July 2015 included the announcement that tax credits would be reformed "to make them fairer and more affordable", among other proposed welfare reforms. In language repeated often in justification since then, the Chancellor of the Exchequer said that, on top of Child Benefit for every child,

"An out of work family of five children can currently claim over £14,000 a year in tax credits alone. The government believes that those in receipt of tax credits should face the same financial choices about having children as those supporting themselves solely through work. The budget will therefore limit support provided to families through tax credits to 2 children so that any subsequent children born after April 2017 will not be eligible for further support."

I have taken that summary directly from Mr Higlett's statement.

33.
The Treasury and Department for Work and Pensions produced an Impact Assessment dated July 2015. The problem under consideration was this:

"The government has made clear its objective of tackling the deficit and rebalancing the welfare state. Welfare expenditure is a significant driver of public spending and the government is committed to delivering a more sustainable welfare system, including the changes to tax credits, to put the system on a more sustainable footing. The current benefits structure, adjusting automatically to family size,

removes the need for families supported by benefits to consider whether they can afford to support additional children. This is not fair to families who are not eligible for state support or to the taxpayer."

34.
The Policy objectives of the reform to the tax credits system were "to make them fairer and more affordable." It would ensure that "those on benefits face the same financial choices around the number of children they can afford as those supporting themselves through work. Encouraging parents to reflect carefully on their readiness to support an additional child could have a positive effect on overall family stability." The changes were part of a package which would deliver a more sustainable welfare system and return expenditure on tax credits to 2007/08 levels in real terms. Options considered were whether the measures should apply to all families in receipt of tax credits, whether they should apply as transitional measures, or whether nothing should be done. It was decided that entitlement would remain at the level for two children for households "to make the choice to have more children in the knowledge of the policy", so the changes would not apply to remove benefits from those already in receipt of credits for more than two children. The costs to individuals of the two children provision, or put another way, the savings to the Exchequer, would be £1,365m and removing the family element in child tax credit and child element in universal credit would be £675m. The main affected groups would be those currently in receipt of tax credits or UC who choose:

"to have a first or a third or subsequent child after April 2017 and households with children who make a new claim to UC after April 2017. Savings to the taxpayer were estimated to be £2,040m in cash terms on an annual basis by 2020 to 2021 and those savings continue to rise with the flow of new births and claims and on the basis that decisions would be made on the ability to support the family. The rationale for intervention also included the increase in tax credit expenditure which had "more than trebled in real terms between 1999 - 00 and 2010 – 11, with total expenditure in 2014 – 15 estimated to be around £30 billion – an increase of almost £10 billion in real terms over the last 10 years".

35.
The do nothing option was rejected, because it was seen as unfair to families not eligible for state support, and to the taxpayer; nor would it return welfare spending to a sustainable level. Welfare savings were "a vital part of the government's deficit reduction plan. Had the budget not announced such significant welfare savings, steep reductions in public service spending would have been required – or higher borrowing and debt, or higher taxes". Entitlement for those already in receipt of tax credit would not change. It would remain at the level for two children for a household, which in knowledge of the policy, chose to have more children. In respect of new claims, it would apply to families who had been outside the UC and tax credit benefits systems for the previous six months.

36.
The Impact Assessment said this on behavioural assumptions:

"The primary purpose of the Government's welfare policies is to `help people move into sustained employment, whilst ensuring the system is fair to both recipients and non-recipients. The policy which limits the child element of CTC and Universal Credit to two children means that families on benefits will have to make the same financial decisions as families supporting themselves through work. In practice people may respond to the incentives that this policy provides and may have fewer children. There is no evidence currently available on the strength of these effects although the Institute for

Fiscal Studies found a relationship between support for children in the benefit system and childbearing."

37.
The Assessment then discussed the impact on those with protected characteristics as defined by the Equality Act 2010. It added that those more likely to be in receipt of affected benefits were more likely to be affected by the change. On an individual basis women:

"may be more likely to be affected than men. Around 90% of lone parents are women, and a higher proportion of this group are in receipt of CTC. They are therefore more likely to be affected, in the absence of behavioural change…. Ethnic minority households may be more likely to be impacted by these changes. This is because on average they are more likely to be in receipt of these benefits, and on average have larger families."

It concluded, that the proposed changes would enhance the life chances of children as they ensured that households made choices "based on their circumstances rather than on taxpayer subsidies. This will increase financial resilience and support improved life chances for children in the longer term."

38.
The Secretary of State made a statement that the Bill was compatible with the Human Rights Act 1998. A memorandum was sent to the Joint Committee on Human Rights. The memorandum dealt compendiously with all the provisions, including the link between article 14 and A1P1, and article 8. The Secretary of State's view was that the measures pursued legitimate aims and were justified, proportionate and not manifestly without reasonable foundation. It recognised that, in relation to the particular change at issue here, it might be argued that article 14 was engaged because the provisions fell within the ambit of A1P1 or article 8 ECHR. It pointed out that the limit would arise only in relation to entitlement arising in the future. But it could be argued that the measures had a greater impact on larger families, that large family size might be regarded as an "other status" for the purpose of article 14 and that the changes could be more likely to affect women as the main claimants of CTC. It said this in response:

"Any differential treatment of a group identified above as a result of the limitation of the child element is justified, proportionate and not manifestly without reasonable foundation. The changes are part of the wider reforms to the welfare system aimed to bring about savings on the UK's welfare spend and reduce economic deficit. Taking into account the wide margin of appreciation for the State's administration of social security benefits, the policy is based on a number of political, economic and social considerations. These include a desire to ensure families in receipt of benefits are encouraged to make the same financial decisions as families supporting themselves solely through work, to ensure fairness for the taxpayer and to secure the economic recovery of the country,"

Safeguards would be put in place to protect certain households including those with disabilities.

39.
The memorandum also made reference to other international human rights treaties, dealing first with the UNCRC. The memorandum said that, although such instruments had no direct legal effect in domestic law and were not justiciable in our courts, the Government had paid due regard to its obligations under them. It made these points both generally, and commented that they applied also to the two child provision in CTC and UC. It said:

“In relation to clauses 4 to 6 (life chances), the Government’s position is that in refocusing government action from tackling the symptoms of child poverty (low income) to tackling the root causes of poverty (worklessness, poor educational attainment) its primary consideration is “the best interests of the child” in accordance with Article 3 of the UNCRC. This new direction is a more appropriate means to make a real and lasting difference to children’s lives, to ensure the survival and development of the child (in accordance with Article 6) and to recognise the right of every child to an adequate standard of living (in accordance with Article 27). The Government considers that the new reporting duty will be a better means of combating child poverty as the current targets fail to recognise the root causes of child poverty. Evidence shows that worklessness and low educational attainment are key root causes of child poverty and the reporting duty will drive Government action to improve the life chances of children. In accordance with Article 12 of the UNCRC, as part of the 2012 consultation on better measures of child poverty which informed the development of the new reporting duty, the Government took care to ensure that the views of children and young people were heard, including by working closely with the Office for the Children’s Commissioner for England.

In relation to clauses 7 and 8 (reduction of the benefit cap), the Government notes the Supreme Court’s decision in R (on the application of SG & Others) v SSWP [2015] UKSC 16 but, in relation to the reduction of the cap, the Government has fully considered its obligations under the UNCRC, and in particular article 3 (the duty to treat the best interests of the child as a primary consideration) and article 27 (standard of living). The Government considers that £20,000 and £23,000 is a sufficient amount for families to live on – many working households earn less than this. The best interests of children overall is to have parents in work and work remains the surest route out of poverty. Children in workless families are three times as likely to be in relative poverty, than families where at least one parent works. The cap has been proven to encourage movement into work. Evidence shows that capped households are 41% more likely to go into work after a year than similar uncapped households so reducing the cap further will encourage more people into work. The savings afforded to the Government by reducing spending on welfare will allow the Government to protect expenditure on education, childcare and health and the improvements to overall economic situation will have a positive impact on children and their best interests. These considerations apply equally to clauses 9 and 10 (freeze of certain social security benefits and certain tax credit amounts), clauses 11 and 12 (two children restriction in child tax credit and UC), clauses 13 and 14 (removal WRA/LCW element in ESA and UC) and clause 15 (work-related requirements in UC).”

40.
The House of Commons Briefing Paper summarised the debates. The debate at the Second Reading in the House of Commons on 20 July 2015, about all the measures contained in the Welfare Reform and Work Bill 2015, demonstrates just how politically contentious the changes were. The Secretary of State introducing the Bill said this:

“…This is a Bill for working Britain, and it is underpinned by three key principles: first, work is the best route out of poverty, and being in work should always pay more than being on benefits; secondly, spending on welfare should be sustainable and fair to the taxpayer while protecting the most vulnerable; and, thirdly, people on benefit should face the same choices as those in work and those not on benefits. I wish to talk about each of those principles in turn…

Let me turn to the third principle in the Bill. We are ensuring that people on benefits face the same choices as those in work and those not on benefits. Families in work have to make careful choices about what lifestyle the money they earn can support and what their income can provide for. In that context, it is right that people who receive child tax credit should make the same financial choices

about having children as those who are supporting themselves through work. Therefore, from April 2017 the Bill will limit the child element of child tax credit to the first two children. The two child limit will also apply on universal credit in relation to a third child or subsequent new children in the household and to completely new claims. Again, we are ensuring that this change is fair. It will not affect existing claimants at the point of change. That is the key point."

The Minister of State in conclusion after the debate said this:

"On the changes to tax credits, it is right that families on benefits should have to make the same financial decisions as families supporting themselves solely through work. I emphasise that child benefit will continue to provide additional support for the first child. There are no cash losers, contrary to what Opposition Members have been saying."

41.
In between those contributions, the debate had focused mainly on other proposals in the Bill than the one with which this case is concerned. It covered of course the interaction between budget deficit and welfare and tax credit costs. An opposition spokesman appeared to agree that those on benefits should face the same choices as those not on benefits. There was concern that those currently in receipt of CTC would find their existing levels of CTC reduced by the two child provision. Concerns were raised about how the system would work where somebody lost their job or where there was family break up. The association between larger families and greater poverty was raised, as was the way in which the legislation could be seen as blaming the child for the acts of the parents, leading to what some described as a tyranny equivalent to China's one child policy.

42.
The seventh sitting of the House of Commons Committee on the Bill focused on the two child provision. Mr Higlett explained that a number of amendments were raised seeking to delay its operation, or to increase the number of children above two, or indeed eliminating the restriction altogether. The debate on the second reading had led to concerns being expressed about the "rape" or "non-consensual conception" exception and further amendments were tabled seeking to define various exceptions. Mr Higlett highlighted a response by the Exchequer Secretary to the suggestion that the limit on the number of children who would be entitled to receive CTC or UC should be raised or eliminated. The Exchequer Secretary said this:

"The level of spending we have reached on tax credits - £30 billion – is unsustainable and carries a risk to our public services. That is why the Government have taken steps to ensure that the system is fair to those who pay for it as well as those who benefit from it. That is why the Government are limiting support to two children in child tax credit and universal credit from April 2017.

…

The average number of children in families in the UK in 2012 was 1.7. The Government therefore think it is fair and proportionate to limit support through tax credits and universal credit to the payments for two children. To give families time to prepare, the change will not come into effect until April 2017…."

43.
The Committee debate discussed amongst other matters the wisdom and definition of the rape exception. It discussed the comparison between the proposal and States which limited the number of children which a family could have, multiple births, the ability of families with larger numbers of

children to cope with the CTC/UC changes proposed, the interaction with housing benefit, disability, religious objection to the use of contraception, and whether there was an incentive for families to separate in order to continue to receive support for children. All the amendments were either defeated on a vote or withdrawn.

44.
At the report stage in the House of Commons on 27 October 2015, an opposition amendment to the effect that the current arrangements for CTC should remain in place was defeated. Little of the debate was about the specific two child provision, but focused instead on the more general issue of how a system could be devised which encouraged people to work and to work more, whilst having a welfare system which did not discourage that, at whatever income level or none. The debate on the particular issue did not appear to add any points that had not been considered in the second reading debate, though it may have added a little more detail. The Government's position was much the same and often in the same terms as it had previously expressed. The amendment was defeated.

45.
Much of the debate in the House of Lords on the second reading echoed that in the House of Commons, in its less contentious style. The Committee debate in the House of Lords on 7 December 2015 related primarily to exceptions. No amendments were proposed relating to the two child provision. There was rather more debate about the concept of "choice" in the circumstances to which the CTC change would apply, and the ECHR and UNCRC were prayed in aid by those opposing the Bill. There was concern that there had been no Initial Equality Assessment, and the EHRC had expressed concerns about equality impacts. The two child provision was not directly the subject of the debate on 23 February 2016 on the Bill's return to the House of Commons, but the Minister for Employment noted at the outset of the debate that:

"The Bill is a vital part of the government's reforms that are moving this country to a high wage, low tax, low welfare economy. It is fundamental to our commitment to end child poverty and improve children's life chances, and to ensure work always pays more than a life on benefits and that support is focused on the most vulnerable."

46.
That was of course a comment on the Bill in general and not just on the provision with which this case is concerned.

47.
The Briefing Paper then summarised the responses from organisations. The Child Poverty Action Group, which acts as solicitor to the Claimants, contended that the change broke the link between assessed need and the provision of a minimum level of support. It was immoral that some children, because of the circumstances of their birth, were treated as less deserving of a decent standard of living than others: the Bill, if enacted, would increase and deepen poverty because children in larger families were at a higher risk of poverty. CPAG had also raised the sequencing issue. The Institute for Fiscal Studies, IFS, had estimated that 600,000 more children in families with three or more children would be in absolute poverty by 2020 – 2021. The policy was extremely likely to contravene various human rights. It created perverse incentives for larger families to separate, for women to have abortions, for partners with children not to join in a blended family. The concept of choice was fundamentally flawed because conception and birth could not be neatly categorised as voluntary or involuntary; nor could one plan one's financial circumstances 18 years into the future from the time of the decision to have a child, because there were no guarantees against relationship breakdown,

disability, long-term illness or widowhood (or other factors) affecting the income of any family. The impact of the changes was said to be this; but not all of it related to the two child provision:

“The two child limit and removal of the family element will save around £2.3 billion per annum in 2020 – 21 and, once fully in place, save around £5 billion a year. Once current, protected claimants have left the caseload, the two child limit might affect around 900,000 families.”

48.
The IFS said this, in its March 2017 briefing:

“Since the changes only affect families with new births and then (towards the end of next year) new claims, no one will see their benefit income fall between one period and the next as a result of this policy. But these are substantial changes to the long run generosity of the system, expected to reduce government spending by a significant £5 billion a year in the long run. About £3 billion of that £5 billion is expected to come through limiting support to two children, which means substantial cuts in support for larger families.”

49.
While acknowledging that existing claimants would not have their award reduced by these measures, the IFS further noted that:

“Eventually the reform will mean about 600,000 three child families getting around £2,500 a year on average less than they would have got, with a further 300,000 families with four or more children getting £7,000 a year less on average. The remaining £2 billion annual long-run saving comes from removing the £545 ‘family element’, which will ultimately affect around 4 million families (on top of any losses from the limiting of support to two children).”

50.
Exceptions to the two child provision had been raised during the debates. How they should be implemented was the subject matter of formal consultation on a paper entitled “Exceptions to the limiting of the individual Child Element of Child Tax Credit and the Child Element of Universal Credit to a maximum of two children” published on 21 October 2016. The consultation responses received by 27 November 2016 were set out in the Government’s response to them published in January 2017. The consultation paper had contained the Government’s recognition that some parents or carers were not in the same position to make choices about the number of children in their family as were others. That was the basis for the exceptions, for example, in respect of multiple births, or children living long-term with family or friends with formal or informal caring arrangements. The exception in relation to children likely to have been conceived as a result of rape and how reporting that should be dealt with, was also raised. Mr Higlett said that the exceptions could be kept under review and their operation monitored and evaluated, as is obviously the position.

51.
The Government response, in relation to informal caring arrangements, stated that it “proposed that where [a child living with friends or family because they are unable to live with their families and who, without this arrangement is likely to be looked after by the local authority] are the third or subsequent child in the carer’s household, they should be an exception to the Child Element limit”. The consultation did not invite comment on the sequencing provision raised in this exception. Accordingly, the Government’s response, to the other issues which were raised, simply stated “the exception is intended for third and subsequent children who would otherwise likely be looked after by

the local authority." No consideration was given to the issue which arises in this case. The range of exceptions was considered but no further exceptions were raised or commented on in the response.

52.
The draft Regulations were referred to the Social Security Advisory Committee on 25 January 2017, although strictly that was not necessary. Concerns were raised by it about some of the exceptions in particular the "non-consensual conception" exception. The letter from the Minister for Employment to the Chair of the Social Security Advisory Committee of 1 March 2017 dealing with adoption and formal long-term care arrangements said this:

"The policy is based on the decision of a parent/parents who are already caring for two children, to ensure that the welfare system is fair and that those households supported by Child Tax Credit or Universal Credit think carefully about whether they are financially prepared to support a new child in the same way as any family which supports itself solely through work."

Non-adopted children should be treated equally to adopted children; the decision to take on a further child, whether by adoption or not, "should be based on whether the parent/parents can afford to support additional children." If the parents already had two children and wished to have a third by adoption the Government did not wish to dissuade them from doing this in the interests of the adopted child.

53.
The Social Security Advisory Committee comment on the draft Regulations was reported. The documents are before the Court anyway, but was usefully summarised as follows in the Briefing Paper:

"**Adoption and formal long-term care arrangements**

The letter from SSAC urged the Government to look again at the kinship exception rules, which they argue create an "inequality of treatment which is wholly dependent on something as arbitrary as the order in which the children arrived." The following examples were given to illustrate this argument:

It is not hard to envisage a case where someone takes on caring responsibilities for the children of a sibling who has died before the circumstances have been right to start a family of their own. It is difficult to understand why they should be penalised for taking on that responsibility for children that might otherwise be in Local Authority care. And in very hard cases, where perhaps an individual could not otherwise afford to have a child of their own, it is conceivable that they would take the decision to put into Local Authority care one or more of the children they have been looking after.

The Government response did not offer to look again at these rules. It argued that it did not want to put parents off adopting children, but that parents already caring for two children (adopted or not) would need to think about how they could financially support any additional children of their own."

54.
Mr Higlett's description of the exception, in relation to third and subsequent children who are adopted, points out the justification for the third child being taken on where there are already two children in the family as being to avoid the costs of them living in local authority care and encourages children to be in a family where they are better off than in the care system. Mr Higlett dealt with the position of claimants such as CC who, being responsible for two children one of whom they are responsible for under a non-parental caring arrangement, need to decide whether their existing budget together with further support other than the further child element of CTC, can accommodate a further child. They would need to reach that decision regardless of the circumstances in which any

children already in their care became part of the household. As they were part of the household they should not be treated differently or as having less value to a claimant at the time that a decision to bring another child into the family fell to be taken. Mr Higlett saw that as being the same choice that would have to be made by families who supported themselves solely through working and it maintained equal treatment.

55.
Quite apart from general public announcements in the summer budget of 2015 and other forms of messaging, HMRC provided information in leaflets to all claimants renewing their CTC claim in summer 2016 and summer 2017.

Issue 1: Direct breaches of ECHR Articles 8 or 12

56.
The relevant ECHR articles provide:

“Article 8

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 save 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.

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

57.
I first consider the Claimants’ contention that the two child provision interferes with private and family life under article 8, and the right to found a family under article 12. Mr Drabble submitted that article 8 was “engaged” directly, in the sense that the primary legislative changes constituted an interference with private and family life, which would amount to a breach unless justified within article 8.2. Article 12 was also engaged.

58.
I have been shown no ECHR authority which holds that article 8 is directly engaged by the absence of provision of any, or of a particular form of, social security benefit or of a particular level, let alone that each form of benefit should be considered separately from any other benefit payable.

59.
Okpisz v Germany [2006] 42 EHRR 32 held that child benefits came within “the ambit” of article 8 for the purposes of article 14 because such benefits were a means whereby states “are able to demonstrate their respect for family life” within article 8. But it did not hold, nor was it asked to hold, that the legislative change which meant that child benefit which had been paid in respect of a particular child, was no longer payable, directly interfered with article 8 rights.

60.

Stec v UK [2006] 43 EHRR 47 also concerned article 14, this time in connection with A1P1, but the Strasbourg Court made it clear that A1P1 imposed no limit on a state's freedom to decide whether or not to have a social security scheme or the type or amount of benefits. There was no suggestion that article 8 was involved.

61.
The position is no different in domestic decisions on article 8, which reflect the established Strasbourg jurisprudence or absence of it. In R (G) v Lambeth LBC [2011] EWCA Civ 526, [2012] PTSR 354, a Court of Appeal, which could have been a Supreme Court majority, considered a damages claim under the HRA 1998 in respect of duties breached by a local authority towards a "former relevant child". Wilson LJ with whom Lord Neuberger MR and Toulson LJ agreed, pointed out at [34] that although Strasbourg:

"… has envisaged it as a possibility, [it] has never held that a failure of the state to provide financial or other support to a person represented a violation of article 8. If the consequences of such a failure are so gross as to have subjected him to inhuman or degrading treatment, article 3 will have been violated: see the decision of the Grand Chamber in MSS v Belgium and Greece[2011] 53 EHRR 28 given on 21 January 2011. But, to date an applicant unable to prove such gross consequences has been unable to persuade that court to treat such a failure of state support as a violation of article 8."

He illustrated this by reference to two Strasbourg decisions, before turning to UK decisions where he said at [40]:

"More important than the particular facts either of N's case or of Anufrijeva's case [2004] QB 1124 were the general propositions which this court there advanced. It: (a) stated, at para 19, that the European court had always drawn back from imposing on states, by reference to article 8, the obligation to provide a home or any other form of financial support; (b) observed, at paras 23 and 24, that our welfare system provided benefits which went far beyond any positive action required by the Convention; (c) commented, at para 33, that while in Mazari's case 28 EHRR CD 175 the European court had recognised the possibility that article 8 might in special circumstances require a state to provide positive welfare support such as housing, it had made plain that neither article 8 nor even article 3 imposed such a requirement as a matter of course; but (d) accepted, at para 35, that, if a failure of support degraded a person's circumstances down to the level identified in article 3, the latter required that it be provided."

62.
Although there was one first instance UK authority that, in very strong circumstances, a lack of support could engage article 8, it would be rare that such a case did not also engage article 3 ECHR.

63.
Indeed, this decision was decisive in the rejection by the Court of Appeal in R(SG and JS) v Secretary of State for Work and Pensions [2014] EWCA Civ 156 at [105] of the claim to a free-standing interference with article 8. That aspect of the Court of Appeal's decision was not really challenged in the Supreme Court, where the real focus was on article 14 with A1P1. In SG/JS [2015] UKSC 16, [2015] 1 WLR 1449, at [78 – 80], Lord Reed dealt with it as an aspect of an argument relating UNCRC to article 8, but observed that it failed to address the significant issues which it in fact raised. The Strasbourg decisions cited were very different in the asserted interference with article 8: eviction caused by income reduction, or child abduction. Lord Carnwath at [99] saw no challenge to this part of the Court of Appeal decision. Lord Hughes stated at [139] that: "the article 8 rights of children are not arguably infringed by the benefit cap scheme. Elastic as that article has undoubtedly proved, it

does not extend to requiring the State to provide benefits, still less benefit calculated simply according to need". The same would be true of parents. Neither Baroness Hale nor Lord Kerr took issue with those views, as I read them.

64.
The UNCRC does not add to the interpretation of article 8 in such a way that article 8 should be regarded as directly interfered with in this context. The potential role of articles 26 and 27 UNCRC in this respect has not been used, despite many opportunities, to achieve such a result. There is no Strasbourg authority so interpreting article 8 with UNCRC in the welfare benefits context. Okpisz is a discrimination and ambit case.

65.
There is, not surprisingly, no domestic authority which has moved that far. The obligation in s2 HRA to take Strasbourg jurisprudence into account, precludes the UNCRC being directly binding on any UK domestic courts via the ECHR. The application of the s2 obligation to established Strasbourg jurisprudence was definitively affirmed in R v Special Adjudicator ex p Ullah [2004] UKHL 26 [2004] 2 AC 323, Lord Bingham at [20]. There is here no established jurisprudence, or domestic authority, whether pointing to Strasbourg's established jurisprudence, or venturing ahead of the field, in which the UNCRC has been used as an interpretation tool with the direct effect that article 8 rights are interfered with, where a claimant did not meet qualifying criteria for a welfare benefit.

66.
Nor was the direct engagement of article 8 argued in this case on the basis that this jurisprudence must be seen differently in the light of UNCRC.

67.
Mr Drabble said however that R(MA) v Secretary of State for Work and Pensions [2016] UKSC 58, [2016] 1 WLR 4550 had decided that article 8 could be engaged directly by welfare legislation. This decision also included the appeals of the SSWP in Rutherford and A, and is sometimes referred to as Carmichael, and here as MA/Carmichael. Mr Drabble submitted that his proposition had been accepted by Collins J in R (DA) v Secretary of State for Work and Pensions [2017] EWCH 1446 (Admin), [2017] PTSR 1266, at [39 – 40], a decision currently under appeal. Collins J concluded that what Lord Reed said in SG/JS about article 8 could not survive the unanimous decision of the seven Justices in MA. Collins J reasoned that in MA/Carmichael the "bedroom tax" cap on housing benefit where properties were under-occupied, had affected the family life of the claimant whose husband had to sleep in a separate bedroom because of her disabilities:

"Thus it is clear that benefit cuts can properly be said to engage the article 8 rights of those affected. That they can include the young children whose welfare is likely to be affected by the cuts in the benefits which are specifically for their benefit seems to me to be clear."

68.
This appears to be a distinct point from the role of article 8 taken with article 14 in a discrimination claim. I shall have to return to MA/ Carmichael in the contexts of article 14 discrimination, and the "manifestly without reasonable foundation" test. But here I am just considering whether it alters or qualifies or explains the otherwise clearly established position in relation to the direct engagement of article 8 and welfare legislation.

69.

Collins J's analysis of MA is, with respect, wrong and I am unable to follow it. The majority judgment of Lord Toulson identifies no such issue for decision; it concerned article 8 with article 14; nor did it arise in [49], where Mr Carmichael's appeal was allowed; article 8 was taken with article 14. Nor do the partial dissentients, Baroness Hale and Lord Carnwath take a different view on that particular issue. The Supreme Court in R(HC) v SSWP [2017] UKSC 73 decided not to enter the debate sparked by R(DA) over whether article 8 applied directly to welfare benefit provision. It treated that as a continuing debate.

70.
I have had to resolve it here. The absence of Strasbourg authority, and the clarity of the decisions domestically make it impossible to argue, at all events short of the Supreme Court taking a different view of its recent jurisprudence, that general welfare legislation directly engages article 8.

71.
As Mr Drabble could not make out his case based on the Government's stated aims for the 2016 Act, or in the light of the nature of the legislation passed by Parliament, he was constrained to ask the Court to infer that Parliament intended to influence those in receipt of CTC to have smaller families, by creating an incentive for them to have smaller families; a reduction in the size of, or more aptly potential for growth in, lower income families was foreseen and welcomed. The scheme assumed that people affected by the changes could make choices "in connection with their intimate private life". It was sufficient for "engagement" that effects could be financial, behavioural, emotional or a mixture of them.

72.
Mr Eadie pointed to Government's aims for the legislation as being to ensure that welfare spending was sustainable, fair to the taxpayer whilst protecting the most vulnerable. It was to ensure that people in receipt of benefits should face the same choices as those who supported themselves solely through work and to ensure that the system created incentives to work and to make progress and work as the best route out of poverty. The evidence of Mr Higlett recognised that some claimants might make different decisions about family size in the knowledge that their benefits would not automatically increase, but there was no evidence currently about the strength of such effect. In any event the purpose of the policy was not to influence choices about family size, but to leave those choices to individuals in the knowledge of the state support which would be available; its purpose was to limit the amount of support available to each family so that the levels were sustainable and claimants would be encouraged to consider whether they could afford to support each additional child, as would those reliant solely on earnings. The latter should be compared to those who received additional support through the benefits system; the majority of CTC claimants were in work, and indeed some, but a tiny percentage, with two or more children were on relatively high incomes, over £60000. There was no intention to penalise families, and although there was a possible disincentive to two families, each with children, merging to form one family, it was thought unfair to treat such a family differently from one which had stayed together. That had also to be set against an incentive to a single family to split, and then come together again. I accept that description and the relation of the legislative change to family size.

73.
I also accept Mr Eadie's submission that it is still quite early days in the operation of the legislative change for sound evidence of its effects on decisions made by claimants as to family size to emerge, and it would in any event be difficult to prove how such decisions had been arrived at. The savings would however arise in any event, and the incentive to work more and to progress in work would also

be present. Some of the issues in respect of which criticisms were made by opponents of the provision could be dealt with by exceptions, were that to prove necessary. But there was no legal basis for removing any aspect of family size from the operation of the benefit system.

74.
Mr Drabble's contention is inconsistent with the evidence of the contemporaneous policy statements to Parliament and Mr Higletts's witness statement. It is also inconsistent with the evidence relied on by the Claimants. Consistently with the view expressed in the Impact Assessment criticised by the Claimants, the Joint Faith Group's Briefing for the House of Lords cited at [67] of the Claimant's skeleton argument explains on its last page that "In the US where "family caps" have been applied in a number of states, most studies find little or no effect on fertility [i.e. the number of children born per family]".

75.
Ms Gracestone of Gingerbread, a charity working with single parent families, provided illustrative evidence, based on telephone calls, in and after April 2017, from pregnant women, and from those separating, seeking advice about CTC/UC changes. Two of the sixteen referred to the possibility of an abortion. Neither SC or CB, however, say that knowledge of the legislative change would have affected their behaviour or decision to have the baby. I did not find this cogent evidence of the asserted effect.

76.
Mr Eadie is right that Mr Drabble could only raise an argument on direct interference by showing that the aims of the legislation were to encourage families on CTC not to grow as they would have done. Mr Drabble has not done so, and I accept Mr Eadie's submissions to the contrary.

77.
It is clear from the materials I have cited, and noting Mr Drabble's highlighting of phrases such as "encouraging parents to reflect carefully on their readiness to support an additional child could have a positive effect on overall family stability" and "people may respond to the incentives that this policy provides and have fewer children", that it was not the purpose of this legislation to prevent or discourage parents having a third child or more children. The context was to reduce expenditure on welfare, including by reduction in CTC, and to alter the balance between taxpayer and beneficiary, so that both groups' parental choices would be constrained by resources which did not expand as a consequence of their choice.

78.
It also seems to me inescapable that it was anticipated that some would decide not to have a child when they might otherwise have done so. But I cannot accept that discouraging larger families for those claiming CTC can properly be described as the aim of the legislation, and even less so in view of the other benefits which would still be available to assist with the enlarged family, such as child benefit for the new child, child care, housing benefit for larger accommodation, free education and so forth. The evidence of what Ministers said in Parliament does not permit the contrary conclusion. This is not equivalent to a single or two child "rule" convenient though that description is; it does not forbid marriage, children of any number, or do so except at penal costs, in the way some characterised it as doing. The description can be used in a misleading way.

79.
In my judgment neither articles 8 and 12 are engaged directly.

80.
I should add that I do not consider that article 9 can be directly engaged in this sort of case, if article 8 is not. Article 9 does not require public welfare support for the consequences of the exercise of that freedom; for those whose article 9 freedoms do not permit the use of contraception or abortion, there will come a point at which resources may act as a constraint in various ways, whether in receipt of benefits or not, without the gap being filled as a matter of right from the resources of the state, drawn from the public.

Issue 2: The role of article 14 with articles 8, 9, 12 and A1P1

81.
The relevant articles of the ECHR, not so far set out, provide:

“Article 9

1.
Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

THE FIRST PROTOCOL

Article 1

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.”

82.
The first question is whether, notwithstanding that no article of the ECHR is directly “engaged,” article 14 is breached when taken, as it has to be, with some other ECHR article. The ones put forward here by the Claimants or the EHRC are articles 8, 9, 12 and A1P1. The answer depends on the nature of the link between the act complained of and those substantive rights: is the act within the “ambit” or “scope” of those articles although it may not engage them directly? Although there is much authority on it, there is no very clear test for what suffices for such a link. It is as much a question of recognising its presence, as of defining the characteristics of the link. I accept that there is no distinction to be drawn between any of the articles at stake in terms of their ability to link to article 14, and that the link required is obviously something less than direct engagement.

83.
Okpisz, already cited, illustrates the existence of the necessary link or connection, in that case through article 8 in its positive sense of showing respect for family life, and the removal of the child benefit which the family had enjoyed. The link was demonstrated where the “subject matter of the disadvantage…constitutes one of the modalities of the exercise of a right guaranteed,” or the measures complained of are “linked to the exercise” of such a right; [32].

84.
Stec, above, illustrates the application of article 14 with A1P1, even though A1P1 was not engaged directly. The absence of an obligation to create a benefit scheme did not absolve a state which did so from doing so in a manner compatible with article 14.

85.
The domestic authorities are in the same vein. Lord Wilson in Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47, [2015] 1 WLR 3250 illustrates the same principle. The removal of Disability Living Allowance in that case was within the ambit of A1P1, and provided the link to article 14. The link to article 14 was not controversial in that case, which was more to do with the consequences of establishing a link, namely that once established, article 14 bit to prevent discrimination in the benefit, rather than with what the nature of the connection had to be, in order for the link to be established in the first place.

86.
Mr Drabble placed particular reliance on the admissibility decision in Stec v UK (2005) 41 EHRR SE 18 [46-55] and on what the House of Lords decided it signified in R(RJM) v SSWP [2008] UKHL 63 [2009] 1 AC 311 at [23-34], per Lord Neuberger with whom their Lordships agreed. The former dealt with whether women, whose Reduced Earnings Allowance, granted as a result of work-related injury, was replaced by a lower benefit when a man’s REA would have continued at the same level, came within the “scope” or “ambit” of A1P1 so as to enable article 14 to be relied on. It reconsidered much of the ECtHR’s previous jurisprudence under the heading “The approach to be applied henceforth”. “Possessions” were to be regarded as consistent with “pecuniary rights”; where an individual had an assertable right under domestic law to a welfare benefit, the importance of that interest should be reflected by holding [A1P1] to be applicable.” It meant that the interest fell within its ambit for article 14 purposes, rather than that A1P1 was directly engaged. If a state provided for the payment as of right of a welfare benefit, conditionally or not, “that legislation must be regarded as generating a proprietary interest falling within the ambit of [A1P1] for person satisfying its requirements.” Therefore, the question was whether “but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law to receive the benefit in question.” Although A1P1 gave no right to receive a social security benefit of any kind, if a state did decide to create a benefits scheme, it had to do so in a manner compatible with article 14.

87.
In RJM itself, the claimant lost his disability premium because he became homeless and therefore ceased to satisfy a statutory condition for its receipt. That provision came within the ambit of A1P1, and so his “other status” as homeless could be relied on to show that that existing statutory provision was unjustifiably discriminatory. Lord Neuberger concluded that Stec, though a departure from the principles normally applied to A1P1, and perhaps founded more on broad policy than strict logic, had not subsequently been doubted by the ECtHR, and accordingly concluded that disability premium, a part of the welfare system, gave RJM a sufficient “possession” to bring his discrimination claim.

88.
It is evident that the decisions in Stec and RJM give rise to issues, not fully resolved, about the relationship between how a welfare benefit becomes a pecuniary interest sufficient to be a possession, and the act of discrimination relied on as a breach of article 14. Welfare benefits are inherently discriminatory in the obvious sense that they are not made available to all regardless of circumstance. Groups are defined by characteristics which policy or legislation consider appropriate for various forms of state assistance: child benefit, state pensions, disability benefits, housing benefit and CTC/UC and so on through the whole catalogue. Necessarily some fall outside those categories, whether on a blanket or bright or arbitrary line approach. Groups, and there is no shortage of ingenuity in defining groups with “another status” in this area, can argue that they are discriminated against, in relation to a pecuniary interest, because they fall outside the scope of the welfare provision.

89.
It appears to me that the position is that, whether the legislation concerns a condition in an existing scheme under which a claimant was already receiving benefits or creates a new benefit scheme, or a new condition of entitlement in an old scheme or has imposed a condition from the outset always applied so as to preclude entitlement, the claimant is treated as having a right to that benefit, which was not to be withheld or removed by discriminatory action in breach of article 14 unless justified. The analysis involves two stages. It starts with the judgment that the benefit at issue is available to cover a defined set of circumstances of need; those who come within those circumstances of need are treated as entitled to the benefit provided to meet it; that is their pecuniary right; if a legislative criterion then precludes receipt in circumstances which the benefit covers for others, there may be discrimination by virtue of that criterion.

90.
That analysis rather highlights the need for care over the definition of “other status” in this field, rather than glossing over the need for it to be satisfied. I deal with this later, but the departure from principle in Stec, as described by Lord Neuberger in RJM, reinforces the need for rights protected by ECHR to be practical and effective, rather than extended artificially, with the real risks that judges then take decisions about the scope of welfare benefits which belong in the political sphere. That is exactly where the risks of adopting artificial definitions of “other status” are highest and closest to being defined by the fact of discrimination in the provision or removal of the benefit. That is the illegitimate bootstraps argument, defining “other status” by the fact of discrimination, to which I shall come. The link must be established through how the benefit or action relates to the substantive article at issue. Once the link is established, then the discrimination issues can be considered. Otherwise article 14 becomes a free-standing obligation, and a very broad provision indeed.

91.
Here, the need to which CTC for such a child had been addressed was the need of the third or more children. Now, subject to transition and exceptions, not of themselves directly involved in this aspect of the argument, after January 2019 no one can make a new claim for CTC, and no one can now make a new claim for CTC for a third child born on or after 6 April 2017, subject to certain exceptions, and no one can now make a new claim for CTC for a third child born on or after 6 April 2017. Subject to a few exceptions, no one receives the benefit. The need to which the benefit was addressed goes unmet for all. But no one now in receipt of CTC for a third child will stop receiving it.

92.
I do not consider that the fact that, without legislative change, a claimant would have become entitled to CTC/UC, of itself comes within the broadened approach in Stec and RJM to the ambit of A1P1.

Nobody could reasonably expect that, regardless of economic circumstance or change of government, benefits upon which they might wish to rely in the future would not be altered. There can be no legitimate expectation in the Convention sense that Parliament would not legislate to change benefits to which an individual has not already become entitled. The expectation of a prospective increase in CTC should a third child be born is not enough to create a pecuniary right or interest so as to be a possession. The expectation that, should a family with three or more children need to make a new or further claim for CTC in the future, is also not enough to create such a possession.

93.
There is nothing in those cases to support so large an extension of A1P1 and its ambit as these Claimants would need, who were never entitled to CTC for the third child, even at the date of conception. No child born on or after 6 April 2017 could have been conceived before the legislation, expressly including that date, was passed, with some publicity. No existing benefit entitlement has been removed. The fact that someone with three children born before that date could not now make a fresh claim, or wholly new claim, for CTC for the third or more children, involves no act within the ambit of A1P1. The law simply changed with effect on future claims. Accordingly, I conclude that the 2016 Act does not come within the ambit of A1P1.

94.
There is no link with article 12, and the right to found a family. I cannot see how the absence or presence of a particular form of child benefit is linked to that right or constitutes one of the "modalities of the exercise of the right" to found a family. I see no Strasbourg or domestic authority to that effect, though there has been no shortage of alterations to benefits in a way which, impinging on a family's overall budget or accommodation, could have had that effect. Of course, there is a potential overlap with article 8, but article 12 has been generally given a tighter interpretation, with a close but not necessarily each way link between its two parts, and it appears unlikely that article 12 links could potentially do service with article 14 where article 8 could not.

95.
The same reasons which I gave as to why article 9 is not directly engaged also apply to preclude this change in welfare legislation coming within its ambit for the purpose of the link to article 14.

96.
So far as article 8 and article 14 are concerned, there is both Strasbourg and domestic illustration of links between the two, which I shall have to consider for their relevance to the facts here, and they do relate to social welfare legislation.

97.
Okpisz, above, found that, after several years of receiving it, the refusal of further child benefit to immigrants following a change in the law requiring them to have a permanent residence permit which they had been refused, fell within the "ambit" of article 8 for article 14 purposes.

98.
Here, the link between articles 8 and 14 can only be furnished by the fact that a CTC/UC will not be paid to third or further children born after a date fixed well before conception or for new or further claims for a third or further child whenever born. Okpisz might perhaps have intended to go that far because [32] opens with the words "By granting child benefits, states are able to demonstrate their respect for family life…the benefits therefore come within the scope of that provision." And it may be thought that, for example, the introduction of a new benefit to support children would fall within the "scope" of that provision, without there being any right to have the new benefit created, but

nonetheless linking article 8 to article 14 such that an unjustified discriminatory provision would breach article 14 with article 8.

99.
I have come to the conclusion, however, that Okpisz is not to be taken as a general statement of a link between articles 8 and 14 in relation to social welfare benefits, or as intending to create a link of the breadth necessary here. It is not sufficient to point in a very general way to a link between a benefit, family income and family life. Okpisz contains very little reasoning and analysis, for that short Chamber judgment to be given so wide an effect; the offending legislation removed an existing benefit; and the legislation was being replaced anyway. It was clearly not treated as a case for the testing and consideration of important principles, but as a rather straightforward case. I would have expected something much clearer from Strasbourg if legislation on benefits, merely by affecting household income, whether or not calculated by reference to the needs of one or more children, could come within the ambit of article 8 or do so because it could affect a decision as to whether to have a third or subsequent child. I would have expected the decade or more since Okpisz was decided to have produced something more from Strasbourg, were that its interpretation of the articles, and certainly if it were to be taken as its established jurisprudence.

100.
MA/Carmichael, above, concerned the amendment to Regulations whereby housing benefit in the social housing sector was reduced to reflect what was considered to be its under-occupation; the so-called removal of the spare room subsidy or imposition of the bedroom tax. The claimants contended that the amending Regulations breached article 14 ECHR, taken with article 8, and A1P1. The Court of Appeal in two different constitutions found that they breached article 14.

101.
Mrs Carmichael succeeded in her challenge based on article 14 because the bedroom, for which now no housing benefit was to be paid, was needed by her because her disabilities meant that she could not share a bedroom with her husband. Unless he or she received support, they would have had to pay for a room they needed, in order each to have a room to sleep in to remain as the one family in a household. The precise basis for her success may have been unexpected.

102.
It was common ground that the receipt of housing benefit was a possession for the purposes of A1P1 and its removal from those who were receiving it was an interference which required justification. The Court of Appeal had decided the case on the basis that, although article 14 was engaged because of the admitted engagement of A1P1, (see [4] of the judgment of Lord Dyson MR [2014] EWCA Civ 13), the discrimination had been justified. That justification was where the Supreme Court expressed its disagreement with the Court of Appeal. However, at [49], in Lord Toulson's judgment, he concluded that he would allow Ms Carmichael's appeal because of a violation of article 14 taken with article 8. There is no reference to a different argument being raised in the Supreme Court in relation to article 8, and it is not clear why there should have been. No reasons are given for its allowing the appeal on the basis of that different article, when the debate was about justification. However, the parenthetical comment in [49], about A1P1 adding nothing, shows the reference to article 8 to be no slip, and it was agreed by four other Justices; nor was it the basis at all of the dissenting judgments. The nature of that link to article 8 is clear in Mrs Carmichael's case.

103.

Certainly it shows that article 8, with article 14, is not excluded from the social welfare context. How far it goes is another matter.

104.
Mr Drabble submitted that Mr Eadie's attempt to restrict the significance of MA/Carmichael for the "ambit" of article 8 to such clear cases, as the removal of any existing benefit, foundered on the appeal in Rutherford in which the Secretary of State was unsuccessful. This concerned overnight accommodation for the professional carers of the disabled child. But the facts, as set out in the appendix to MA /Carmichael, show that without the bedroom for the professional respite carer, the grandson would have to go into a care home. So there was a clear link to article 8, of very much the same strength as in Carmichael. Moreover, the appeal in Rutherford was dismissed on the basis of the Court of Appeal decision; [2016] EWCA Civ 29, notably at [72 – 74]. The Court of Appeal reached its decision, as it seems to me, on the basis that the relevant regulations created an irrational and unjustifiable distinction between disabled adults, whose overnight respite carers were allowed a separate bedroom for the calculation of housing benefit, and disabled children, whose overnight respite carers were not. This did not accord with the UNCRC obligation to treat the best interests of the child as a primary consideration. The Court of Appeal judgment makes no reference to the ECHR article to which article 14 was linked. The correct understanding of Rutherford to my mind is that it was following MA in the Court of Appeal, and so adopted, so far as article 14's unspoken link was concerned, the MA Court of Appeal link through A1P1, which would not have been controversial, and would readily have been assumed. It does not however advance either the A1P1 argument, nor the article 8 argument, if that in fact was the basis for the decision.

105.
The link provided between articles 8 and 14 in MA/Carmichael is not that housing benefit schemes or welfare legislation in general affect how families live and so link article 8 to article 14. I would have expected some clear and reasoned statement by the Supreme Court, if such a decision were intended involving so large a step, instead of the short statement in [49] on the facts of a particular case. There were instead two specific aspects. First, a specific benefit which each of those two claimants was receiving was being capped, or as in Okpisz removed; second, although article 8 could not be engaged directly, the effect on family life in each case from its removal was direct and real. Okpisz was not cited in MA/Carmichael, and the latter cannot be taken to have confirmed that possible but very wide view of Okpisz, which I believe is wrong. The two aspects to which I have referred, namely the removal of an existing benefit with a direct effect on family life, together show the established limit of the link. They explain why the reasoning was in such short form, because those aspects made it obvious – and why A1P1 added nothing.

106.
In my judgment, the two child provision does not come within the "ambit" of article 8. The Claimants' circumstances are not remotely those of Carmichael or Rutherford. The effect is plainly not of the direct nature seen in MA/Carmichael. Although one purpose in changing the legislation is to alter the circumstances in which families in receipt of CTC/UC will make decisions or choices about having a third child or more, Mr Eadie is right that the amount of income available to any potential parent will have the potential to affect such choices. More is required before a decision on the levels of benefit or family income comes within the ambit of article 8 for the purposes of article 14. No recipient of CTC, as at the date of the change is affected. The impact of legislative change is on future claims and claimants. And I can see no sound basis for holding that, for article 8/article 14 "ambit" purposes, it should be considered in isolation from the other state support available for a third or further child

within the claimant family. For future claims, the argument in reality would have to be that respect for family life required a state to provide benefits and of a particular sort. I can envisage extreme circumstances, for example akin to article 3, where that might be so, but that is not the position here, nor the argument.

107.
Lord Carnwath, at [31], of R(HC) v SSWP was prepared to “proceed on the basis” that welfare benefits could fall within the ambit of article 8 for the purposes of article 14. But the Supreme Court decision in MA/Carmichael shows that they can do so for certain circumstances, rather than generally. I see no basis in any Strasbourg or binding domestic authority for going further than MA/Carmichael. And that is what the Claimants need to do, by a very long way.

Issue 3: the basis of discrimination

108.
The next issue is whether, if the 2016 legislation falls within the ambit of article 8 or A1P1, there is discrimination at all which would require justification to avoid a breach of article 14. This requires consideration first of the possible bases for such discrimination, including “other status”. It was not at issue that there was indirect discrimination against women, brought about by the change, and that that required justification. This indirect discrimination arose from the fact that 90 percent of single parents with children are women, and they make up about 33 percent of families in receipt of CTC. So, taking all female parents together, they are more likely to be affected than men by changes to CTC, and indeed by changes to any child-related benefit.

109.
I do not accept that there is discrimination on the grounds of “birth”, within article 14. This is concerned with issues such as legitimacy. I do not think that it can be extended to cover the order of birth. There is an issue, to which I shall come, over the exception for the child cared for by a family member, but that is particular to that exception. The date of birth, by reference to the date for the operation of the two child rule is no more than a reflection of the legislation itself. If justified, the date, like most dates in legislation has something of the arbitrary about it, and could not show any unlawfulness in otherwise lawful legislation. In view of the breadth of the concept of “other status”, there is no reason for the specified groups to be given wide application.

110.
Ms Mountfield QC for the EHRC suggested that there was also discrimination by reference to religion within article 9 because those who had a religious or ethical objection to contraception or abortion, were faced either with sexual abstinence or transgressing their moral or religious beliefs or values. I do not accept that that is any different in nature from the decision that any woman, or man for that matter, with two children, married or single, would face: can I afford another child and if not, what do I do to avoid pregnancy, if anything? Some may face that decision after having more children than others, but I see no discrimination by reference to religious or ethical beliefs.

111.
The major issue under this head is whether Mr Drabble and Ms Mountfield are right to submit that there is an “other status” of being a “child with multiple siblings” or “a child with multiple siblings affected by the two child rule”. Mr Drabble also submitted that “a child” could have a status. However that was expressed, there was discrimination against such a group.

112.

I accept that the concept of “other status” is to be given a broad interpretation, as shown by Mathieson, above. The parents of a severely disabled child received disability living allowance, DLA, in respect of him at the highest rate. He was admitted to an NHS hospital, staying there for 13 months. DLA was suspended under relevant Regulations once he had been an in-patient for more than 84 days. The child appealed against the suspension on the ground that it breached article 14 ECHR, taken with A1P1. The Court of Appeal had rejected the argument that the justification for the suspension of DLA after 84 days should be considered in the light of article 3.1 UNCRC, and the UN Convention on the Rights of Persons with Disabilities. It was conceded that the provision of DLA or its suspension fell within “the scope or ambit” of AIPI, in the sense that the action was sufficiently linked to A1P1 for article 14 to apply to the action. The link could be established by a relationship short of an actual right to DLA, or not to have it suspended, under A1P1. The question was whether he had any “status” within the meaning of article 14 on which the decision to suspend his DLA was based. The appeal was allowed on the basis of a “status” as “a severely disabled child in need of lengthy in-patient hospital treatment” or as “a child hospitalised free of charge in an NHS hospital”. This status was not within the scope of any of the listed grounds of forbidden discrimination but was “any other status”.

113.
Lord Wilson’s judgment showed that such “other status” included but extended well beyond innate characteristics or personal characteristics which a person did not choose or cannot or should not be expected to change. RJM, above, showed that “other status” included homelessness, albeit that the focus was on “what somebody is, rather than what he is doing or what is being done to him”. He cited Lord Walker’s approach from [5] of RJM which I set out here:

““Personal characteristics” is not a precise expression and to my mind a binary approach to its meaning is unhelpful. “Personal characteristics” are more like a series of concentric circles. The most important personal characteristics are those which are innate, largely immutable, and closely connected with an individual’s personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person’s family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual’s personality (they reflect, it might be said, important values protected by articles, 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify.”

114.
Lord Neuberger in agreeing with Lord Walker’s approach, had also agreed in RJM with what had been said in R (Clift) v SSHD [2006] UKHL 54, [2007] 1 AC 484, that a generous meaning “should be given to “other status”, not too closely limited by the grounds specifically prohibited in article 14. But distinctions still existed: treating offenders differently because of the different types of offending was distinguishing not groups of people but “types of offence”. That distinction between different offences and the offenders who committed those different offences, drawn by the ECtHR, is not

straightforward as it is the offenders who experience the different treatment – which of course, their different offences may amply justify.

115.
Lord Neuberger also saw that approach as consistent with, and to my mind therefore approved, the continued application of what Lord Bingham had said in Clift that “a personal characteristic cannot be defined by the differential treatment of which a person complains”.

116.
Lord Wilson in Mathieson, referred to what had happened to Clift. The House of Lords had rejected Clift’s claim to “other status” based on his being a person sentenced to a term of at least 15 years. This had meant that the Secretary of State for the Home Department could reject a Parole Board recommendation for his release on licence after serving half of his sentence, whereas the Secretary of State for the Home Department had no such power in relation to those sentenced to life imprisonment or to less than 15 years. The ECtHR had accepted his claim, commenting that whether a difference was based on “a personal identifiable characteristic” was to be decided on all the circumstances of the case, bearing in mind that the rights guaranteed are practical and effective. Lord Wilson commented that the House of Lords in deciding Clift “had articulated an inhibition, less keenly felt by this court nowadays, about extending the meaning of the Convention terms beyond what the [Strasbourg] Court had “authorised…”. Discrimination on grounds of disability was specifically prohibited; discrimination on the grounds of degrees of disability was within those of Lord Walker’s three circles closer to the centre.

117.
In my judgment, the concept of “other status”, broad though it may be, must be given meaning and cannot be treated as having diminished to vanishing point, in the light of those and other authorities. After all, the Supreme Court in RJM applied it to the concept of homelessness. Lord Wilson in Mathieson at [22] did say that, after Clift it was clear that if the alleged discrimination fell within the scope of a Convention right, the Strasbourg court was reluctant to conclude that the applicant had no relevant status, which is quite the reverse of “status” ceasing to be a relevant issue.

118.
Lord Mance and Lord Hughes, in R(Kaiyam) v Secretary of State for Justice [2014] UKSC 66, [2015] AC 1344 at [52], referred to a comment by the Strasbourg Court in Clift to the effect that where supplementary rights were provided by a state, which fell within the ambit of the substantive Convention rights, article 14’s role was to ensure that the supplementary rights “are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified.” They expressed the view, obiter, that read literally that could eliminate any consideration of status. They said so in order to reject such a conclusion, as is plain from their brief consideration of whether pre and post tariff prisoners enjoyed different statuses.

119.
In Stevenson v SSWP [2017] EWCA Civ 2123, at [41] the Court of Appeal considered what they had said. Henderson LJ, with whom Arden and Jackson LJ J agreed, did not suggest that that point had been reached in the Strasbourg jurisprudence. That shows that “status” still matters for article 14. But he added that in the majority of cases “it is probably now safe to say that the need to establish status as a separate requirement has diminished almost to vanishing point.” This seemed to him “to provide a realistic recognition of the direction in which the Strasbourg court’s jurisprudence is moving”, reinforcing what Lord Wilson had said in Mathieson to the effect that the question of status

would “normally be answered in the claimant’s favour on the basis that he or she possesses either a personal or an identifiable characteristic assessed in the light of all the circumstances of the case.”

120.
The Court of Appeal appears not to have been referred to what the Supreme Court said in R v Docherty [2016] UKSC 62 at [63] in the judgment of Lord Hughes, with which Lords Neuberger, Mance, Reed and Carnwath agreed. It showed a careful approach to the definition of status, and affirmed the importance of status being defined otherwise than by the terms of the treatment complained of, the “bootstraps” argument.

121.
Unless and until the Strasbourg Court explicitly states, and the Supreme Court explicitly accepts, that express words in the Convention itself are generally to be ignored because made redundant by its interpretation, meaning and purpose must be given to them. The dictum, for it is no more, in Stevenson does not sit well with Supreme Court authority, including that to which it was not referred, and appears to go beyond what Lord Wilson himself intended. But either way, I am bound by the Supreme Court, and not the Stevenson dicta, and I intend to consider status as an issue and one separate from the treatment leading to the allegation of discrimination. I recognise, in so doing, that the concept is a broad one and has a purpose.

122.
Mr Drabble submitted that children as a group were disproportionately disadvantaged as a child was more likely than an adult to be a member of a household “financially affected by the two child rule”, which gave an income lower than they would otherwise have enjoyed, and which could be lower than the “subsistence” level. It reduced all children to “appurtenances” of their parents, rather than them being considered individually for entitlement to subsistence benefits. Only households with children could be affected. They were more likely to be affected in such households because there would never be more than two adults in the household, whereas there could be one, two or three or more children in a household with children. Some of this I consider to be a rather overstated description of the effects.

123.
“Child” could constitute a status: but there is no discrimination against children as children. I agree with Mr Eadie that Mr Drabble’s approach is wrong: the only group in comparison with which there could be discrimination against children in general is adults in general, that the difference arises from their different legal status, and the amount which parents may claim for the household.

124.
Mr Drabble next submitted that, though not all children were discriminated against, children were discriminated against indirectly because there was a disproportionately prejudicial effect on “children with multiple siblings.” This was the particular group he mostly relied on, and it is that “other status” which has to be shown. In DH v Czech Republic (2008) 47 EHRR 3 at [175], the case he relied on for the role of indirect discrimination under article 14, the group was “Roma” and not all Czech children.

125.
I accept Mr Eadie’s submission that this cannot constitute an “other status”. Of course, the personal characteristic which defines the “status” does not have to be innate or acquired, but can be imposed, or the upshot of circumstance, as with homelessness. However, the number of siblings or child siblings that a child may have, cannot sensibly be described as a personal characteristic of that child.

126.
An only child might have a status, so too might a child with siblings, or all dependant children living in a family or even all dependants below 21, applying a broad approach. But that is not enough for Mr Drabble's purpose; the inclusion of the word "multiple" is to bring in the effect of the third child and to contrast it with families with only one or two children. However, apart from the legislation at issue, I can see no reason why a child with no or one sibling should be treated as of a different status from one with two. Nor is it parents generally or parents with two children who have this "other status." The two children of a parent who may decide, perhaps reluctantly, to have no more, are not included in this status, whether the parent was receiving CTC or not; but if a parent with two children did decide to have more, all the children would then be part of the group, for the suggested status is not confined to the third or further children, but would cover the, usually, older pre-existing children of the family. Nor is it easy to see why siblings of any age help define that status, whether or not they are independent adults. If it is dependant sibling children, it would not cover adults up to 20, who could be "qualifying young persons," for the purposes of CTC/UC but it is not, at least explicitly, the Claimants' aim that they be excluded from the definition of the status discriminated against.

127.
Nor is it easy to see why "sibling" ("offspring of the same parent or parents", Shorter OED) is the word chosen, given the variety of family arrangements, more or less informal, in which children may find themselves, with others who may be no natural relations at all, or in a family other than the one in which all their other siblings live. In the former, would live some who would not count for the purposes of this "status" and in the latter, the status could reflect ties wholly unrelated to any sense of a group. This definition could create perverse distinctions of itself.

128.
But although necessary in order to find a group in respect of which discrimination can be alleged, Mr Drabble's efforts are no different in substance from Ms Mountfield's definition which incorporates directly the effect of the legislative change. It relates the definition to the two child rule, and defines the group by reference to the alleged discriminatory treatment rather than independently of it. This has the merit of squaring up to the issue but the disadvantage of requiring the status to be defined by discrimination, and the legitimacy of the 'bootstrap' argument to be recognised, contrary to Supreme Court authority and indeed ECtHR jurisprudence, taken at face value with the text of the Convention itself.

129.
Mr Drabble either has to argue for a status too broad for him to show that it has been discriminated against, or his suggested status, if he defines status so that he can show that those within it have suffered adverse treatment, has to be defined by reference to the allegedly discriminatory treatment itself. The group is defined in reality, and however it may be cloaked, as children affected by the legislative change compared to those who are unaffected; the existence of such a group falls foul of the bootstraps argument; the status arises solely because of the legislation. It therefore does not satisfy a basic requirement for an article 14 "other status" to arise.

130.
It also seems to me that these efforts illustrate the problem with a broad approach to "pecuniary interest" and "possessions" for the purposes of A1P1 with article 14, if allied to a carefully worded status, which teeters, more or less unsuccessfully, on the edges of definition by reference to the discrimination alleged. I have already adverted to the range of people and circumstance which legislation carefully defines for the purpose of welfare legislation. Very real problems would be

created for Parliament or secondary legislation if either had to anticipate “other status” defined with this ingenuity, or defined by reference to the discrimination asserted, in order to avoid legislating in a manner incompatible with the ECHR, let alone incompatibly with the procedural tests in article 3.1 UNCRC as elaborated by General Comment 14, if this can illuminate the meaning of article 8 in that way. Definition by the discriminatory act, if status can be so defined in this area, risks making the Courts the judges of the direct justification for many legislative choices in the welfare arena.

131.
If however, there were such a status as “child with multiple siblings”, Mr Eadie is right that the status is at best of the “peripheral and debatable type”, which affects the nature of the justification required.

Issue 4: the justification for discrimination under article 14

132.
On the assumption that the two child provision comes within the ambit of either or both of articles 8 and A1P1, I now consider the justification for discrimination, but confined to the acknowledged indirect discrimination against women, and the asserted discrimination against “children with multiple siblings”. The only ECHR article to which that latter can be linked is article 8, though I see no difference in the tests for or substance of the justification as between those two ECHR provisions. Both are forms of indirect discrimination, to use the concept of UK domestic law. Consideration of articles 9 and 12 adds nothing anyway.

133.
The approach to the assessment of justification for a difference in treatment is the same as for an assessment of the proportionality of an interference with a Convention right: see for example what Lord Kerr said in In re Brewster [2017] UKSC 8, [2017] 1 WLR 519 at [66]:

“The test for the proportionality of interference with a Convention right or, as in this case, the claimed justification for a difference in treatment, is now well settled: see the judgments of Lord Wilson JSC in R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening) [2012] 1 AC 621, para 45, Lord Sumption JSC in Bank Mellat v HM Treasury (No 2) [2014] AC 700, para 20 and Lord Reed JSC in Bank Mellat, at para 74. As Lord Reed JSC said:

“it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter…”

134.
There are some difficulties in applying that fourfold test in distinct stages to article 14 cases, if it is the task of the court to consider the importance of the provision as a whole, where there is no interference with a protected right other than under article 14. This is because the justification relied on goes to each stage.

135.
There is no controversy now over the test which has to be satisfied in relation to those four stages by the justification for discrimination under article 14: it is the “manifestly without reasonable

foundation” test; MA/Carmichael at [29-38] in the judgment of Lord Toulson in which on this issue all of the seven Justice Court concurred; the larger constitution was chosen, as I understand it, to resolve the previously more varied and contradictory jurisprudence of the Supreme Court. This decision came out on 9 November 2016.

136.
The first question addressed by Lord Toulson with whom Lords Neuberger, Mance, Sumption, and Hughes agreed, was the test for the justification of discriminatory treatment: was it that the discriminatory treatment was “manifestly without reasonable foundation”? He agreed with the analysis by Baroness Hale, with whom the whole Court agreed, at [15-19] in Humphreys, above, citing it extensively at [29]. Stec v UK (2006) 43 EHRR 47 provided the proper approach to justification in discrimination involving state benefits:

“16 The court repeated the well known general principle that ‘A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised’ (para 51). However, it explained the margin of appreciation enjoyed by the contracting states in this context, at para 52: ‘The scope of this margin will vary according to the circumstances, the subject matter and the background. As a general rule, very weighty reasons would have to be put forward before the court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the state under the Convention when it comes to general measures of economic strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the court will generally respect legislature’s policy choice unless it is “manifestly without reasonable foundation”.

137.
After citing House of Lords and Supreme Court authorities adopting that same test, Baroness Hale, in Humphreys, had noted that the test was the same even if the ground of discrimination were a “suspect” ground such as race or sex. But the fact that the reasons did not need to be weighty, did not mean that they should escape careful scrutiny. There was no good reason for departing from that decision.

138.
Lord Toulson emphasised that the fundamental reason for the application of the “manifestly without reasonable justification” test by a domestic court was that choices about welfare systems involve policy decisions on economic and social matters which were pre-eminently for national authorities; [32]. Lord Dyson MR had rejected the claimants’ argument that their challenge was not to policy or economic or social judgment, but to the details or technicalities of its implementation, thus claiming that test was inapplicable. He had rejected it because, though the precise scope and detail of the Regulations might not be matters of high policy in themselves, they formed part of high policy decisions and could not be dismissed as mere technical detail; a variable test depending on such distinctions would lead to undesirable uncertainty and was not sanctioned by any Strasbourg or domestic authority.

139.
Lord Toulson illustrated his agreement with Lord Dyson by pointing out that the broad question for the Secretary of State, in relation to the particular provision in the Regulations relating to those with

disabilities, had been whether to deal comprehensively with all disability problems by precise rules, or whether to accommodate them by a linked system of discretionary benefits. That too was a question of economic and social policy but it was also integral to the structure of the welfare benefit scheme. Departure from the normal approach would too readily enable a skilled lawyer to circumvent the general policy by couching a discrimination complaint as an attack on matters of detail.

140.
Uncertainty over the “manifestly without reasonable foundation” test was briefly reintroduced by the Supreme Court’s decision in R(A and Another) v Secretary of State for Health [2017] UKSC 41, [2017] 1 WLR 2492, at [33], argued on 2 November 2016, obviously without reference to the judgment in MA/Carmichael, and with its judgment published on 14 June 2017, also without making reference to MA/Carmichael. This concerned the refusal of abortions on the English NHS for residents of Northern Ireland; the outcome would not have been affected, though [32] in which all agreed, excluded the “manifestly without reasonable foundation” test from the fourth question of the breakdown of justification. This does not appear to be consistent with MA/Carmichael, and cites earlier authority not followed in MA/Carmichael. But that hiatus in consistency lasted but a short while until, on 15 November 2017, in a case argued on 21-22 June 2017, R(HC) v SSWP [2017] UKSC 73, also known as Sanneh, the Supreme Court, at [32], adhered expressly to MA/Carmichael.

141.
There is some debate about what it is which needs to be justified by such a test. In SG/JS at [135iii], in his analysis of common ground between their Lordships, Lord Hughes referred to “the scheme as a whole, including its discriminatory effects” as what needed to be justified, common ground which Lord Kerr agreed at [233]. Baroness Hale, with whom Lord Kerr also agreed, explained at [189] that in a case of indirect discrimination, it was the policy or scheme which had to be justified and not the discrimination, by contrast with direct discrimination. Lord Reed referred to DH above, and the need for discriminatory treatment to be justified, [13]. DH is a case of indirect discrimination in which it was the difference in treatment which had to be justified, [177] and [207]. Baroness Hale cited s19 of the Equality Act 2010; she also cited Strasbourg authority earlier than DH.

142.
It may not matter a great deal here in view of the nature of the justification for each, but I will consider both aspects: justification for the provision, and for the difference in treatment. I do not, however, see the direct/indirect distinction being drawn by Strasbourg in its approach to article 14, and what needs to be justified. It obviously does not need to adopt the approach enjoined by domestic legislation. I see Strasbourg as taking a rather broader approach to identifying the discrimination and its justification.

143.
I turn to assess justification and proportionality applying the “manifestly without reasonable foundation” test. There is a danger in “double discounting” here; the fact that the proposals were in the election manifesto of the party which then formed the Government, is already allowed for in the breadth of the test, and adds nothing. The fact that the action complained of is primary legislation, which has passed through all the stages for an Act, with debate on the broad policy justification and some of the details, places a greater need for care in the way the test is applied, than may be warranted for secondary legislation, or, say, guidance approved by Parliament as to how an Act or Regulation should operate.

144.

As Lord Reed said in SG/JS above at [92-95]:

“92 Finally, it has been explained many times that the Human Rights Act 1998 entails some adjustment of the respective constitutional roles of the courts, the executive and the legislature, but does not eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their accountability and their legitimacy. It therefore does not alter the fact that certain matters are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as matters of that nature have to be considered by the courts when deciding whether executive action or legislation is compatible with Convention rights, that is something which the courts can and do properly take into account, by giving weight to the determination of those matters by the primary decision-maker.

93 That consideration is relevant to these appeals, since the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. It is therefore necessary for the court to give due weight to the considered assessment made by those institutions. Unless manifestly without reasonable foundation, their assessment should be respected.

94 As I have explained, the Regulations were considered and approved by affirmative resolution of both Houses of Parliament. As Lord Sumption JSC observed in Bank Mellat v HM Treasury (No 2) (Liberty intervening) [2014] AC 700, para 44:

“When 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.”

95 Many of the issues discussed in this appeal were considered by Parliament prior to its approving the Regulations. That is a matter to which this court can properly have regard, as has been recognised in such cases as R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246, R (Hooper) v Secretary of State for Work and Pensions [2005] 1 WLR 1681, R (Countryside Alliance) v Attorney General [2008] AC 719 and R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] AC 1312. Furthermore, that consideration followed detailed consideration of clause 93 of the Bill, which became section 96 of the 2012 Act. It is true that details of the cap scheme were not contained in the Bill which Parliament was debating, but the Government’s proposals had been made clear, they were challenged by means of proposed amendments to the Bill, and they were the subject of full and intense democratic debate. That is an important consideration. As Lord Bingham observed in R (Countryside Alliance) v Attorney General [2008] AC 719 para 45: “The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament.” The same is true of questions of economic and political judgment.”

145.
I have set out the justification and debate in relation to the particular part of the 2016 Act at issue.

146.
In my judgment, the objectives (1) of reducing the budget deficit and, as part of that, reducing the amount spent on welfare benefits, including CTC, (2) altering the balance between the taxpayer and the recipients of benefits, placing the recipients of benefits in a position where they have to make choices of a sort which those not in receipt of benefits have to make about family size, and (3)

encouraging recipients of benefits to work and make progress in work, are all legitimate objectives for Parliament to give effect to through specific steps, including a reduction in expenditure on CTC.

147.
It is inevitable that, if child–related benefits, paid to a parent and used by the household, are reduced or not made available for a third or further child, that that will affect more women, because of the higher proportion of single-parent households which they make up. It is inevitable, likewise, that the third child, or the other two, or all of them, will be affected by CTC not being available for the household in respect of the third child, in relation to new CTC claims. Of course parental behaviour may be affected in some cases by the absence of CTC for a third child, and it would be surprising if no choices were affected by it.

148.
However, the underlying policy given legislative effect is undeniably legitimate; the measure is rationally connected to the objective; and a less intrusive measure could not have been used without compromising the achievement of the objectives, for example by reducing the savings, at the expense of the taxpayer who might be compelled to make choices from which the welfare recipient would be to some extent freed. One only has to look at the debates in Parliament, and to consider the general lines of the issues, to see that this Court cannot rule that the underlying objective is not lawful without stepping a long way beyond all judicial limit. It is only too easy to see how, in political terms, the debate about competing interests and the drawing of lines, unfolds or is perhaps ignited.

149.
It is not for the Court to rule that some other welfare provision, unspecified as beyond its responsibility, should be cut, or that CTC should not be cut, or should only be cut by reference to some equally unspecified criteria but not the number of children in the family. If the Court makes decisions of that sort, however specific it is or is not about alternatives, it would make considerable incursions into the exclusive territory of Parliament, or of the executive accountable to Parliament. The court is not concerned either with the effectiveness of the measure in reducing child poverty or increasing it. That is a political judgment.

150.
In reality, the Court can only then be concerned with whether the discriminatory effects are justified, whether the discriminatory effects are rationally connected to the objective, whether a less discriminatory measure could have been used without unacceptably compromising the achievement of the objective and whether, balancing the severity of the discrimination against the importance of the objective to the extent that the discrimination will contribute towards its objective, the achievement of the latter outweighs the former.

151.
It is clear that the objective could not be achieved at all if the limit of CTC to two children could not be achieved, and third or further children had to be able to receive CTC. Of course, it would be possible to reduce the rate of CTC, or to increase the rate and levels at which income led to benefits tapering off. I have no evidence, or at least not that I am aware of, which analyses such possibilities, but even if comparable savings could be achieved in that way, it still could not achieve the objective of putting welfare recipients into a position where they had to make choices about having a third child, more closely resembling the position of those who were not welfare recipients, and it would affect the way in which individuals were encouraged into work or to seek better paid work including via promotion and improved skills.

152.
For all those reasons, in so far as this case relies upon asserted discrimination in respect of “children with multiple siblings”, neither the policy nor the discrimination is manifestly without reasonable foundation and so there is no incompatibility with the ECHR on that account.

153.
I turn to the position of the single parent household which is a little more problematic; 90 percent of them are headed by the mother, and it is that which gives rise to indirect discrimination against women in the scheme as a whole.

154.
If single-parent households did not have the CTC limit applied, were they to have a third child, this particular indirect discrimination would not arise, and if disapplication of the limit were not confined to females, no further discrimination would arise either. I have already dealt with the four stages in so far as they relate to the legislative scheme, which clearly passes those tests. So I consider the justification for the discrimination.

155.
As Mr Eadie submitted, the question then is whether Parliament ought to have enacted, or through Regulation created, an exception covering single-parent or single mother households. In my judgment the absence of such an exception does not create any unjustifiable discrimination against women.

156.
Mr Higlett pointed out that about 34% of the 900,000 families with three or more children currently on tax credits were lone parents, just over two thirds of whom were not working. 87 percent of lone parent families had one or two children, a marginally higher percentage than two-parent families. The number of lone parent households, very largely single mother households, affected by the application of the two child provision to future claims in respect of three children born before 6 April 2017, therefore seems unlikely to be large. Similarly, those who after the change have a third child, to which no exceptions apply, seems likely to be small.

157.
There is a range of other benefits or welfare provision which is not affected and from which they will continue to benefit. I do not consider it realistic to ignore the way in which the single mother claimants have described themselves as affected by the change in CTC provision, which illustrates how CTC is regarded as part of the family’s overall income. Where the effect of an alteration to benefit calculated by reference to the needs of a child is being considered, whether increased or decreased, it would be wholly artificial to require the other resources of the household to be ignored, whether state or private. I see no rule that requires Government or Parliament always to distinguish between benefits calculated by reference to a household from those calculated by reference to a child or number of children. And some of the costs of additional children vary obviously with their closeness in age.

158.
I can also see the problematic perverse incentive to split or not to form households, if an exception were made for single parents or single mothers. The single mother or father with CTC has to make a decision about the availability of her or his resources to sustain a third child, as would a single mother or father not in receipt of CTC.

159.

Of course, Mr Drabble was not suggesting that the issue should be resolved by an exception for single mothers or single parents, but it does illustrate how the justification for this indirect discrimination is not a mere matter of technical detail, but goes to the very operation of the scheme. I accept that there can be a different perverse incentive not to form households in the scheme as enacted, but that does not advance an argument that other or alternative sorts of perverse incentive should be created in order to avoid indirect discrimination against women, nor does it help show that the scheme has a manifestly unreasonable foundation. It merely reflects the fact that general provisions and particular exceptions require bright line definition, with what may be quite difficult problems to resolve. This does not show the lack of proper justification for the overall reduction in the availability for the future of CTC, or more aptly, it does not show that it is manifestly unreasonable whether it is the policy or the discrimination itself or a more general view of each which is being justified.

160.
Accordingly, if there were discrimination, I consider that it has been justified, and no breach of the ECHR arises.

Issue 5: the United Nations Convention on the Rights of the Child and the ECHR

161.
Of course, the UNCRC is not incorporated into UK domestic law. Its role arises here only in relation to the article 14 issues. Such a role can only be one of illuminating the interpretation of article 14 and any article to which it is linked. Its effect in such a role is controversial. I need to consider its role in article 14 in relation to two forms of discrimination: the admitted discrimination indirectly against women, and the asserted but rejected discrimination against children with multiple siblings. It was argued by the Claimants, and especially by the EHRC, that the ECHR link to the justification for the two child provision required analysis by reference to the UNCRC, and interpreted with the UNCRC, the ECHR was breached by the two child provision.

162.
Ms Mountfield referred to a number of other international conventions, but they do not add anything to this debate.

163.
The provisions of the UNCRC specifically relied on are as follows:

“Article 2

1.
States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2.
States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination, or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.

Article 3

1.

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.

Article 26

1.
States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.

2.
The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1.
States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2.
The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3.
States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4.
States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad."

164.
Although ECtHR jurisprudence provides examples of the interpretative role of the UNCRC, it offers very little which affords guidance so far as concerns primary legislation in the welfare benefit context. And there is none in that area which could be regarded as established jurisprudence. The issues have been considered to an extent in two recent Supreme Court cases: SG/JS and Mathieson. I have set out the judgments at greater length than normally appropriate to help me to keep in mind the varying strands in the judgments and what they did or did not decide. There are also very significant arguments, adumbrated and recognised but not resolved, about the way in which the UNCRC is interpreted and how, breached or not, it is to be used in confounding the justification, for welfare benefit legislation, put forward by Government as its maker or promoter. I refer to these briefly later.

165.
SG/JS considered the lawfulness of Regulations which imposed a cap on housing benefit when a claimant's existing entitlement to welfare benefits exceeded a stated amount. The Regulations were

said to be unlawful because they discriminated against women and large families, contrary to article 14 ECHR taken with A1P1 and as an alternative route into article 14, article 8. Article 8 was also used as a means of bringing in a duty on the Secretary of State to treat the best interests of the child as a primary consideration when imposing the benefits cap, drawing on UNCRC.

166.
The first judgment was delivered by Lord Reed, which focused on the article 14 argument with A1P1. Lord Reed considered the legislative process leading to the enabling legislation, the Welfare Reform act 2012, and the Regulations, so as to identify the aims they pursued. He said [16]:

“Consideration of the Parliamentary debates for that purpose is not inconsistent with anything said in Wilson v First Country Trust Limited (No. 2) [2004] 1 AC 816: the purpose of the exercise is not to assess the quality of the reasons advanced in support of the legislation by ministers or other Members of Parliament, nor to treat anything other than the legislation itself as the expression of the will of Parliament.”

167.
Lord Reed considered whether a possession had been interfered with, differential treatment between men and women, the legitimacy of the aim pursued by the Regulations, and the proportionality of the Regulations. He said at [75-76] that, in such cases, the court was concerned with whether legislation unlawfully discriminated between men and women, rather than with the hardship which might result to those most severely affected. But he regarded it as plain that a disparity between the numbers of men and women affected was inevitable if the aims of the legislation, legitimate as he found them to be, were to be achieved. The exclusion of child-related benefits from those counting towards the housing benefit cap would compromise the achievement of legitimate aims.

168.
Lord Reed then turned to what he described as an argument of a different character based on article 3.1 UNCRC. The argument initially had been that the benefit cap had an impact on the private lives of children forming part of the households affected, and so article 8 ECHR was applicable. The ECtHR would have regard to UNCRC article 3.1, when applying article 8 in relation to children. Therefore, the Secretary of State was obliged, in acting in accordance with his duty in s6 HRA 1998, likewise to treat the best interests of children as a primary consideration when making the Regulations.

169.
Of this argument, Lord Reed said at [79] and following:

“79. This argument raises a number of questions. In the first place, there is the question whether general legislation which limits welfare benefits, resulting in some cases in a reduction in household income, constitutes, by reason of the impact of that reduction in income on the lives and circumstances of those affected, an interference with their right to respect for their private and family life. If it does, the ambit of article 8 is enlarged beyond current understanding so as to embrace legislation imposing increases in taxation or reductions in social security benefits. Secondly, on the assumption that such legislation falls within the ambit of article 8.1, article 8.2 permits an interference with the right to respect for family life to be justified as being necessary in a democratic society in the interests of the economic well-being of the country. The argument that justification on that ground is impossible unless the best interests of the children affected by the measure in question have been treated as a primary consideration – not only in the sense that they have been taken into account but, as counsel emphasised, in the sense that the legislation is in reality in the best interests

of the children affected by it – has major implications for the effect of the Convention in relation to legislation in the field of taxation and social security.

80…The cases indicate that a reduction in income may have consequences which are such as to engage article 8, as for example where non-payment of rent leads to the threat of eviction from one's home, but they do not indicate that the reduction in income is itself within the ambit of article 8….

81. A more closely reasoned argument has been developed in submissions lodged after the hearing which treats article 3.1 of the UNCRC as forming part of the proportionality assessment under article 14 of the Convention read with AIPI. In consequence, a test of compliance with article 3.1 is effectively substituted for the "manifestly without reasonable foundation" test which all parties agree to be applicable in the present context. On that basis, article 3.1 is argued to be decisive of the appeals. It is therefore necessary to consider carefully how, if at all, article 3.1 bears on the issues in these appeals.

82. As an unincorporated international treaty, the UNCRC is not part of the law of the United Kingdom (nor, it is scarcely necessary to add, are the comments on it of the United Nations Committee on the Rights of the Child). "The spirit, if not the precise language" of article 3.1 has been translated into our law in particular contexts through section 11(2) of the Children Act 2004 and section 55 of the Borders, Citizen and Immigration Act 2009: ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 AC 166, para 23. The present case is not concerned with such context.

83. The UNCRC has also been taken into account by the European Court of Human Rights in the interpretation of the Convention, in accordance with article 31 of the Vienna Convention on the Law of Treaties. As the Grand Chamber stated in Demir v Turkey [2008] 48 EHRR 1272, para 69:

"The precise obligations that the substantive obligations of the Convention impose on contracting states may be interpreted, first, in the light of relevant international treaties that are applicable in the particular sphere."

It is not in dispute that the Convention rights protected in our domestic law by the Human Rights Act can also be interpreted in the light of international treaties, such as the UNCRC, that are applicable in the particular sphere."

170.
He gave three examples of the ways in which international conventions, including UNCRC, had been used domestically or by Strasbourg in the interpretation of the ECHR. As I read them, none suggest a wholesale reading into article 8 or 14 of the text of the UNCRC, or that a breach of article 8 could be founded, without more, on a breach of an article of the UNCRC; the Strasbourg Court decides on the autonomous meaning of the ECHR, albeit illuminated by or harmoniously with such of the variety of international conventions as it considers appropriate for the case; it regards itself as the master of its own Convention.

171.
As Lord Reed pointed out, the fact that the cap might breach article 3.1 UNCRC, and that it affected more women than men, said nothing of whether the cap might be unjustifiable for article 14 purposes. The question was whether the differential impact on women and men could be justified under article 14 read with A1P1.

172.
Lord Reed then said at [90] **:**

“90. Nor is the argument made stronger by being recast in terms of domestic administrative law, on the basis that the decision to make the Regulations was vitiated by an error of law as to the interpretation of article 3.1 of the UNCRC. It is firmly established that United Kingdom courts have no jurisdiction to interpret or apply unincorporated international treaties: see, for example, J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, 499 and R v Lyons [2003] 1 AC 976, para 27. As was made clear in R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE Intervening) [2009] AC 756, it is therefore inappropriate for the courts to purport to decide whether or not the executive has correctly understood an unincorporated treaty obligation. As Lord Bingham of Cornhill said, at para 44:

“Whether, in the event that there had been a live dispute on the meaning of an unincorporated provision on which there was no judicial authority, the courts would or should have undertaken the task of interpretation from scratch must be at least questionable. It would moreover be unfortunate if decision-makers were to be deterred from seeking to give effect to what they understand to be the international obligations of the United Kingdom by fear that their decisions might be held to be vitiated by an incorrect understanding.”

173.
Lord Carnwath at [100], dealing with how the interests of children affected by the scheme might be relevant to the legal analysis, pointed out that they had no relevant possessions in their own right for the purposes of A1P1, “nor are they a protected class under article 14.” But it would be artificial to ignore the effects on children when considering the nature of the discriminatory effect of the scheme on lone parents, mainly women, and its alleged justification.

174.
Article 3.1 UNCRC had originally been raised as a question of whether there had been direct compliance with it by the Secretary of State, on the basis of apparent agreement that its obligations were to be taken into account in considering ECHR obligations. That had developed, after the hearing, into a crucial issue. But Lord Carnwath dealt with it first on the basis upon which it had originally been argued. In the course of that he said, at [105], that General Comment No 14 was “the most authoritative guidance now available on the effect of article 3.1.” It had been adopted by the United Nations Committee on the Rights of the Child in 2013. He understood it to be intended “as a restatement of established practice, rather than a new departure.”

175.
This General Comment explained that “best interests” in article 3.1 was a “threefold concept” which he set out in [106] as follows:

“(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph I creates an intrinsic obligation for states, is directly applicable (self-executing) and can be invoked before a court.

(b)…

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children

concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, states parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual case." (Emphasis added).

176.
The phrase "actions concerning children" was to be read in a "very broad sense" covering actions, such as those relating to housing, where the decision would have a major impact on children and a greater level of protection and detailed procedures to consider their best interests were appropriate. These and other passages led Lord Carnwath to agree, [108], that what mattered was "the substance of what is done rather than the form", but that the evaluation "needs to consider, where relevant, the interests both of children in general and of those directly affected by the action. It also needs to indicate the criteria by which the "high priority" given to children's interests has been weighed against other considerations." Where the evaluation showed conflict with the children's best interests, it needed either to demonstrate how the conflict would be addressed or what considerations justified overriding those interests. That had not happened here. Therefore, his provisional view had been that the regulations were not compatible with the ECHR.

177.
I infer that he moved directly from non-compliance with article 3.1 UNCRC, interpreted in the light of the General Comment, to the incompatibility of the regulations with the ECHR. He did so, it appears, in the absence of any contention contrary to that approach. It is uncertain over how a breach of one convention, used as an interpretative aid and no more, could without more ado warrant a conclusion that a different convention had been breached, which appears to underlie Lord Carnwath's comments and reservations on the issue thus approached, at the end of [101].

178.
Lord Carnwath then turned to the Secretary of State's submissions, which I set out because it is said that they are close to those repeated before me.

"114 They summarised their submissions in the following six points: (i) article 3.1 of the UNCRC is a provision of an unincorporated treaty which may only be relied on to the extent that it has been transposed into domestic law; (ii) the European Court of Human Rights ("ECtHR") uses international law when determining the meaning of provisions of the Convention, in accordance with the Vienna convention on the Interpretation of Treaties; (iii) article 3.1 of the UNCRC is, as a matter of principle and in accordance with Strasbourg authority, not relevant to the question of justification of discrimination under article 14 read with A1P1. It has no role to play in determining the meaning of article 14 (read with AIPI or otherwise), and does not inform or illuminate the question whether the differential impact on women of the benefit cap is proportionate; (iv) article 3.1 of the UNCRC does not supplant, dilute or compromise the Stec test (Stec v United Kingdom [2006] 43 EHRR 1017) which all parties have agreed, at every stage of these proceedings, applies both when considering whether the aims are legitimate and when determining whether the 2012 Regulations, having regard to their differential impact on women are proportionate; (v) even if the court were to consider it foreseeable that the ECtHR may develop its case law to have the effect that a breach of article 3.1 of the UNCRC renders legislation disproportionate, there are strong constitutional reasons why the court should refrain from going beyond the current Strasbourg jurisprudence; and (vi) in any event, the 2012 Regulations do not breach article 3.1 of the UNCRC. The Secretary of State fully took into account the

best interests of the children, as a primary consideration, and these were extensively debated in Parliament."

179.
Lord Carnwath considered point (iii) and (vi) in greater detail, as he considered the others not to be controversial, and no one had argued that they should go beyond ECtHR jurisprudence. On (iii), he said that Demir v Turkey [2009] 48 EHRR 54, illustrated the application of international conventions as an aid to the interpretation of the ECHR, and he saw no reason why that should not also apply to article 14 ECHR. Indeed, the ECtHR had used article 3.1 as a prominent part of its reasoning, rather than as mere add-on or confirmatory factor, in X v Austria (2013) EHRR 405, in deciding what outcome would be more in keeping with the best interest of the child. He added at [120]:

"120 I see no inconsistency between such reference to international treaties where relevant and the Stec test. In Burnip [2013] PTSR 117, paras 27 – 28 Henderson J, giving the lead judgment, cited the passage in Stec 43 EHRR 1017, para 52 which established the "manifestly without reasonable foundation" test as appropriate for review of "general measures of economic or social strategy", and declined to adopt an "enhanced" test requiring "very weighty reasons" for the discrimination. It was in this context that Maurice Kay LJ, who agreed with Henderson J on the issue of justification (para 23), drew assistance from the CRPD."

180.
Lord Carnwath then turned to compliance with article 3.1 UNCRC. [122] is important in view of the submissions here. I quote:

"122 It is not in dispute that, as asserted, issues in relation to the interests of children "were extensively debated in Parliament" or that the views so expressed were taken into account by ministers. But article 3.1 is more than a restatement of the ordinary administrative law duty to have regard to material circumstances. The principles were summarised by Lord Hodge JSC in Zoumbas v Secretary of State for the Home Department [2013] 1 WLR 3690, paras 10 – 13 in seven points. I would emphasise the first and last, at para 10: "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 of the Convention… (7) a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent". On the other hand, as he added (by reference to H(H) 1 AC 338) there may be circumstances in which "the weight of another primary consideration can tip the balance and make the interference proportionate even where it has very severe consequences for children": [2013] 1 WLR 3690, para 13."

At [125], in a passage which Mr Drabble said applied to CTC as much as to other child related benefits, Lord Carnwath said:

"125…Although paid to the parents these benefits are designed to meet the needs of children considered as individuals. As Baroness Hale JSC said in Humphreys v Revenue and Customs Comrs [2012] 1 WLR 1545, para25 (summarising the case for the Revenue): "The aim of child tax credit is to provide support for children. The principal policy objective is to target that support so as to reduce child poverty. The benefit attaches to the child rather than the parent." The same could be said of child benefit."

181.
He continued at [126] saying that, for the first time, the combined benefits/tax system would limit the mechanism for adjusting for family size; and children would lose benefits for reasons which had nothing to do with their own needs, but were related solely to the circumstances of their parents. He

found this difficult to reconcile with the best interests of the child concerned or the principles he had already cited from Zoumbas v SSHD [2013] UKSC 74, [2013] 1WLR 3690.

182.
Accordingly, his provisional view was unchanged: the Secretary of State had failed to show how the Regulations were compatible with his obligation in the UNCRC to treat the best interests of children as a primary consideration.

183.
However, he felt bound to conclude that Lord Reed was right in the way he related article 3.1 UNCRC to A1P1, because the allegation was of discrimination against women and not against children. In all the article 14 cases in this context, there had been a direct link between the international treaty relied on and the particular discrimination alleged. Thus, it could "plausibly be argued that the court was using the international materials to fill out, or reinforce, the content of a Convention article dealing with the same subject matter. They can be justified broadly as exercises in interpretation of "terms and notions" in the Convention consistently with the Demir principle." There was no such connection here; the fact that children are statistically more likely to be living with a single mother than with a single father was unrelated to the question of whether their best interests had been treated as a primary consideration. No Strasbourg jurisprudence had been shown to use an international treaty in this indirect way, and the Court had heard no argument that they should go beyond what Strasbourg had done.

184.
Lord Hughes specifically agreed with Lord Reed. His judgment was directed to the differences between the views of the majority and those of the dissentients, Baroness Hale and Lord Kerr.

185.
At [135 (iii)], one point of common ground was that A1P1 was engaged to the extent that, as established by Stec v UK [2006] 43 EHRR 1017, and though the ECHR gave no entitlement to benefits, it did require that, if provided, they had to be administered in a manner which was not discriminatory contrary to article 14.

186.
The differences of opinion related to the place of article 3.1 UNCRC, which gave rise to two questions, the first of which was whether article 3 had legal effect in English law and if so by what route. The relevant route in that case, as here, was that it could be relevant to the extent that the court was applying the ECHR, via the Human Rights Act 1998. The Strasbourg Court had sometimes accepted that the ECHR should be interpreted, in appropriate cases, in the light of generally accepted international law in the same field, including multi-lateral treaties such as the UNCRC. Below and for the hearing in the Supreme Court, article 3 had been prayed in aid in construing article 8 ECHR, based on the asserted rights of children affected by the cap. The post hearing submissions then advanced it as relevant to the justification for the admitted indirect discrimination against women in relation to their A1P1 rights. The majority rejected that argument because it sought to give article 3 "the force of domestic English law on the grounds that it bears on the issue of whether the agreed discrimination against women in relation to their A1P1 rights was justified." Nor could Article 3 be given direct effect simply on the alternative basis that the UK's signing of the UNCRC imposed a domestic duty to comply with it.

187.

The argument in the Court of Appeal, that children's article 8 rights were infringed, had failed and was not repeated in the Supreme Court. The article 8 argument was pursued only as the basis whereby article 14 was brought in. The post hearing argument was about the altered use made of article 3.1 of the UNCRC, from its previous and now abandoned role as an interpretative tool in relation to article 8 in its directly applicable role, to its new role as a basis for challenging the justification argument put forward for the admitted indirect discrimination in the Regulations:

"139 For the reasons set out by the Court of Appeal, the article 8 rights of children are not arguably infringed by the benefit cap scheme. Elastic as that article has undoubtedly proved, it does not extend to requiring the state to provide benefits, still less benefits calculated simply according to need, nor does it require the state to provide a home: see Chapman v United Kingdom [2001] 33 EHRR 399, para 99; R (G) v Lambeth London Council (Shelter intervening) [2012] PTSR 364, paras 34 and 40; and AM v Secretary of State for Work and Pensions [2014] EWCA Civ 286, para 22 and the cases there cited. Winterstein v France (Application No 27013/07) (unreported) given 17 October 2013 depended on the long toleration of itinerants on the land from which they were evicted and the absence of provision of alternative accommodation, and does not lead to a different conclusion. Moreover, the likely impact of this scheme on some children who are members of larger families living in high-rent homes is at most to make it unavoidable for the family to move; the duty of local authorities to provide accommodation under Part VII of the Housing Act 1966 remains. None of the judgments suggests that article 8 is engaged. I agree that it is not. It follows that article 3 of the UNCRC cannot have effect in English law on the grounds that it is relevant to its interpretation…

"141 It may not be difficult to see that in interpreting the content of the article 8 rights of children, it may be legitimate to take into account the international obligation contained in article 3 of the UNCRC. ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 AC 166 was an article 8 case where the relevance to that article of the interests of the children of a potential deportee was conceded. Similarly, Neulinger v Switzerland [2010] 54 EHRR 1087 depended on article 8. It concerned an order directly about the upbringing of a child, namely an order for return to another state pursuant to the Hague Convention on the Civil Aspects of Child Abduction (1980), and the very first words of that Convention declare the interests of children to be of paramount importance in matters relating to their custody. If article 8 rights are engaged, the question will often become: is such impairment of respect for private and family life nevertheless permissible under article 8.2? If the article 8 rights relied on are those of children, as was asserted here, or of their parents in the form of their relationship with their children, as in ZH (Tanzania), there is scope for the argument that an internationally recognised duty to approach the children's interests in a particular way bears on whether article 8.2 is satisfied – in the context of these Regulations whether any impairment of children's article 8 rights was permitted on the grounds that it is necessary in a democratic society in the interests of the economic well-being of the country of the protection of the rights and freedoms of others, such as those taxpayers who do not claim benefits."

188.
Baroness Hale and Lord Kerr dissented, principally on the issue of whether the UNCRC applied to discrimination against women. Baroness Hale and Lord Kerr differed from the majority in their conclusion about whether the Regulations were incompatible with article 14, with A1P1, on the grounds of indirect discrimination against lone parents on grounds of sex. The question was whether the benefit cap as applied to lone parents could be justified independently of its discriminatory effects; [224]. Baroness Hale agreed that the "manifestly without reasonable foundation" test approach applied to whether the measure was in the public interest, i.e. had a legitimate aim. She accepted that

the test also applied to the proportionality of indirectly discriminatory means employed in its achievement. International obligations, such as the UNCRC, were taken into account in UK domestic law “in so far as they inform the interpretation and application of the rights” in the ECHR, [210]. She agreed with Lord Carnwath’s reading of X v Austria as illustrating the relevance of article 3.1 UNCRC, and of the best interests of the child to the determination of whether discrimination was justified under article 14 ECHR, where the discrimination was against the mother. She agreed with Lords Carnwath and Kerr, that the rights of children had not been taken as a primary consideration. Lord Kerr went further but he agreed with Baroness Hale, so far as she went.

189.
SG/JS was decided shortly before Mathieson, above, was heard. Mathieson too is relevant to the role of the UNCRC and justification, expressed in different terms and emphasis, but not holding that SG/JS was wrongly decided. Lord Wilson in Mathieson, having considered extracts from Parliamentary debates on the Regulations, and modest evidence from the Secretary of State, concluded that there was no evidence that the Secretary of State had ever asked himself whether justification, relating to the overlap between benefits and longer term free in-patient care, extended now sufficiently to justify suspension of DLA after 84 days.

190.
This was where the claimant relied on article 3.1 UNCRC and General Comment No. 14 of the UN Committee on the Rights of the Child referred to in SG/JS by Lord Carnwath. Lord Wilson referred to the substantive right of a child to have his best interests considered and to the procedural rule, the third aspect analysed in the General Comment.

191.
He said this at [41]:

“On the evidence before the court, however, the Secretary of State has never conducted an evaluation of the possible impact of the decision on the children concerned, with the result that he has perpetrated a breach of the procedural rule which constitutes the third aspect of the concept of the best interests of children. Unsurprisingly – might one say inevitably? – breach of the procedural rule has generated a violation of the substantive right of disabled children to have their best interests assessed as a primary consideration which constitutes the first aspect of the same concept. So the Secretary of State is in breach of international law. But does this conclusion affect [C’s] right?”

192.
The Court of Appeal had held that the circumstances permitted no room for the various conventions to “give a steer to the proper interpretation of [C’s] rights”; he continued in [42]:

“Consistently with that conclusion, the Secretary of State proceeds to submit that it is in principle illegitimate to have regard to the conventions and in this regard he relies on the recent decision of this court in the JS case [2015] 1 WLR 1449, cited at para 39 above.

43. It is clear that in the JS case the Secretary of State submitted that, while an international covenant might inform interpretation of a substantive right conferred by the Convention, it had no role in the interpretation of the parasitic right conferred by article 14 and thus, specifically, no role in any inquiry into justification for any difference of treatment in the enjoyment of the substantive rights. But his submission was not upheld. While Lord Reed JSC did not expressly rule on it, it was rejected by Lord Carnwath JSC (paras 113 – 119, by Lord Hughes JSC (paras 142 – 144), by Baroness Hale DPSC (paras 211 – 218) and by Lord Kerr of Tonaghmore JSC: paras 258 – 262. Lord Carnwath JSC,

for example, pointed out at paras 117 – 119 that the Secretary of State's submission ran counter to observations in the Court of Appeal in the Burnip case [2013] PTSR 117, cited at para 23 above, and indeed to the decision of the Grand Chamber in X v Austria [2013] 57 EHCR 405. The decision of the majority in the JS case [2015] 1 WLR 1449 was not that international Conventions were irrelevant to the interpretation of article 14 but that the UN Convention on the Rights of the Child was irrelevant to the justification of a difference of treatment visited on women rather than directly on children: para 89 (Lord Reed JSC), paras 129 – 131 (Lord Carnwath JSC) and para 146 (Lord Hughes JSC).

44. The noun adopted by the Grand Chamber in the Neulinger case 54 EHRR 1087, cited above, is "harmony". A conclusion, reached without reference to international Conventions, that the Secretary of State has failed to establish justification for the difference in his treatment of those severely disabled children who are required to remain in hospital for a lengthy period would harmonise with a conclusion that his different treatment of them violates their right under two international Conventions."

193.
(The "two" Conventions do not include the ECHR.) The Secretary of State had breached the claimant's article 14 rights when taken with A1P1. Baroness Hale, Lord Clarke and Lord Reed agreed with Lord Wilson, but Lords Clarke and Reed also agreed with Lord Mance who said that, although ultimately coming to the same conclusion as Lord Wilson, he had found the appeal "more finely balanced than he has done". He said this at [51]:

"Courts should not be over-ready to criticise legislation in the area of social benefits which depends necessarily on lines drawn broadly between situations which can be distinguished relatively easily and objectively. I would emphasise this as an important role in terms rather more forceful than I think para 27 of Lord Wilson's JSC's judgment conveys. In R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] AC 1312, Lord Bingham's speech on this point read more fully at para 33 as follows:

"Thirdly, legislation cannot be framed so as to address particular cases. It must lay down general rules: James v United Kingdom [1986] 8 EHRR 123, para 6; Mellacher v Austria [2989] 12 EHRR 391, paras 52 – 53; R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2002] 1 AC 800, para 29; Wilson v First Country Trust Ltd (No 2) [2004] 1 AC 816, paras 72 – 74; R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173, paras 41, 91. A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule, if judged in the round, it is beneficial."

194.
Their conclusion on justification was more particularised to the claimant's individual circumstances: the same needs for parental care existed while the claimant was in hospital, but his parents had to incur extra expense to provide it. Although a significant group appeared to be in the same position, no general declaration was granted in respect of those in hospital for longer than 84 days.

195.
The flaw the majority saw in the justification for the Regulations was the failure of the SSWP to recognise the modern importance of parental care for a child undergoing long-term hospitalisation, and the assumption that, in its absence, the NHS would simply fulfil those tasks at least adequately. They also found not particularly attractive, absent full development in argument and evidence showing its significance, the Secretary of State's contention that the continuation of other benefits

such as child benefits, not required in the same way during hospitalisation because for example meals were provided, made up for the suspension of DLA.

196.
I consider that the following emerges from SG/JS. The UNCRC is relevant as an interpretative aid to article 14 with article 8 and A1P1. The majority held that the UNCRC did not illuminate article 14 with A1P1 because the discrimination against women did not bring the UNCRC into relevance, and so it could not be relevant to its justification either. No article 8 with article 14 argument was in fact disposed of in that case, in view of the way it had been argued. There appear to be at least two broad approaches to the relationship of the UNCRC to that argument, whether it is limited to the sort of direct interference involved in the upbringing or abduction of a child, or whether it extended to the sort of welfare provision at issue.

197.
A different majority, Baroness Hale, Lords Carnwath and Kerr, were prepared to reach a decision as to the meaning of article 3.1 and to hold that it had been breached by the SSWP. For Lord Carnwath that conclusion is obiter, but fully reasoned, on the question of its interpretation. For Baroness Hale and Lord Kerr, and at one time provisionally Lord Carnwath, this was the crucial, if not the sole basis for their conclusion as to the breach of article 14. They appear to constitute a majority in favour of a broader approach to the role of UNCRC. But the judgments have left untouched rather than resolved the issue raised by Lords Reed and Hughes to the Court's role in so direct a task of interpretation of a Convention which has not been incorporated with domestic law.

198.
The decision in Mathieson does not purport to hold any aspect of SG/JS to be wrong, as I have said. It illustrates the application of the majority approaches, as I hope I have discerned them. Mathieson is not an article 8 case.

199.
One issue merits special mention. Two Justices, Lords Carnwath in SG/JS at [105] and Hughes at [150 – 154] specifically considered the role of General Comment No. 14, though reaching very different views on it. I have set out how Lord Carnwath saw it, to which Lord Wilson referred in Mathieson. I do not consider that this issue is resolved by Mathieson, which does not touch upon the very serious arguments to which the use of the General Comment gives rise, and does not address the alternative point of view. I agree with what Lord Hughes said, in the only considered analysis of the nature and purpose of such Comments, and the role of the United Nations Committee on the Rights of the Child. He said that it might be thought that article 3 was intended to apply to decisions directly about or perhaps directly affecting a child, but that was not the view taken in General Comment 14, adopted by the Committee in 2013. That Comment suggested that article 3 extended to decisions which indirectly affected individual children or children in general including those related to the environment, housing or transport, which imported a very wide range of decisions indeed. He did not "take it as read" that those views, although entitled to careful consideration, could be regarded as binding on state parties as to the meaning of the Treaty to which they agreed.

200.
The issue was not to be resolved in that case, but the wider the reach of "decisions concerning" an individual child or children in general, the less possible it was to impose their best interests as a priority factor among the complex considerations governing such decisions. The General Comment realistically recognised that the relevant best interests of children, if not decisions about identified

individual children, would include those of children in general. In the context of socio-economic legislation, of the sort being considered in SG/JS , there would be an obvious tension between “the interests of children generally in promoting legitimate aims of reducing a culture of benefit-dependency and encouraging work and, on the other, the special interests of those children most likely to suffer an adverse effect of the cap, such as the present appellants.”

201.
Ms Mountfield’s note in reply on the General Comments issued by the UN Committee rather highlights that its task is not issuing authoritative interpretative guidance, but examining progress in realising rights, monitoring compliance and making “suggestions and general recommendations”.

202.
I accept Mr Eadie’s submission that the procedural obligation, as discerned in article 3 UNCRC through the General Comment raises real problems in relation to primary legislation as to how it could be taken into account, as Parliament records no reasons, and the Supreme Court has not held that if Parliament legislates without the sort of document which the General Comment refers to, it cannot comply with the UNCRC.

203.
I turn to consider UNCRC and article 8. I focus on article 8 here, because “children with multiple siblings” could only be discriminated against on the basis of article 8 since, applying SG/JS, the child would have no “possession” in CTC for the purpose of A1P1, and the mother or other single parent, if CTC were her “possession”, would not be discriminated against in a way which involved A1P1, as SG/JS decided. In my judgment, the instant case does not involve discrimination linked to A1P1; if any article is linked to article 14 so as to require consideration of the UNCRC, it is article 8. This is not an A1P1 case.

204.
If article 8 rights are not directly interfered with, as I have concluded they are not, can UNCRC be of assistance to the question of whether the two child provision comes within its ambit for article 14 purposes? And can it assist on the question of whether, if such action as is within the ambit of article 8 has led to discrimination, it is justified by the circumstances relied on here? If it can, I do not consider, applying the majority decision in SG/JS, that it can do so in relation to the indirect discrimination against women. I see no distinction between whether the article 14 discrimination is linked to article 8 or to A1P1 in the relevance of the UNCRC.

205.
So, the UNCRC is only relevant to the asserted discrimination against children with multiple siblings. I shall assume that it can illuminate the ambit of articles 8 and 14 and be relevant to justification, though I am not clear where the dividing line is to be found between illumination and a direct interpretation of the UNCRC, for the purposes of establishing a breach of the ECHR, a line I am sure must be drawn. SG/JS, recognising that there are decisions within the ambit of article 8 which may engage the UNCRC in an interpretative role, did not do so in the broad and general way via family income, and parental decisions in the way which would be required here, or as were found in MA/Carmichael.

206.
I now consider the justification for the discrimination in the light of the UNCRC.

207.

I have not approached this by asking myself whether any article of the UNCRC has itself been breached, because I do not consider that to be a question vouchsafed to a domestic court by binding authority from the Supreme Court, and it would run counter to well established authority on the interpretation of international treaties. I have noted as important the view expressed by the Government in its memorandum to the Joint Human Rights Committee.

208.
At one level, no detailed statistical analysis has been provided, were that possible, of the number and circumstances of families with more than two children who after January 2019 might make a claim where UC would be limited to two children, nor of the number and circumstances of lone parent families in such a position, nor of the number who might have a third child after 6 April 2017 for whom no claim could be made and who fell outside the scope of an exception. Some view must however have been formed in order for the sum total of benefit expenditure savings to have been calculated. At another level, there is no analysis of alternative courses of action to reduce public expenditure, whether in the welfare budget or not, and if within the welfare budget, whether related to expenditure on children or not, and if so with what effect. At a further level, I have seen no analysis of the economic stability and encouragement to work or progress in work which a decision not to have a third or further child might bring to the family who might otherwise have a CTC claim; nor any analysis of the advantage to the child in a family not claiming CTC who might benefit from a reduced, perhaps not increased, tax burden on that family. The two child provision, through the taper as income increases, and because it will not affect existing claimants with a gap in claims shorter than six months, will have “quite a long tail”, and how significant it is depends upon the social security regime as a whole. It cannot therefore simply be frozen as if a snapshot.

209.
What underlies the two child provision is a broad political, social and economic judgment but one in which the best interests of the child as a general proposition have been centrally placed. The best interests of the child were at the forefront of the debate and the desire to tackle the root causes of child poverty. There was a broad and general judgment about the degrees of impact and where it would fall; much of the debate was centrally focused on children. There is plenty of scope for argument about whether the legislation is indeed in the best interests of the child. But that is not the question. The question is whether it was a primary consideration. It plainly was. I think it clear that the judgment made by Government was that the proposals were in the best interests of children generally, but even if they were not, they were justified because of the objectives which the two child provision sought to meet. In the light of the strictures of the Supreme Court in SG/JS and Mathieson about the way in which Government considered UNCRC, its memorandum to the Joint Human Rights Committee is important.

210.
The best interests of children have to be judged by reference to the total social welfare benefits available for the family in which the child is being brought up. No UNCRC obligation exists regardless of resources, and it contains no bar on restricting the numbers of children in a family who might receive benefit or how the needs of those children should be judged in relation to others who might benefit from the absence of provision, or in other ways from a cut in public expenditure. This was not at odds with the principle that a child should not be blamed for the conduct of a parent, for which he or she is not responsible; the seventh principle at [10] in Zoumbas, above. I add that I do not find all seven principles readily applicable to judgments about legislation as opposed to decisions about the

best interests of an individual child, unless the UNCRC has somehow taken deeper root than even its interpretative role in the ECHR has gone.

211.
I consider that the issues which the UNCRC raises were given careful consideration; and that what is left is scope for disagreement at a political level and not scope for disagreement about compliance with the UNCRC obligations, unless they are given a role in ordering the welfare legislation and economic decision-making of the signatory states which might come as a surprise to an elected Parliament. The EHRC and Claimants' submissions on UNCRC are, or are very close to submitting, that properly interpreted, and the more so with General Comment No. 14, Parliament cannot legislate as it has done conformably with the UNCRC and so legislated incompatibly with ECHR. That involves a sequence of direct interpretation and application of UNCRC by the Court, decision on breach, and an interpretation thence of articles 8 and 14, stretching far beyond any Strasbourg jurisprudence. It requires the prior resolution of many issues not tackled in the Supreme Court.

212.
Accordingly, insofar as issues of discrimination and article 8 ECHR fall to be considered, and allowing an interpretative role for the UNCRC in determining the extent of the obligations and allowing it a role in judging the basis for and quality of the justification proffered for any such discrimination for the purposes of article 14, I consider that it leads to no different outcome from that which I had already reached without it. It certainly does not show the justification manifestly to be without reasonable foundations for discrimination against a group which, if it has a status, is on the periphery of Lord Walker's third concentric circle.

213.
I have considered the General Comments, but there is a real danger in treating such Comments as themselves being the UNCRC language, when they are not, and still less are they the language of the ECHR. Their analysis is not apt for direct or precise application in each and every issue, in any event. Nor are the General Commentators the guardians of the meaning of the UNCRC, reaching conclusions after forensic debate involving the signatory states. Neither the Strasbourg Court nor the UK domestic courts are required to decide the meaning of the ECHR or the compatibility with it of domestic legislation by reference to such sources. The illumination they afford needs careful judgment; it may not illuminate the real issues, but become a mistaken focus. None of the General Comments require an increase in benefits for each child or prevent an adjustment of the sort here, whether stigmatised as a deliberate regressive measure or not, in relation to future levels of benefit. I do not consider the expressions of concern by distinguished personages such as the UN Special Rapporteur can be given any weight in the context of the compatibility of primary legislation with the ECHR.

214.
I note here the arguments which Mr Eadie raised on these points, and on which my judgment need go no further than to say that, if the issues were before me for decision devoid of authority, I would be inclined to accept them. I consider there to be little to be gained, in an already overlong judgment, in analysing whether or if so quite how those two cases may or may not have resolved those issues or some of them.

1)
Strasbourg has not gone so far as to use the UNCRC as mandatory hard edged rules relevant to determining justification under any article, particularly in view of its "manifestly without reasonable

foundation" test. Its focus is harmony, and the quality of decision-making. It has not incorporated the UNCRC into articles 8 or 14. Adopting hard edged rules from the UNCRC, even more so if the General Comments are used as if they were parts of the UNCRC itself, would undermine the flexibility which that test creates. Strasbourg has gone no further than Demir v Turkey which is an orthodox application of the Vienna Convention on the Law of Treaties. The domestic courts should go no further than the established Strasbourg jurisprudence.

2)
Great caution is required about importing the UNCRC to rewrite the ECHR, and creating a body of rules non-compliance with which would show discrimination or other interference in an ECHR right not to be justified. The UK has a firmly established dualist approach to international treaties and domestic law, recently approved by the Supreme Court in R (Wang Yam) v Central Court [2015] UKSC 76, [2016] AC 771.

3)
Mr Eadie referred to R (ICO Satellite Ltd) v The Office of Communications [2010] EWHC 2010 Admin, Lloyd Jones J at [88-92] on the interpretation of international treaties. In the absence of an authoritative meaning for relevant articles of the UNCRC, the Government view, if tenable, is to be adopted and is for the Government to defend on the international plain.

4)
The UNCRC lacked the requisite clarity to contain a positive obligation to provide benefits on any particular basis or level, particularly in the light of the unwillingness of Strasbourg itself so to use it. And it was difficult to see how the UNCRC contained the sort of balance which Government or legislature had to undertake in the context of welfare legislation. The meaning or application of the UNCRC was in any event insufficiently precise to enable a breach to be shown, and therefore that article 14 had been breached.

5)
The issue in this case relates to the justification for discrimination to which the UNCRC is not relevant, and where there would be constitutional difficulties were it to be so; this is in reality not an issue of interpretation at all. The Supreme Court in Mathieson rejected a different argument, which was that the UNCRC had no role in the interpretation of article 14 in an enquiry into justification, as opposed to illuminating aspects whereby it was to be judged.

Issue 6: The ordering of the cared for child exception

215.
The issue here relates to the 2017 Regulations and not to the primary legislation: Mr Drabble contends that the exception in relation to a child cared for by the family is perverse because the availability of CTC for a third child depends on whether the third child was born before or after the family began to care for the second child. Mr Higlett suggests the justification that, because the cared for child is not to be treated as of any less value than a natural child of the family, and the family, caring for a child, should face the same choice about a third child as would a family not in receipt of CTC, the sequencing provision is rational and justifiable in domestic public law terms.

216.
I do not accept that. I do not think that in so far as it was seriously considered, there is any rational justification for a parent's decision, about whether to have a child of their own, to be affected by whether that decision was made before or after another decision, as to whether they should care for

someone else’s child, which could need to be made quite independently of a decision about having their own children. The purpose of the exception is to encourage, or at least to avoid discouraging, a family from looking after a child who would otherwise be in local authority care, with the disadvantages to the child over family care which that can entail, and the public expenditure it can require. The choice which the family is being asked to make has a very different and indeed opposite purpose in relation to public expenditure, from that which is part of the principal thinking behind the two child provision. It is not rationally connected to the purposes of the legislation, and indeed it is in conflict with them. The perversity of the provision is well-illustrated by CC’s evidence that HMRC advised her that a device was at hand whereby the two child provision could be circumvented, and in a way which CC and CD rejected, in the best interests of the cared for child. HMRC disputes giving any such advice, though seemingly not that the device would work.

217.
It is not the exception itself which is unlawful but the sequencing or ordering part of it. I will hear counsel on the appropriate form of relief for that unlawful provision.

Overall conclusion

218.
Subject to that exception, I find that the two child provision is compatible with the ECHR, and I dismiss the application.