THE COURT ORDERED that no one shall publish or reveal the names or addresses of the Appellants who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of them or of any member of their families in connection with these proceedings.

15 May 2019

PRESS SUMMARY

R (on the application of DA and others) (Appellants) v Secretary of State for Work and Pensions (Respondent)
R (on the application of DS and others) (Appellants) v Secretary of State for Work and Pensions (Respondent)
[2019] UKSC 21
***On appeals from:* [2018] EWCA Civ 504 and [2016] EWHC 698 (Admin)**

JUSTICES: Lady Hale (President), Lord Reed (Deputy President), Lord Kerr, Lord Wilson, Lord Carnwath, Lord Hughes, Lord Hodge

BACKGROUND TO THE APPEALS

These appeals are brought on behalf of various lone parent mothers and their young children to challenge the legislative provisions known as the 'benefit cap'. These provisions originally capped specified welfare benefits at a total of £26,000 per household. But by the Welfare Reform and Work Act 2016 the government and Parliament reduced the cap to £23,000 for a household in London, £20,000 elsewhere.

Single people (including lone parents) are exempt from the revised cap ('the cap') if they work for 16 hours each week. The aim of the cap is to incentivise work. The appellants argue that in introducing the cap, the government, through Parliament, has discriminated against lone parents of young children, whose childcare obligations severely curtail their ability to work, and against the children themselves.

In the *DA* case the appellants are three lone parent mothers two of whom had a child under two at the outset of proceedings, and those two children themselves. In *DS*, the appellants are two lone parent mothers with nine children, three of whom were under five, and those nine children themselves.

On 22 June 2017 the High Court held in the *DA* case that the benefit cap unlawfully discriminated against the children under two and their mothers, but on 15 March 2018 the Court of Appeal set aside the High Court's order. On 26 March 2018 Lang J formally dismissed the *DS* claimants' claims but granted a leap-frog certificate so that they could apply to appeal directly to the Supreme Court.

JUDGMENT

The Supreme Court dismisses the appeal by a majority of 5-2. Lord Wilson (with whom Lord Hodge agrees) gives the main judgment. Lord Carnwath (with whom Lord Reed and Lord Hughes agree) and Lord Hodge (with whom Lord Hughes agrees) give concurring judgments. Lady Hale agrees with Lord Wilson on the principles, but not the outcome. Lord Kerr disagrees with him about both.

REASONS FOR THE JUDGMENT

Lord Wilson acknowledges that the cap has had a major impact on lone parent households with a child aged under five and in particular under two **[22]**. It does incentivise them to try to find work for at least 16 hours per week, but this was argued to fly in the face of the government's own policy of providing no free childcare for children under two and of replacing income support with job-seeker's allowance only after a lone parent's youngest child has reached school age. The government's funding of Discretionary Housing Payments ('DHPs') may alleviate the impact of the cap on such lone parent

households but the evidence on this could be stronger. The cap saves little public money, but it can take the families it affects well below the poverty line. Living in poverty has a particularly adverse impact on the development of children under five **[23]-[34]**.

The cap's reduction of benefits to well below the poverty line engages the claimant mothers' and children's right under Article 8 of the European Convention on Human Rights ('ECHR') to respect for their family life **[35]-[37]**. Each of the four classes of claimants has a separate status under Article 14 (for example, 'lone parents of children under two') on grounds of which status, they might complain they face discrimination in the enjoyment of that right **[38]-[39]**. Their complaint, for which there is prima facie evidence, would be that despite being in a relevantly different situation from others subjected to the cap, they are treated the same way – see *Thlimmenos v Greece* (2000) 31 EHRR 12 **[40]-[51]**.

The government must objectively justify this discrimination – in this case, its failure to exempt the *DA* and *DS* cohorts from the cap **[52]-[54]**. The test for whether the government can justify a discriminatory rule governing the distribution of welfare benefits is whether the rule is manifestly without reasonable foundation ('MWRF'). Once the government has put forward a foundation, the court will proactively examine whether it is reasonable **[55]-[66]**. The United Nations Convention on the Rights of the Child ('UNCRC') requires the public authorities to treat the child's best interests as a primary consideration. It forms no part of our domestic law, but aids interpretation of the ECHR, as to whether the government unjustifiably discriminated against the children and their parents in their enjoyment of their right under Article 8. The evidence shows that the government did, as a primary consideration, evaluate the likely impact of the cap on lone parents with young children **[67]-[87]**. Furthermore, the government's belief that there are better long-term outcomes for children in households where an adult works is a reasonable foundation for treating the *DA* and *DS* cohorts similarly to all others subjected to the cap **[88]**.

Lord Carnwath and Lord Hodge both express reservations on the issue of status, but agree with Lord Wilson on the relevance of the UNCRC and also on the application of the MWRF test. They agree with him that the executive and Parliament both gave proper consideration to the interests of the children affected **[89]-[123]**, **[124]-[131]**.

Lady Hale agrees with Lord Wilson on the legal principles but not their application. She holds that the government failed to strike a fair balance between the very limited public benefits of the cap and the severe damage done to the family lives of young children and their lone parents if the parents must choose between working outside the home and not having enough for the family to live on **[132]-[157]**.

Lord Kerr considers the MWRF test to have derived from the margin of appreciation which is afforded to decisions of national authorities in the European Court of Human Rights. He would not import this approach into the national court's consideration of a measure's proportionality. The steps in the proportionality analysis at the national level are well settled in the case law **[164]-[172]**. The MWRF standard should not be applied as part of this analysis – instead, the question should be whether the government has established that there is a reasonable foundation for its conclusion that a fair balance has been struck **[173]-[177]**. In relation to the UNCRC, Lord Kerr does not agree with Lord Wilson that the key question is whether the government has acted in breach of Article 3 of the UNCRC **[183]**. A finding that Article 3 has not been breached does not establish the proportionality of the measure **[186]**. The evidence in this case shows that, while the impact on children's rights was considered, it was not given a primacy of importance which Article 3 requires **[196]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html