

# The benefit cap: the limits of legal challenge

**Welfare rights advisers use the law on a daily basis to challenge decisions on social security benefits and to ensure their clients receive their legal entitlement. However, there are occasions when what needs to be challenged is not a decision which has not been taken in accordance with the existing law, but rather the law itself. This is what CPAG's test case work is about. Carla Clarke discusses CPAG's recent challenge to the benefit cap, on the basis that it discriminates against lone parents, why it was ultimately unsuccessful and where we can go next.**

## **Welfare reform and the targeting of lone parents and women**

*Women in the United Kingdom earn less than men, shoulder a greater amount of unpaid labour and are more likely to experience poverty...*

*Given the structural disadvantage faced by women, it is particularly disturbing that so many policy changes since 2010 have taken a greater toll on them. Changes to tax and benefit policies made since May 2010 will by 2021/22 have reduced support for women far more than for men.*

*Single parents, 90 per cent of whom are women, are more than twice as likely to*

*experience persistent poverty as any other group, and 50 per cent of children in single-parent households are in poverty. Benefit changes – including the benefit cap, the two-child limit and the introduction of full job-seeking requirements for single parents of children as young as three – have had a stark impact on single parents... Single parents in the bottom 20 per cent of income will have lost 25 per cent of their 2010 income by 2021/22 as a result of changes to tax and benefit policies, and the poverty rate for children in single-parent households will jump to a shocking 62 per cent by then...*

*It may well appear that women, particularly poor women, have been intentionally targeted.*

These were the conclusions of the UN Special Rapporteur on extreme poverty and human rights in his report on his visit to the UK, published on 23 April 2019.

Three weeks later, the Supreme Court gave its judgment in two cases challenging the revised benefit cap (which now limits the total amount of benefits a family can receive to £20,000 outside London and £23,000 in London – down from a previous £26,000) – holding the cap to be lawful. How could the UK's highest court reach a decision that a policy causing disproportionate hardship to lone parents, who are overwhelmingly women, does not unlawfully discriminate against lone parents and/or women and their children?

## **The revised cap: its aims and impact**

The revised benefit cap came into force in November 2016, increasing the number of affected families fivefold. Department for Work and Pensions figures show a consistent picture since the cap was lowered:<sup>1</sup>

- Almost 75 per cent of all households that have had the amount of their housing benefit capped are headed by a lone parent.
- Most households that have had the amount of their housing benefit capped are lone-parent families with a child under five (now 53 per cent).

- Only around 25 per cent of capped households have escaped the benefit cap by finding sufficient work.

The targeting of lone parents is even starker when you consider that lone-parent households are less common than two-parent households, both nationally and among benefit claimants. The cap also disproportionately affects women: 97 per cent of lone parents who are benefit capped are female.

The government's justification for the cap as a whole is that it saves money, incentivises work and improves the fairness of the social security system by ensuring that those on benefits do not have a higher income than what many working families earn. These points may sound reasonable, but a closer look reveals there are difficulties with each of them.

On fiscal savings, published figures do not include the costs associated with the cap – eg, the costs of administration, and the costs to local authorities in housing families rendered homeless by the cap and supporting families to become uncapped (by finding work, moving to a cheaper home or claiming an exempting benefit). Nor has it ever been clarified whether the government's savings figures take account of the fact that many of those who come off the cap do so by claiming an exempting benefit, and those who escape the cap by finding sufficient work will usually still be claiming housing benefit and working tax credit (or universal credit). It is hardly surprising that the aim of fiscal savings was 'scarcely... pressed' before the Supreme Court.<sup>2</sup>

As to incentivising work, only one evaluation has been undertaken which robustly compares the outcomes of capped households with uncapped households. This was back in 2014 under the original cap and it showed that just 5 per cent – one in 20 – were incentivised to work by the cap.

And as to fairness, the benefits system is already calibrated so that a person in work always has a higher total income (earnings plus benefits) than someone whose sole income is from benefits.

We therefore have a piece of legislation which overwhelmingly affects lone parents and their children and which does not deliver on its stated aims, yet which inflicts untold misery on thousands of families who are already struggling. (By 2023, four in five children affected by the benefit cap will be living below the poverty line, even without the cap being applied to their

family.<sup>3</sup>) Having been unable to prevent such legislation getting onto the statute books through lobbying, and with awareness-raising of its impact through media work and reports having only a limited impact, challenging it through the courts (again<sup>4</sup>) seemed the only remaining option to secure change.

### **Human rights law: the right to social security and non-discrimination**

In domestic law there is no free-standing right to social security, equivalent to, for instance, the right to life or to a fair trial. At the international level, the UK has signed up to the UN Convention on Economic, Social and Cultural Rights (ICESCR) and the UN Convention on the Rights of the Child (UNCRC), both of which protect the right to social security. However, these have not been incorporated into UK law. This means that a person affected by the benefit cap cannot simply argue in a court that her right to social security has been violated by a measure which is retrogressive and discriminatory and sets her and her children's subsistence benefits at an inadequate level. She can only rely on the European Convention on Human Rights (ECHR), as brought into UK domestic law by the Human Rights Act.

Under the ECHR there is no obligation on any state 'to have in place any form of social security scheme or to choose the type or amounts of benefits to provide under such scheme.'<sup>5</sup> Crucially though, if a state does provide some form of social security, it must do so *in a non-discriminatory manner*. Consequently, it is not possible to argue under domestic human rights law that the benefit cap is unlawful simply because it reduces the amount of benefits to which a household would otherwise be entitled. The only way to challenge it is to say that it does so in a discriminatory manner. Given the overwhelming impact of the cap on lone-parent households, CPAG focused on challenging this aspect. If the benefit cap was found to be unlawful with regard to over 70 per cent of those affected, we hoped that an overhaul of the whole policy would follow.

### **Justifying the differential impact**

The mere fact that a policy treats some people less favourably than others does not make the policy discriminatory under the Human Rights Act/ECHR: it must be shown that there is a difference in treatment which *cannot be justified* (the difference must be 'manifestly without reasonable foundation'). Given the undeniable disproportionate impact of the benefit cap on lone parents and their children, what had to be justified in order to defend the policy was not the

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introduction of the cap itself, but the introduction of the cap *in a way which has disproportionately adverse impacts on lone-parent households*.<sup>6</sup> This required evidence that lone parents are less inclined to work and therefore need greater work incentives than other groups, or that they are more likely than others to respond to the benefit cap by finding additional work. No evidence was put forward in the case to support either of these positions, and it was hoped that the government's defence of the cap would therefore fail.

Unfortunately, that was not the case. The unwelcome result might be partly because Human Rights Act/ECHR discrimination law has evolved into a technical and formulaic analysis with multiple stages and sub-stages, meaning that courts are ill-equipped to deal with a policy which has the discriminatory effect built into its very structure. Lone parents, particularly those with several children and/or young children, are more likely to be affected by the cap precisely because the presence of several children brings their benefits to the cap limit and because it is so difficult for them to move into sufficient work to escape the cap because they are the sole earner and sole carer. The cap is thus discriminatory by design, even though apparently neutral on its face.

Ultimately, the real problem though (and why the Supreme Court avoided anything other than a cursory consideration of the question of justification which lay at the very heart of the case) was judicial deference. The lead judgment emphasised that the benefit cap had received considerable parliamentary debate, had already been considered in its original form by the Supreme Court and was being investigated by the Work and Pensions Select Committee. A challenge to the policy, beyond one seeking to carve out a narrow exception, was not for the judicial, but for the political, arena.<sup>7</sup>

### What next?

This should not mark an end to challenges to the benefit cap and to wholesale challenges to controversial social security measures. One of the few positive developments to come out of the judgment was the Supreme Court's finding that welfare rights policies (including for means-tested benefits) could come within the scope of the 'right to family life':<sup>8</sup>

*It cannot seriously be disputed that the values underlying the right... to respect for family life include those of a home life underpinned by a degree of stability, practical as well as emotional, and thus by financial resources adequate to meet basic needs.*

Previously there had been considerable judicial caution in finding that general legislative measures affecting welfare rights – and therefore the amount of household income – could come straightforwardly within the scope of the right to family life.<sup>9</sup> Children, for whom certain benefits may be intended but to which they have no legal entitlement,<sup>10</sup> most notably child tax credit and the child element in universal credit, could not directly challenge welfare reform measures which affected them under human rights law.<sup>11</sup> Now, it will be easier to argue on behalf of children themselves that certain welfare measures come within the scope of their right to family life and so must not discriminate against them.<sup>12</sup>

The other positive was the recognition that, in a claim that a welfare rights measure discriminates against children and their parents in respect of their right to family life, regard must be had to UNCRC Article 3.1 and the obligation to give primary consideration to the best interests of the children: if it can be shown that the government has not complied with that obligation, it might well be found that differential treatment is unjustified.<sup>13</sup> Less helpful, however, was the majority's view that it was not the court's role to evaluate the government's conclusion that a measure was in the best interests of children, however questionable the basis for this claim might be.<sup>14</sup>

The benefit cap judgment was not the outcome we wanted, nor what we expected given legal developments in the field, particularly around children's rights. But while this underlines the fact that litigation is always unpredictable, it is certainly not a reason to row back on using the law as a vital tool for securing justice. ■

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- 1 [www.gov.uk/government/statistics/benefit-cap-number-of-households-capped-to-may-2019?utm\\_source=3af83a5c-22f5-4f88-ab61-319ae623254b&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=immediate](http://www.gov.uk/government/statistics/benefit-cap-number-of-households-capped-to-may-2019?utm_source=3af83a5c-22f5-4f88-ab61-319ae623254b&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate)
- 2 *R (DA and DS) v SSWP* [2019] UKSC 21, para 32
- 3 CPAG, *Universal Credit: what needs to change to reduce child poverty and make it fit for families*, 2019
- 4 The original benefit cap was challenged in the case of *R (SG) v SSWP* [2015] UKSC 16.
- 5 *Stec v United Kingdom* [2006] 43 EHRR 1017
- 6 See *DH v Czech Republic* [2007] ECHR 922, paras 193 and 195; *R (SG) v SSWP* [2015] UKSC, para 188
- 7 An earlier challenge on its application to carers was successful: *R (Hurley) v SSWP* [2015] EWHC 3382
- 8 *R (DA and DS) v SSWP* [2019] UKSC 21 para 35 – see also para 37
- 9 See for example, Lord Reed in *R (SG) v SSWP* [2015] UKSC, para 79
- 10 Entitlement instead vesting in the parent.
- 11 The one exception being disability living allowance where entitlement rests with the disabled child: *Mathieson v SSWP* [2015] UKSC 47
- 12 The challenge to the two-child rule, which is currently waiting on a decision for permission to appeal to the Supreme Court, is just such a measure: *R (SC and others) v SSWP* [2019] EWCA Civ 615
- 13 *R (DA and DS) v SSWP* [2019] UKSC 21, para 78
- 14 *R (DA and DS) v SSWP* [2019] UKSC 21, para 87

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