Equal treatment and objective justification in social security cases under the European Convention on Human Rights

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Equal treatment and objective justification under the European Convention on Human Rights in the light of Humphreys and Burnip

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This article discusses recent UK case law on equal treatment and social security with particular reference on objective justification in two important recent decisions: the Supreme Court decision in Humphreys and the Court of Appeal’s judgment in Burnip. Part 1 discusses briefly the development of UK case law on equal treatment under the European Convention on Human Rights (ECHR). Part 2 examines the facts of the recent cases and how they were analysed by the courts. Part 3 concludes.

Introduction

There has been a marked and progressive improvement in the analysis of equal treatment issues under the ECHR by the UK courts. This has, of course, been assisted by the acceptance by the House of Lords in RJM of the European Court of Human Rights’ ruling in Stec which has the effect that the vast majority of social security payments fall within the scope of the Convention as ‘possessions’ for the purposes of Article 1 of the First Protocol (containing the right not to be deprived of one’s possessions save on specific bases). This, in turn, brings such

2 Burnip v Birmingham City Council [2012] EWCA Civ 629. As we will see Burnip involved three like cases, all of which had been rejected by the Upper Tribunal: [2011] UKUT 23 (AAC); [2011] UKUT 172 (AAC); and [2011] UKUT 198 (AAC). A similar case, involving a claim that a wife required a second bedroom due to disability, was rejected in KM v South Somerset District Council [2011] UKUT 148 (AAC).
5 Article 1 of Protocol 1 (P1-1) provides that “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.” These decisions largely resolved the earlier—rather ludicrous—position whereby the lower courts were obliged to follow Court of Appeal precedent on the issue even though it was clearly inconsistent with Stec. However, the broader issue of stare decisis remains. See McGrath v Secretary of State for Work and Pensions [2012] EWHC 1042 (Admin) in which Cranston J. “loyally” followed the ruling of the Court of Appeal that recovery of an overpayment
payments within the scope of the non-discrimination provision of the Convention (Article 14). Decisions of European Court — such as Carson — have helped to clarify that Article 14 is not narrowly confined to the grounds set out therein and that a broader range of statuses (such as disability and being a prisoner) are also covered. The more flexible approach to comparators has also been recognised by the UK courts. Finally, both the European and national courts appear to have accepted that statistical evidence is not necessarily required in order to support a claim of disparate impact, thereby facilitating claims involving indirect discrimination. All of this has helped to focus the attention of the courts on the key issues of establishing whether discrimination has occurred and, if so, whether it is objectively justified, as in the cases considered here.

**Humphreys and Burnip**

**Facts**

Although the benefits and factual situations involved in the cases were very different, both basically involved claimants who were “asking for an exception to be made to an otherwise justifiable rule”. Humphreys involved child tax credit (CTC) which is payable to one parent only in respect of each of their children, even where the care of the child was shared between separated parents. Where the parents do not agree, the single payment is made to the parent with the “main responsibility” for the child. The question before the Supreme Court was whether this difference in treatment (which it was accepted had a disproportionate impact on fathers as men were more likely to be minority carers) was justified or whether the refusal of CTC to a father who looks after his children for three days a week was incompatible with art.14 of the ECHR.

**Burnip** encompassed three separate cases concerning housing benefit. Although the statutory provisions are somewhat complicated, all three cases basically involved a limitation of the maximum amount of HB payable which, it was argued, did not meet the needs of the claimants due to their specific requirements arising from disability. Two of the cases involved single claimants who, due to disability, needed the presence of carers throughout the night in the rented flats in which they lived. As a result, they required two-bedroom apartments but the HB rules allowed only
for the one-bedroom rate which applied to able-bodied tenants. The third case involved a family with three children, two of whom were disabled and required separate bedrooms as a result of their disability. As a result, the family required a four-bedroom house but HB was provided at the three-bedroom rate which applied to a family with children who were not disabled.

The Law

Common issues

First, as noted above, it was accepted that both CTC and HB fell within the remit of the First Protocol art.1 (P1-1). Gender (the issue in Humphreys) was obviously a status for the purpose of art.14 and it was accepted in Burnip that disability fell within the concept of “other status”. Finally, it was accepted in Humphreys that the single payment rule discriminated indirectly against fathers, because experience showed that they are far more likely than mothers to be looking after the child for the smaller number of days in the week. Therefore the issues were (in Humphreys) whether the disproportionate impact of the single payment rule was objectively justified and (in Burnip) whether the failure to provide for the specific needs of disabled claimants amounted to a prima facie case of discrimination and, if so, whether it was objectively justified.

The courts agreed that the test for objective justification was that set out by the Grand Chamber of the Court of Human Rights in Stec, viz.

“A difference of treatment is …. 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.”

The Grand Chamber went on to say that

“The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.

“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 or social strategy. Because of their direct knowledge of their society and its

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13 From April 2011, the relevant provisions were amended to provide for “one additional bedroom in any case where the claimant or the claimant’s partner is a person who requires overnight care (or in any case where both of them are)”.  
14 Humphreys [2012] UKSC 18 at [1] and Burnip v Birmingham City Council [2012] EWCA Civ 629 at [8]. There do not appear to have been any recent UK decisions in which it has been held that a social security payment is not a possession.  
16 Humphreys [2012] UKSC 18 at [1]. The point had been argued before the Upper Tribunal.  
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 the legislature’s policy choice unless it is ‘manifestly without reasonable foundation’.”  

In both cases, the question arose as to whether the stricter (“very weighty reasons”) standard applied. In Humphreys the difference in treatment was on the basis of gender. Having reviewed the case law, Lady Hale (who gave the judgment of a unanimous Supreme Court) concluded that “it seems clear from Stec, however, that the normally strict test for justification of sex discrimination in the enjoyment of the Convention rights gives way to the ‘manifestly without reasonable foundation’ test in the context of state benefits.”

With respect, this is incorrect. Lady Hale does not refer to any case in which the Court of Human Rights has explicitly set out this principle (and it certainly did not in Stec). Indeed, it does not appear that the Court has ever done so. Rather the Court has waived the need for the “weighty reasons” normally required to justify a difference in treatment based on sex where there is alternative justification for deferring to the approach of the Contracting State, in particular in cases involving transitional arrangements to phase out existing discrimination between men and women (such as in Stec itself and also in Runkee and White involving survivors benefits). The Court has specifically applied the “very weighty reasons” approach in social security cases involving nationality and gender discrimination.

Indeed, the Court has (post-Stec) extended this approach to differences based on sexual orientation. However, not much turns on this in the instant case as Humphreys was a case of indirect discrimination and the Court of Human Rights has not applied the “weighty reasons” standard in such cases.

In Burnip, it was argued that disability discrimination should be included in the category of cases requiring very weighty justification. Henderson J. (who gave the judgment of the court with regard to objective justification) was prepared to “accept that congenital disabilities … may in principle fall within the category of grounds for discrimination which can be justified only by very weighty reasons”. However, he concluded that

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19 Humphreys [2012] UKSC 18 at [19].
20 Appl. No.42949/98 and 53134/99, Runkee and White v United Kingdom, May 10, 2007. See also Appl. No.6268/08, Andrle v Czech Republic, February 17, 2011. In Stec there was the additional justification that the provisions were allowed by EU law. See the discussion in M. Cousins, The European Convention on Human Rights and Social Security, (Cambridge: Intersentia, 2008), Ch.9.
21 For example, Appl. 17371/90, Gaygusuz v Austria 23 E.H.R.R. 364; Appl. 40892/98, Konu Poirrez v France 40 E.H.R.R. 34; Appl. 77782/00, Luczak v Poland, November 27, 2007 (post-Stec).
24 For example, Appl. No.58641/00, Hoogendijk v Netherlands (2005) 40 E.H.R.R. 22. Although accepting that the Humphreys case involved possible indirect discrimination on grounds of gender, at one point Lady Hale suggests (at [20]) that “the real object of the complaint is the discrimination between majority and minority shared carers.” This buttressed her view that the lower standard of justification should apply. With respect, this is to miss the point that the CTC payment structure is based on the original assumption that the mother would (in the vast majority of cases) care for the child. It is precisely to avoid the continuation of stereotypical assumptions of this kind (despite the gender neutral language of the provision) that the concept of indirect discrimination was developed.
“there is no good reason to impose a similarly high standard in cases of indirect discrimination, or cases where the discrimination lies in the failure to make an exception from a policy or criterion of general application, especially where questions of social policy are in issue.”

The application of these principles to the facts of both cases is considered separately below.

**Humphreys**

Turning to the application of the objective justification rule, Lady Hale stated that “the fact that the test is less stringent than the ‘weighty reasons’ normally required to justify sex discrimination does not mean that the justifications put forward for the rule should escape careful scrutiny”. She pointed out that, unlike *Stec* and *Rankee*, *Humphreys* involved a means-tested benefit and, perhaps more importantly, while those cases concerned transitional arrangements, the Court here was faced “with a considered policy choice which could last indefinitely”.

The appellant’s case was that he was responsible for looking after his children for three days a week. He was dependent upon subsistence level benefits and, therefore, had no means to meet the needs of his children while they were with him. He argued that splitting CTC would address this inequality. To the contrary, the respondent argued that the aim of CTC was to provide support for children. It was paid to the main carer because the main carer carried more of the everyday expenditure for the child and most of the expenditure on items such as clothes, shoes, sporting and leisure equipment, school trips and the like. Splitting the benefit would reduce the amount available to the main carer, who was usually the one less well placed to earn income, and might result in neither household being able to afford such items as clothes and shoes. Splitting the CTC would raise the question as to how the means test would operate and would inevitably lead to increased administrative complexity and costs. Given the overall limits on public expenditure, this might result in less money being available to support children.

The state argued that “bright line rules of entitlement to benefits can be justified, even if they involve hardship in some cases. Hence, this rule cannot be said to be unreasonable or ‘manifestly without reasonable foundation’”.

While expressing some scepticism as to the objective of abolishing child poverty, Lady Hale accepted that “if funds are targeted at one household, it is likely that a child living in that household will be better off than he or she would be if the funds are split between two households with modest means”. The state was, in her view, “entitled to conclude that it will deliver support for children in the most effective

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26 *Burnip* [2012] EWCA Civ 629 at [28] applying *AM (Somalia)*.
27 *Humphreys* [2012] UKSC 18 at [22]. The Court did not consider to what extent the test under the ECHR is different from the test in EU law at [21]. The Upper Tribunal had taken the view that the ECHR test was less stringent but the Court of Appeal thought that the two tests would not lead to materially different outcomes in the case. Similarly, although the parties argued as to the import of the decision in *Hockenjos v Secretary of State for Social Security* [2004] EWCA Civ 1749 (which concerned EU gender discrimination law—Directive 79/7/EEC—and child supplements to jobseeker’s allowance), the Supreme Court did not express any view on this decision.
28 *Humphreys* [2012] UKSC 18 at [22].
29 *Humphreys* [2012] UKSC 18 at [23]–[25].
30 *Humphreys* [2012] UKSC 18 at [26].
31 *Humphreys* [2012] UKSC 18 at [29].
manner, that is, to the one household where the child principally lives”. She also cited, as further justifications for the refusal to split CTC: the fact that it would be simpler and less expensive to administer CTC; the integration of the tax and social security systems, so as to smooth the transition from benefit to work and reduce the employment trap; and the fact that it was reasonable for a government to regard the way in which the state delivers support for children, and families as a separate question from the way in which children spend their time. She concluded that the “no-splitting” rule was a reasonable rule for the state to adopt and the prima facie indirect sex discrimination was justified.

**Burnip**

The claimants appear to have advanced two alternative lines of argument. First, it was argued that the rules had “a disparate adverse impact on the disabled”. Alternatively, the rules “fail[ed] to take account of the differences between the disabled and the able-bodied”. The claimants argued that these ways of putting their case were “complementary and overlapping”. However, the latter appears to be the correct basis for the claim given that this was clearly a case of treating unlike cases alike. The Court of Appeal considered both aspects of the claim.

As to the disparate impact claim, the Secretary of State argued that the claim was not based on the correct comparator, relying on *Lewisham Borough Council v Malcolm*, and criticised the lack of statistical evidence. Maurice Kay L.J. (who gave the judgment of the court on the discrimination issue) rejected both arguments. First, he did not accept that *Malcolm*—which involved the Disability Discrimination Act 1995—provided the correct approach in the present context. He took the view that “it would be quite wrong to resort to *Malcolm* so as to produce a restrictive approach to Article 14. Indeed, one of the attractions of Article 14 is that its relatively non-technical drafting avoids some of the legalism that has affected domestic discrimination law”. On the same basis, he concluded that, while statistical evidence can be important, it was not a prerequisite. He held:

> “Where, as in the present case, a group recognised as being in need of protection against discrimination — the severely disabled — is significantly disadvantaged by the application of ostensibly neutral criteria, discrimination is established, subject to justification”.

Although this might have disposed of the issue, Maurice Kay L.J. turned to consider the second aspect of the claim. This was based on a failure to treat unlike sets of circumstances in an unlike manner and relied on *Thlimmenos v Greece*, where the European Court stated:

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32 *Humphreys* [2012] UKSC 18 at [29].
33 *Humphreys* [2012] UKSC 18 at [33]. Perhaps rather unrealistically, Lady Hale suggested that the more rational solution to the problem under discussion would be to restore to the family courts the power to make appropriate orders to deal with such payments (at [32]).
34 *Burnip* [2012] EWCA Civ 629 at [10]. Maurice Kay L.J. (presumably reflecting the claimants’ submissions) stated that it was not argued that the statutory criteria amounted to indirect discrimination against the disabled. However, disparate impact and indirect discrimination would seem to involve the same issues.
35 [2008] UKHL 43.
36 *Burnip* [2012] EWCA Civ 629 at [13]. This point was emphasised by Lady Hale in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42 at [20]–[25].
37 *Burnip* [2012] EWCA Civ 629 at [13].
“The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”. 38

The Secretary of State argued that the Thlimmenos principle only applied to “exclusionary rules” and that there was no example of the courts requiring a state to take positive steps to allocate public resources to a particular person or group. Maurice Kay L.J. again rejected this argument and could see no basis for imposing a prior limitation on the Thlimmenos principle.39

Interestingly, had he considered that the correct legal analysis of the meaning of art.14 had been elusive or uncertain (in the context of these cases), Maurice Kay L.J. would have been prepared to refer to the United Nations Convention on the Rights of Persons with Disabilities (CRDP). He concluded (albeit obiter) that this would have resolved any uncertainty in favour of the appellants.40 He took the view that the CPRD had “the potential to illuminate our approach to both discrimination and justification”.41 It is, of course, trite law that international conventions do not form part of UK national law unless and until they have been incorporated into national law. At best, such agreements may be taken into account as an aid to interpretation if and when there is an ambiguity in the national law, e.g. where the law is reasonably capable of more than one meaning.42 However, it is now arguable that, in a limited way, such agreements may be incorporated into UK law by way of the European Convention on Human Rights. Maurice Kay L.J. referred to Demir, in which, with reference to the European Social Charter, the Grand Chamber of the European Court of Human Rights stated that

“The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.”43

The European Court has not, however, to date relied greatly on such instruments in the area of social security and it will be interesting to see whether it (and the national courts) do so in the future.”44

39 Burnip [2012] EWCA Civ 629 at [20].
40 Burnip [2012] EWCA Civ 629 at [22].
41 This agreeing with the approach adopted in AH v West London MHT [2011] UKUT 74 (AAC) and disapproving that in R(NM) v London Borough of Islington [2012] EWHC 414 (Admin).
42 Abdurrahman v Secretary of State for Work and Pensions [2007] EWCA Civ 657 at 35–40. Arguably, this would have allowed the court to refer to the CPRD in any case had there been an uncertainty.
44 See, for example, Weller v Hungary (44399/03), March 31, 2009 in which Judge Tulkens (in a concurring judgement) suggested that art.14 should be construed in the light of art.12.4 of the European Social Charter, which provides that domestic law cannot reserve social security rights to their own nationals (although this was strictly obiter).
Prima facie discrimination having been established, Henderson J. addressed the issue of justification. He emphasised that

“what has to be justified is not the scheme of HB as a whole, or the general policy of calculating HB in the private sector by reference to the number of bedrooms deemed to be needed by ‘occupiers’, but rather the difference in treatment resulting from the application of those criteria which has been held to infringe Article 14.”

He considered the circumstances of the claimants in some detail in the context of the Secretary of State’s argument that the wider benefits available to the claimants provided an objective and reasonable justification. In the case of Mr Burnip, the Court concluded that it was necessary to draw a clear distinction between (a) general subsistence benefits (which were not intended to help with his housing needs) and (b) benefits in respect of his housing needs. Secondly, Henderson J. found that Mr Burnip’s objectively verifiable need was for a flat with two bedrooms and the maximum HB available to him on the one bedroom basis left a substantial shortfall from the rent which he had to pay.

Henderson J. noted that discretionary housing payments were in principle available as a way of bridging this gap, but concluded they could not be regarded as a complete or satisfactory answer to the problem as (a) they were purely discretionary in nature; (b) their duration was unpredictable; (c) they were payable from a capped fund; and (d) their amount, if they were paid at all, could not be relied upon to cover even the difference between the one and two bedroom rates of HB, still less the full amount of the shortfall. He noted that

“Housing, by its very nature, is likely to be a long term commitment. This is particularly so in the case of a severely disabled person, because of the difficulty in finding suitable accommodation and the probable need for substantial physical alterations to be made to the property in order to adapt it to the person’s needs. Before undertaking such a commitment, therefore, a disabled person needs to have a reasonable degree of assurance that he will be able to pay the rent for the foreseeable future, and that he will not be left at the mercy of short term fluctuations in the amount of his housing-related benefits.”

The Secretary of State relied on the Court of Appeal’s decision in AM (Somalia). That case involved a requirement of the Immigration Rules that prospective immigrants be able to maintain themselves adequately without recourse to public funds. It was argued that this infringed art.14 by failing to make special provision for people with disabilities by either excusing them from the maintenance requirement, or at least allowing them to be maintained by third parties. The Court of Appeal had found that the requirement was objectively justified. However,
Henderson J. distinguished that case on the basis that it involved immigration control, where the courts are particularly reluctant to interfere in matters of policy.\(^{51}\) Secondly, the instant case did not, he said, involve a general exception from the normal bedroom test for disabled people of all kinds but only for a very limited category of claimants, namely those whose disability is so severe that an extra bedroom was needed. Thirdly, such cases by their very nature would be likely to be

“relatively few in number, easy to recognise, not open to abuse, and unlikely to undergo change or need regular monitoring. The cost and human resource implications of accommodating them should therefore be modest, quite apart from the point that in some cases the effect of refusing the claim could well be to force the claimant into full-time residential care at much greater expense to the public purse.”\(^{52}\)

Fourthly, the extra assistance provided by discretionary housing payments fell far short of being an adequate solution to the problem (for reasons outlined above). Finally, Henderson J. took the view that the fact that Parliament had now legislated for the circumstances of disabled persons requiring a carer (such as Mr Burnip), might “reasonably be taken as recognising both the justice of such claims and the proportionate cost and nature of the remedy”.\(^{53}\)

On this basis, the court concluded that the rule was not objectively justified. The broader issues of the approach to proportionality will be considered below. However, with the exception of the point concerning the nature of the claim (i.e. deference concerning immigration matters), these conclusions are open to some criticism. With respect, it is by no means clear either that a finding of discrimination in AM (Somalia) would have required a sweeping exemption for all disabled people, or that the implications of the Burnip ruling are so narrowly confined as Henderson J. believes. As Judge Howell stated:

“The claimant’s argument really comes down in my view to saying that because of his special needs as a disabled person he requires a more expensive home for himself, and should be entitled to extra housing benefit to reflect this. He has (or those acting on his behalf have) chosen to pin the claim on the extra room rate for another full-time resident but once one departs from the rules the reality, it seems to me, is that it is the same argument in principle whether quantified in that way or as extra cash towards the increased cost of renting a ground-floor flat with level access, wider doors and other features or adaptations to make it a more suitable home for him.”\(^{54}\)

While the specific judgment in Burnip may affect a relatively small group, its implications are potentially much broader.\(^{55}\)

In addition, Judge Howell is surely more correct when he says that the argument that the April 2011 amendment involved a de facto acknowledgment that the

\(^{51}\) Burnip [2012] EWCA Civ 629 at [64].
\(^{52}\) Burnip [2012] EWCA Civ 629 at [64].
\(^{53}\) Burnip [2012] EWCA Civ 629 at [64].
\(^{54}\) [2011] UKUT 23 (AAC) at [49].
\(^{55}\) Judge Howell referred to “the unknown quantity of other groups who might with equal justice emerge to claim special treatment and extra cash” at [51]. See, for example, the claim that a wife required a second bedroom due to disability, rejected in KM v South Somerset District Council [2011] UKUT 148 (AAC).
previous rule was unjustified, did not at all follow as a matter of law under art.14. As Judge Howell observed, the extra allowance to alleviate the position of comparatively few claimants was introduced at the same time as more general cuts across the board and he argued that the effect was “merely to underline the point that the making of such changes, the amounts involved and their timing, are matters for legislation, not judicial tinkering with just one setting in one individual piece of the overall machinery”.

Comment

As noted above, there has been very considerable progress in the manner in which the UK courts approach equal treatment issues. There is now much greater clarity as to the material scope of the ECHR (and, in particular, as to what constitutes a possession for the purposes of P1-1); and as to what constitutes a “status”. The fact that indirect discrimination is covered by European Convention is now clearly established. And it has been recognised both that a flexible approach to comparison should be adopted and that, while statistical proof of disparate impact may be important in certain cases, it is not a prerequisite for a finding of indirect discrimination. This does not mean that the courts have upheld more art.14 challenges—indeed *Burnip* is one of the few cases to have been successful since 2010—but that the courts are more correctly applying principles of ECHR law.

The clarification of these aspects of the law means that more emphasis now falls on the question of objective justification. The first question is the appropriate standard of review. As noted above, the European Court has—at least in principle—tended to distinguish between issues such as nationality and gender, where “very weighty reasons” are required to justify differential treatment, and “general measures of economic or social strategy”, where a lower standard applies. Indeed, in *Carson*, the House of Lords appeared to adopt a similar approach, distinguishing between discrimination on grounds such as race and sex (referred to as “suspect”) and discrimination on grounds such as place of residence and age. The disadvantages of adopting a dichotomous approach have been pointed out, but the European Court has not, in practice consistently applied this distinction. On the one hand, as we have seen, it has frequently accepted less than weighty reasons to justify different treatment even on core grounds while, on the other, it has (rather occasionally) upheld discrimination claims outside these areas. And it does not appear to have applied the higher standard in cases involving indirect discrimination. Given that cases concerning direct discrimination in the areas identified as ‘suspect’ are, probably, now unlikely to arise frequently (outside

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56 [2011] UKUT 23 (AAC) at [51].
57 [2011] UKUT 23 (AAC) at [51].
58 It is interesting to note that Lady Hale felt that it was ‘quite likely’ that the European Court would regard a distinction between majority and minority carers as a ‘status’ for the purpose of art.14 (*Humphreys* [2012] UKSC 18 at [20]).
62 For example, Appl. No.6638/03, *P.M. v United Kingdom*, July 19, 2005 (a case concerning income tax relief for an unmarried father).
“transitional” issues), the UK courts arguably need to develop a more nuanced approach to the standard of review. An example of such an approach is that adopted in *R (D & M) v Secretary of State for Work and Pensions*, where Burnett J. declined to apply a “light touch” reflecting the state’s margin of discretion, as “the claimants in this case are prisoners and patients suffering from serious mental illness. Whilst justification in this area does not call for the very weighty reasons referred to . . . , in my judgment the weight of the justification needed in this context is more than the Strasbourg Court would look for in a case concerned with the payment of ordinary social welfare benefits.”

The UK courts also need to develop their approach to balancing objective justification. The Court of Human Rights has stated that to be objectively justified a measure must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court has further stated that to be proportionate, “a ‘fair balance’ must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden.”

Unfortunately this concept was not explicitly discussed in either of the decisions considered here. In *Humphreys*, the focus of the discussion was entirely on whether the non-splitting rule pursued a legitimate aim. Mr Humphreys’ argument that there was not a reasonable relationship of proportionality between the means employed and that aim was not explicitly addressed and it appears that the state’s submission that a “bright line” approach is permissible was, in effect, adopted. In *Burnip*, in contrast, the emphasis was very much on whether the failure to make an exception to the general rule could be justified. With respect, it is arguable that neither approach is entirely correct and that, under ECHR law, the focus should be on whether a “fair balance” has been struck between the rule and the exception (or lack thereof).

It must be accepted that it is difficult (arguably impossible) to draw any clear or consistent guidance from the jurisprudence of the Court of Human Rights about how to apply the concept of proportionality in social security cases. Even if the issue had been explicitly addressed in *Humphreys*, the Court might well have found that a “fair balance” had been struck between the demands of the general interest of the community and the protection of Mr Humphreys’ fundamental rights and that the additional cost he bore did not constitute ‘an individual and excessive burden’. While one might have considerable sympathy with the *Burnip* claimants, it would seem that the approach adopted in that case is rather different to that taken

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63 For a recent example concerning bereavement grant, see ES v Secretary of State for Work and Pensions [2010] UKUT 200.
64 [2009] EWHC 45 at [21].
65 *James v United Kingdom* (1986) 8 E.H.R.R. 123 at [52].
66 It must be accepted that the Court of Human Rights itself has not consistently applied the concept of proportionality. In some cases, it has (without obvious rationale) applied it in a very stringent manner (e.g. Appl. Nos 27458/06, 37205/06, 37207/06 and 33664/07, *Lakicevic v Montenegro and Serbia*, December 13, 2011) while, in others, it has applied a very weak test (e.g. Appl. No.6268/08, *Andrle v Czech Republic*, February 17, 2011; Appl. No.36571/06, *B. v United Kingdom*, February 14, 2011) or effectively ignored the issue altogether (e.g. Appl. No.16149/08, *Zubczewski v Sweden*, January 12, 2010).
in Humphreys (and, despite the presence of Maurice Kay L.J., with that taken by the Court of Appeal in AM (Somalia)). Nor is it easy to distinguish why the failure to make an exception in Burnip breached art.14 while that in Humphreys did not (it is not clear, for example, that the burden imposed on the Burnip claimants was significantly more excessive than that borne by Mr Humphreys). 67

Having addressed many of the preceding issues, the issue of how to approach objective justification (and, in particular, proportionality) is one which now requires clarification from the Supreme Court. At the time of writing, the Secretary of State for Work and Pensions has applied to the Supreme Court for permission to appeal the Burnip decision and, should this be granted, it would provide a useful opportunity to clarify the law in this area.

67 Indeed one might argue that the effective exclusion from immigration to the UK (in AM (Somalia)) was a much more onerous burden than that imposed in these cases.