Social security, discrimination and justification under the European Convention on Human Rights

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Abstract
This article considers the current state of the law concerning justification of potentially discriminatory treatment in the area of social security under the European Convention on Human Rights. Over time the UK courts have become familiar with the Convention and have improved their interpretation of human rights law and, in particular, non-discrimination under Article 14 of the Convention. The final step in this process is the consideration of proportionality in relation to the justification of potentially discriminatory provisions. There have been a number of recent important decisions on this issue from the Supreme Court including the Recovery of Medical Costs ruling, the ‘Benefit Cap’ decision and Mathieson. The article discusses how the law may develop in this area. This is of particular interest in a social security context in that the Supreme Court has yet to hear the appeal in the ‘bedroom tax/over-accommodation penalty’ ruling.

Introduction
The adoption of the Human Rights Act 1998 has led to a major change in UK social security law (and indeed in UK law generally) with the European Convention on Human Rights (ECHR) now being cited routinely in social security cases. Over time the UK courts have become familiar with the Convention and have improved their interpretation of human rights law and, in particular, non-discrimination under Article 14 of the Convention. The law in many areas – such as the scope of property rights, the approach to comparison and statistical evidence, and the interpretation of status under Article 14 – is now reasonably clear. However, the final step in this process is the consideration of proportionality in relation to the justification of potentially discriminatory provisions. Until recently, the UK Supreme Court adopted a ‘light touch’ approach allowing the State a reasonable margin of discretion in line with the case law of the European Court of Human Rights. Indeed this approach was adopted by the majority in the recent ‘benefit cap’ ruling, s.g. However, in particular recent decisions the Court (or some of its members) have called into question the ‘margin of appreciation’ as it applies to national courts; argued that as part of the proportionality assessment other provisions of international law (such as the UN Convention on the Rights of the Child (UNCRC)) should be taken into account as to

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1 I adopt here Lord Wilson’s comments on terminology and distinguish between differential treatment which may be justified and discrimination rather than ‘justified’ and unjustified’ discrimination. As Lord Wilson said: ‘If justification is established, the result is not “justified discrimination”. For justification will negative the existence of discrimination at all.’ Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47 at [24].

2 R (on the application of SG) v Secretary of State for Work and Pensions [2015] UKSC 16 [hereafter SG]. Or at least in the lead judgement by Lord Reed with which Lord Carnwath agreed as to its conclusions. The details of this case have been discussed extensively in ??? and will not be repeated here.

3 Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales, [2015] UKSC 3.
justification;⁴ and applied a more than usually stringent assessment of justification.⁵ All of this leaves the current law on proportionality in a state of uncertainty.

This article considers the current state of the law – particularly in the light of the recent UK Supreme Court rulings in S.G. (above) and Mathieson⁶ – and discusses how the law may develop. This is of particular interest in a social security context in that the Supreme Court has yet to hear the appeal in the ‘bedroom tax/over-accommodation penalty’ ruling.⁷ The next section outlines the overall approach to discrimination under Article 14 and how this has been clarified by the UK courts. Following this, the article examines the current law as to justification and the principle of proportionality, looking in particular at the appropriate standard of review; the UK Supreme Court’s approach to justification and proportionality; the extent to which other international agreements should be taken into account; and the appropriate remedy to adopt having applied proportionality review. Finally, we discuss how the Supreme Court can clarify the current position and the implications for the pending ‘bedroom tax’ case.

Article 14

Article 14 of the Convention provides that

> 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.

Article 14 is not, of course, free standing and in order to rely on this article another provision of the ECHR must be engaged. According to the jurisprudence of the European Court of Human Rights, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it ‘has no objective and reasonable justification’, that is, 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’.⁸ Moreover the Contracting States enjoy ‘a certain margin of appreciation in assessing

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⁴ Lady Hale, Lord Carnwath and Lord Kerr in S.G.

⁵ Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47. The issue in this case was whether the suspension of payment to a boy aged three, of Disability Living Allowance (DLA) on the ground that he had by then been an in-patient in an NHS hospital for more than 84 days was a breach of his human rights. Lord Wilson (with whom Lady Hale, Lord Clarke and Lord Reed agreed) concluded that it was. Lord Mance (with whom Lord Clarke and Lord Reed agreed) also concluded that it was but on somewhat narrower grounds. As can be seen, Lord Clarke and Reed agreed with both judgments which does not assist in identifying the ratio of the decision. Does Lord Wilson’s ruling represent the judgment of the court or (arguably better) is this in the concurring judgment on the points where the 3 judges differed?

⁶ Note 1 above.

⁷ R (on the application of MA and others) v Secretary of State for Work and Pensions, leave to appeal to the Supreme Court granted 22 December 2014. See also R (A) v Secretary of State for Work and Pensions [2015] EWCA Civ 772.

⁸ Fretté v. France (2004) 38 EHRR 438, at [34].
whether and to what extent differences in otherwise similar situations justify a different treatment.\(^9\)

Thus, in order to make out a case of discrimination in breach of Article 14, it must be shown that (i) the issue falls within the ambit of one of the other provisions of the Convention; and (ii) that on one of the grounds set out in Article 14 or on an ‘other status’; (iii) there is a difference in treatment; (iv) in comparison with persons ‘in analogous, or relevantly similar, situations’;\(^10\) and (v) the difference in treatment is not objectively justified.

The interpretation of Article 14 by the UK courts

(i) Within the ambit

In \textit{RJM} the House of Lords accepted the approach of the European Court of Human Rights (ECtHR) in \textit{Stec} to the effect that most kinds of social security payment will constitute a ‘possession’ for the purpose of Article 1 of Protocol 1 to the Convention (A1P1) which provides for the protection of property.\(^11\) It is now routinely accepted in social security cases that A1P1 is engaged bringing any potential discrimination within the scope of Article 14.\(^12\) This has meant that less attention has been paid to whether an issue might fall within the ambit of other articles, in particular Article 8 (right to respect for private and family life). This was of some significance in \textit{SG}. Both the Divisional Court and the Court of Appeal were of the opinion that Article 8 was engaged (albeit that it was not breached).\(^13\) The Supreme Court did not agree. Lord Reed appeared to say that the argument that the effect of the benefit cap was within the ambit of Article 8 had ‘not been made out’.\(^14\) Lord Carnwath was not persuaded that the arguments as to Article 8 added ‘anything of substance to the claim based on A1P1’.\(^15\) Lord Hughes confused the issue of the infringement of Article 8 rights with the threshold issue of the engagement of Article 8.\(^16\) The dissenting Judges (Lady Hale and Lord Kerr) did not address this important issue.

It is perhaps significant that, in the subsequent \textit{Mathieson} ruling (and although he did not find it necessary to rely on Article 8), Lord Wilson clarified the approach which the courts should take to this issue. He pointed out that, for the purposes of Article 14, it was not necessary to establish that the provision challenged amounted to a violation of the applicant’s rights under the Convention.\(^17\) Nor was it necessary even to establish that this amounted to an interference with his or her rights under the Convention. All that was

\(^9\) Ackermann v. Germany, 71477/01, 8 September 2005.

\(^10\) Carson v United Kingdom (2010) 51 EHRR 13 at [61].


\(^12\) For example in \textit{SG} at [6], [60] and \textit{Mathieson} at [17]-[18].

\(^13\) [2013] EWHC 3350 (Q8) at [69] and [2014] EWCA Civ 156 at [85]. Indeed before the Supreme Court counsel for the Secretary of State conceded that Article 8 was engaged.

\(^14\) \textit{R (on the application of SG) v Secretary of State for Work and Pensions} [2015] UKSC 16 at [80].

\(^15\) Ibid at [99].

\(^16\) At [139].

\(^17\) Mathieson n 1 above at [17].
necessary at this stage was to establish that the suspension was ‘linked to, or ... within the scope or ambit of’ a Convention right.\(^{18}\)

(ii) ‘other status’

At one time the UK courts took a rather restrictive view of what constituted ‘other status’ linking this to a ‘personal characteristic’.\(^{19}\) However, the ECtHR – despite some occasional wavering, as in Carson\(^ {20}\) – has rarely shown any particular interest in defining the concept of ‘other status’ and has generally accepted any and every status (often without any explicit consideration of the issue).\(^ {21}\) The Supreme Court has, after valiant efforts to hold the line,\(^ {22}\) finally accepted the ECtHR’s more flexible approach. In Mathieson, for example, the proposed status was that of ‘a severely disabled child who was in need of lengthy in-patient hospital treatment’.\(^ {23}\) Before the Supreme Court, the Secretary of State contested that this amounted to a status for the purposes of Article 14.

Lord Wilson reviewed the case law of the ECtHR and the UK courts.\(^ {24}\) In particular, he noted that in the Clift case the European Court had not agreed with the House of Lords’ view that ‘a person sentenced to a term of at least 15 years’ did not have a status for the purposes of Article 14.\(^ {25}\) On the basis of this ruling, he concluded that

if the alleged discrimination falls within the scope of a Convention right, the ECtHR is reluctant to conclude that nevertheless the applicant has no relevant status, with the result that the inquiry into discrimination cannot proceed.\(^ {26}\)

Accordingly, he concluded that a severely disabled child in need of lengthy in-patient hospital treatment had a status falling within the grounds of discrimination prohibited by article 14.\(^ {27}\) The ECtHR has held that disability is a status for the purposes of Article 14, as have the UK courts.\(^ {28}\)

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\(^{18}\) Ibid citing Carson v United Kingdom (2010) 51 EHRR 13 and Hode and Abdi v United Kingdom (2012) 56 EHRR 960 as examples of the ECtHR’s approach.

\(^{19}\) See, for example, R (RJM) v Secretary of State for Work and Pensions [2008] UKHL 63 at [45].


\(^{22}\) As in R (Carson) v Secretary of State for the Home Department [2005] UKHL 37.

\(^{23}\) Mathieson at [19].

\(^{24}\) At [21]-[23].

\(^{25}\) R (Clift) v Secretary of State for the Home Department [2006] UKHL 54; Clift v United Kingdom, 7205/07, 13 July 2010.

\(^{26}\) At [22].

\(^{27}\) At [23].

\(^{28}\) Glor v Switzerland, 13444/04, 30 April 2009; Burnip v Birmingham City Council [2012] EWCA Civ 629. See A. Broderick ‘A reflection on substantive equality jurisprudence: The standard of scrutiny at the ECtHR for
(ii) a difference in treatment

The issue of whether there has been a difference in treatment has rarely been critical in recent social security cases. For example, in SG (even though the case involved indirect discrimination) it was conceded on the basis of the statistical evidence that the Benefit Cap Regulations resulted in differential treatment of men and women.29

(iv) of persons in analogous, or relevantly similar, situations

As Lady Hale pointed out in AL (Serbia)

the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether "differences in otherwise similar situations justify a different treatment".30

An analysis of the ECtHR case law on Article 14, put in evidence in that case, showed in only around 4.5% of cases had the Court found that the persons with whom the applicant wished to compare him or herself was not in a relevantly similar or analogous position. Similarly in Burnip, the Court of Appeal rejected an attempt to rely on case law under the Disability Discrimination Act 1995 so as to produce a restrictive approach to Article 14. The Court noted that one of the attractions of Article 14 was that ‘its relatively non-technical drafting avoids some of the legalism that has affected domestic discrimination law’.31 This flexible approach to comparison does avoid the problems which can arise when courts insist on a ‘mirror’ comparator. However, it can also run the risk of mixing up comparison and justification, as the European Court arguably did in Carson.32

In outcome (if not in conceptual approach) this tends to a somewhat similar approach to that in Canada. There the Canadian Supreme Court adopted a flexible approach to comparators in equality jurisprudence, holding that:

a formal analysis based on comparison between the claimant group and a ‘similarly situated’ group, does not assure a result that captures the wrong to which s. 15(1) [the equal protection clause of the Canadian Charter of Rights] is directed — the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including


29 SG at [60]. The issue of whether there was discrimination (or difference in treatment) was considered by Maurice Kay LJ in Burnip but the focus was more on the nature of discrimination and the appropriate comparator.


31 Burnip at [13].

the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.\textsuperscript{33}

Thus, in relation to the issues discussed above, there has been considerable clarification of the correct jurisprudential approach. In most, if not all, these areas the correct approach for the courts and tribunals to adopt is now relatively clear. In addition, the UK courts have generally adopted a flexible approach to the evidence required to prove indirect discrimination avoiding a strict approach in this area. This is well shown in (what became) the \textit{Humphreys} case.\textsuperscript{34} This case involved alleged indirect discrimination on grounds of gender under the ECHR. Mr. Humphreys shared the care of his children with their mother but, like many fathers, was the minority carer.\textsuperscript{35} The social security rules favoured the majority carer and he argued that this involved indirect discrimination. Before the Upper Tribunal, the respondent argued that no evidence has been adduced to show disproportionate impact. The claimant had produced rather general statistics which showed that substantially more men than women were minority carers. The data did not, however, relate to the particular payment at issue. However, having referred to the case law of the House of Lords and the European Court of Human Rights, Judge Jacobs concluded that ‘the focus should be on what matters to the claimant, the issue of discrimination, rather than an analysis of statistical information’.\textsuperscript{36} On the basis of the evidence submitted and his own experience of hearing cases involving child support payments, he accepted that the rule did have a disproportionate impact on men. On appeal before the Court of Appeal and, subsequently, the House of Lords, the respondents accepted this finding and argued that this was objectively justified (on which they were successful).\textsuperscript{37}

Similarly in \textit{Burnip}, the Court of Appeal concluded that, while statistical evidence can be important, it was not a prerequisite. Maurice Kay LJ held that

\begin{quote}
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.\textsuperscript{38}
\end{quote}

This leaves the area of justification as the one area in which the UK courts have yet to adopt a clear approach.


\textsuperscript{34} Her Majesty’s Revenue and Customs v D.H. [2009] UKUT 24; Humphreys v Revenue and Customs [2012] UKSC.

\textsuperscript{35} That is he cared for the children for less time in the week than did the mother.

\textsuperscript{36} At [17].

\textsuperscript{37} Humphreys v HM Revenue and Customs [2010] EWCA Civ 56 at [11]; Humphreys v Revenue and Customs [2012] UKSC 18 at [1]. See Mr. A. v Department of Social Protection, DEC-S2013-010 for a somewhat similar Irish case (involving rent supplement) where on the basis of limited evidence the equality officer was satisfied that disproportionate impact had been shown.

\textsuperscript{38} At [13].
Justification and the principle of proportionality

In this section three key issues are discussed:

i) The appropriate standard of review

ii) The UK Supreme Court’s approach to justification and proportionality;

iii) The extent to which other international agreements should be taken into account; and

iv) The appropriate remedy to adopt having applied proportionality review.

General principles

The ECtHR has consistently stated that Article 14 does not prohibit a Member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article. ... 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. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. 39

The scope of this margin of appreciation will vary according to the circumstances, the subject-matter and the background.40

The appropriate standard of review

One area where the courts have developed the law is in relation to a distinction between those grounds where ‘very weighty reasons’ are required, including nationality,41 gender42 and sexual orientation,43 and other statuses where a lower standard is applied. 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.44 The House of Lords has adopted a similar approach. In Carson, Lord Walker discussed “suspect grounds” in which he included – based on ECTHR case law - race, gender, illegitimacy, religion, nationality and sexual orientation.45

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42 Schuler-Zgraggen v Switzerland, 14518/89, 24 June 1993 albit that the Court does not always apply this strictly in practice as in Runkee and White v United Kingdom, 42949/98 and 53134/99, 10 May 2007.
44 See, for example, James and Others v. United Kingdom, 8795/79, 21 February 1986, Series A no. 98, (1986) 8 EHRR 123.
45 Carson at [58].
Age and place of residence were not seen as amongst the suspect grounds in that case. In *RJM*, Lord Mance preferred the term “core” grounds but found that rough sleeping was not one of these grounds. In *Mathieson*, Lord Wilson considered that disability required some form of heightened scrutiny, although he was not very specific about what this might entail. In *Humphreys*, Lady Hale held that ‘the normally strict test for justification of sex discrimination ... gives way to the ‘manifestly without reasonable foundation’ test in the context of state benefits.’ Arguably this is incorrect as the ECtHR has indeed applied the strict test in several cases involving benefits. However, it does appear that the strict test applies only to direct and not indirect discrimination.

The disadvantages of adopting a dichotomous approach to such scrutiny have been pointed out by Baker, but the European Court has not, in practice consistently applied this distinction. On the one hand, 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. Given that cases concerning direct discrimination in the areas identified as ‘suspect’ are now probably unlikely to arise (outside ‘transitional’ issues), the UK courts arguably need to develop a more nuanced approach to the standard of review.

The Supreme Court’s approach to justification and proportionality;

*Up to 2014*

Up to 2014, the House of Lords/Supreme Court had consistently applied a ‘light touch’ scrutiny to proportionality in social security issues, emphasising the ‘margin of appreciation’ allowed. This is shown in the *Humphreys* case. This involved child tax credit (CTC) which was payable to one parent only in respect of each of their children, even where the care of the child was shared between separated parents. The question before the Supreme Court was whether this difference in treatment (which it was accepted had a disproportionate impact on fathers) was justified or whether the refusal of CTC to a father who looks after his children for three days a week was incompatible with Article 14.

In *Humphreys*, Lady Hale (who gave the judgment of a unanimous court) stated that ‘[t]he proper approach to justification in cases involving discrimination in state benefits is to be

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46 *RJM* at [14]. In that case at [5], Lord Walker developed the concept of ‘concentric circles’. His Lordship based his approach on the concept of ‘personal characteristics’ which is now of rather doubtful relevance. It is not clear that his classification of, for example, ‘pigmentation of skin, hair and eyes’ as in the same group as gender or sexual orientation is useful from an equality perspective. However, in *Mathieson*, Lord Wilson did follow this approach (at [20]).

47 *Mathieson* at [23].

48 *Humphreys* at [19].


50 For example, Appl. No. 6638/03, *P.M. v United Kingdom*, 19 July 2005 (a case concerning income tax relief for an unmarried father).

51 *Humphreys v The Commissioners for Her Majesty’s Revenue and Customs*, [2012] UKSC 18. An earlier example of the same approach can be seen in *RJM*. 
found in the Grand Chamber’s decision in *Stec v United Kingdom*. In that case, the ECtHR had explained the application of the ‘margin of appreciation’ as follows:

The scope of this margin will vary according to the circumstances, the subject-matter and the background. ... 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 the legislature’s policy choice unless it is ‘manifestly without reasonable foundation’.

The Secretary of State argued that the aim of CTC was to provide support for children and that payment to the main carer best achieved that aim. An alternative approach would lead to increased administrative complexity and costs. It was argued a bright line rule concerning entitlement to benefits could be justified, even if it involved hardship in some cases and that the rule could not be said to be ‘manifestly without reasonable foundation’.

Lady Hale accepted that that State’s argument that targeted funds at one household would result in a child being better off than he or she would have been if the funds were split between two households. Thus the state was, in her view, “entitled to conclude that it will deliver support for children in the most effective manner, that is, to the one household where the child principally lives.”

However, in *Burnip* the Court of Appeal, although accepting the same principles as to the approach to justification, applied them in a more rigorous manner. *Burnip* involved three separate cases concerning housing benefit. 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 needs arising from disability. *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.

Henderson J court concluded that the rule was not objectively justified for a number of reasons. First, the case did not involve a general exception from the normal bedroom test for disabled people of all kinds but only for a very limited category of claimants. Second, such cases by their very nature would likely be relatively few in number, easy to recognise,

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53 Ibid, at [51]-[52]. Internal citations excluded.
54 At [23]-[25].
55 At [26].
56 At [29].
57 Ibid.
58 *Burnip v Birmingham City Council* [2012] EWCA Civ 629. The Humphreys ruling was given on 16 May 2012, the day after the Burnip decision.
59 At [26].
not open to abuse, and unlikely to undergo change or need regular monitoring resulting in modest extra costs. Third, the extra assistance provided by discretionary housing payments, fell far short of being an adequate solution to the problem. Finally, the fact that Parliament had by then legislated for the circumstances of disabled persons requiring a carer (such as Mr Burnip) could be taken as recognising both the justice of such claims and the proportionate cost and nature of the remedy.60

Argubaly there is tension between the approach in Humphreys and Burnip. The ECtHR has stated that to be objectively justified a measure (i) must pursue a legitimate aim and (ii) 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.61

Unfortunately this concept was not explicitly discussed in either of the decisions considered here (though see below for the Medical Costs reference).62 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 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). Until 2015, there had been no real attempt in subsequent decisions to explain the difference in approach (if indeed there is one) between the two cases. An appeal to the Supreme Court in Burnip was abandoned and, although the case was referred to in SG and Mathieson, there was no discussion of this aspect of the case.

The 2015 decisions

A series of three judgments in 2015 has made an important contribution to this debate, although they are difficult to reconcile. First, in the Recovery of Medical Costs for Asbestos Diseases Reference, the Supreme Court set out a new approach to the assessment of proportionality under Article 14 taking into account the need for a ‘fair balance’. Unfortunately, however, the Court entirely ignored this in SG where the main judgment followed the standard ‘manifestly without reasonable foundation’ approach while the dissent proposed that provisions of international law (in this case the UNCRC) be imported into the assessment of proportionality. Amazingly there is only one passing reference to the Recovery of Medical Costs ruling in this case. Subsequently, in Mathieson, the Court

60 At [64].
61 James v United Kingdom (1986) 8 EHRR 123 at [52].
62 It must be accepted that the Court of Human Rights itself has not consistently applied the concept of proportionality.
'unanimously' applied a much stricter assessment of proportionality but without any clear explanation is to why it did so and again with only passing reference to the *Recovery of Medical Costs* ruling. We look at each of these three cases in detail.

**Recovery of Medical Costs**

The *Recovery of Medical Costs* ruling concerned a reference to the Court by the Counsel General for Wales on legislation which proposed to impose a retrospective liability on certain persons to reimburse the Welsh Ministers in respect of any relevant Welsh NHS services provided to a person as a result of an asbestos-related disease. The Court had to decide if the Bill was within the legislative competence of the National Assembly for Wales. The majority held that it was not on the basis that the proposed legislation did not fall within the legislative competence of the Assembly. The majority went on to hold that, in addition, the Bill was outside the Assembly’s competence as it involved a breach of the Human Rights Act. Obviously, this latter finding did not strictly arise for decision. The minority of the Court agreed that the Bill was in breach of the Human Rights Act albeit on somewhat narrower grounds. The facts of the case need not concern us here as the main relevance of the case is that the majority took the opportunity to clarify the test of justification under the Human Rights Act.

First, Lord Mance (for the majority) held that, in contrast to the position at the level of the European Court, ‘[t]he margin of appreciation does not apply in the domestic application of the Convention’. He said that '[i]nstead, the issue is with what intensity we should review the Bill and what deference is due or weight attaches to the legislature’s view as to the appropriateness of the Bill'.

His Lordship set out ‘[t]he general principles according to which a court will review legislation for compliance with the Convention rights’ as involving four stages

(i) whether there is a legitimate aim which could justify a restriction of the relevant protected right, (ii) whether the measure adopted is rationally connected to that aim, (iii) whether the aim could have been achieved by a less intrusive measure and (iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.

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63 A person who is or is alleged to be liable to any extent in respect of such disease and by whom or on whose behalf the compensation payment is made after the Bill comes into force. See *Recovery of Medical Costs* at [3].

64 Lord Mance at [35].

65 Lord Mance with whom Lord Neuberger and Lord Hodge agreed.

66 At [44]. See also at [54]: ‘At the domestic level, the margin of appreciation is not applicable, and the domestic court is not under the same disadvantages of physical and cultural distance as an international court. The fact that a measure is within a national legislature’s margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level’. Lord Thomas (at [118]) ‘not dispute that, on the present development of the case law, at a domestic level, a margin of appreciation is not applicable’.

67 At [45]. Citing *Bank Mellat v Her Majesty’s Treasury (No 2)* [2013] UKSC 39, paras 68-76 per Lord Reed and *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 at [310]. The four stages are also set out in similar language in Lord Sumption’s judgment in *Bank Mellat* at [20]. Lord Wilson had earlier taken a similar approach in *R (Aguilar Quila) v The Secretary of State for the Home Department* [2011] UKSC 45 at [45].
Lord Mance agreed that the ‘manifestly without reasonable foundation’ approach did not apply at least in relation to the fourth stage ‘although that [did] not mean that significant weight may not or should not be given to the particular legislative choice even at the fourth stage’.  

The Court concluded that the appropriate test in relation to the aim and the public interest is to ask whether it was manifestly unreasonable, but the approach to the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature’s decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of “manifest unreasonableness”. In this connection, it is important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker.

The minority in this case (Lord Thomas with whom Lady Hale agreed) agreed that the Bill was in breach of human rights law. Lord Thomas adopted the summary of the general principles applicable to A1P1 set out at paras 44 to 53 of Lord Mance’s judgment. Lord Thomas further claimed to agree with Lord Mance that proportionality is an issue where the court must determine whether a fair balance has been struck. However, rather in contradiction to this, Lord Thomas stated that it is an essential part of the balancing exercise that the court accords great weight to the judgement of the legislature as to the public interest, provided that the judgement is not manifestly without reasonable foundation ….

Notwithstanding, the reservations of the minority in this case, the majority set out a clear approach to justification which dispensed with the ‘margin of appreciation’ at domestic level and provided for as assessment of whether ‘a fair balance’ had been struck the relevant interests, an issue which was not to be decided on the ‘manifestly without reasonable foundation’ approach. Having made this important statement of law, the Court entirely ignored it in SG.

**The Benefit Cap ruling**

This case involved a challenge to the ‘benefit cap’ which is provided for in the Welfare Reform Act 2012 and implemented by the Benefit Cap (Housing Benefit) Regulations 2012 (the Benefit Cap Regulations). The cap applies where the entitlement of a single person or

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68 At [46].
69 At [52].
70 At [114]. Lord Thomas expanded on this at [118]-[126].
couple to specified welfare benefits exceeds an amount which represents the net median weekly earnings of a working household in Great Britain (currently set at £350 a week for a single claimant without dependent children and £500 for all other claimants). Benefits covered by the cap include housing benefit, child benefit and child tax credit. The cap does not apply to persons entitled to working tax credit which, in turn, requires a lone parent to work at least 16 hours a week, and a couple to work a total of 24 hours a week, with one working at least 16 hours. It was accepted that the cap had a disproportionate impact on female headed households.

Lord Reed (with whom Lord Hughes agreed) held that the Benefit Cap Regulations were objectively justified under Article 14 applying the usual Stec test of whether the Regulations were ‘manifestly without reasonable foundation’.\(^{72}\) Lady Hale and Lord Kerr in contrast, ruled that the benefit cap breached Article 3 of the UN Convention on the Rights of the Child (UNCRC) which had to be taken into account in applying the provisions of the ECHR and would have struck down the Regulations. Lord Carnwath agreed that the Regulations were in breach of the UNCRC but reluctantly agreed with Lord Reed that this was not relevant to an assessment of the compatibility of the Regulations with Article 14 of the ECHR taken with A1P1. He stated that he ‘would dismiss the appeal, albeit on grounds much narrower than those accepted by the courts below.’\(^{73}\) Unfortunately he does not clearly explain what that narrower basis might be while Lord Reed would appear to have upheld that regulations on broadly the same basis as the courts below.

Lord Reed held that test for justification in the context of welfare benefits involved the ‘manifestly without reasonable foundation’ test.\(^{74}\) The Government’s justification for the scheme was that it is necessary to set a reasonable limit on the extent to which the state will support non-working families from public funds; provide members of households of working age with a greater incentive to work and achieve savings in public expenditure in the interests of the economic well-being of the country.\(^{75}\) In relation to objective justification under Article 14, Lords Reed and Hughes accepted that the Regulations pursued a legitimate aim, accepting all three objectives outlined above. Lord Reed rejected the appellants’ argument that reducing public expenditure could never constitute a legitimate aim.\(^{76}\) However, he also accepted that this did not mean that this aim would constitute a justification for otherwise discriminatory treatment.\(^{77}\)

In applying this test, Lord Reed rejected arguments that for alternative and (arguably) more proportionate approach (e.g. setting the cap by reference to the income of working households including benefits rather than earnings only and/or excluding child benefit). He pointed out that s. 96 of the Welfare Reform Act (which was not challenged) required that the cap be set relevant to earnings, and that decisions as to the level of the cap were ‘a

\(^{72}\) Stec v United Kingdom (2006) 43 EHRR 1017.

\(^{73}\) R (on the application of SG) v Secretary of State for Work and Pensions [2015] UKSC 16 at [133].

\(^{74}\) SG at [11].

\(^{75}\) Per Lord Reed in SG at [4].

\(^{76}\) Ibid at [63].

\(^{77}\) At [64].
matter of political judgement’. Even if the savings from the cap were a relatively small part of the total welfare budget, they nevertheless contributed to reducing the fiscal deficit and were designed to lead to longer-term savings. The possible exclusion of child-related benefits was again ‘inherently a political question’ and their exclusion would have defeated the legitimate aim of the cap by significantly reducing the savings involved. Finally, Lord Reed held that in applying the ECHR, the courts should have regard to the fact that ‘certain matters are by their nature more suitable for determination by Government or Parliament than by the courts’. In this case both the Government and Parliament had given detailed consideration to the issues raised.

Lady Hale accepted the Stec test but took the view that

> even in the area of welfare benefits, where the court would normally defer to the considered decision of the legislature, if that decision results in unjustified discrimination, then it is the duty of the courts to say so.

Lady Hale identified the justification somewhat differently as being to introduce greater fairness in the welfare system between those receiving out-of-work benefits and tax payers in employment; make financial savings to help make the system more affordable by incentivising behaviours that reduce long term dependency on benefits; and increase incentives to work. She accepted that these were legitimate aims but questioned whether the cap did achieve fairness having regard to the intervener CPAG’s evidence that, when in-work benefits were taken into account, families were already significantly better-off in work. She seemed rather unconvinced of the proportionality of the other objectives although it is difficult to find a clear conclusion on this point applying the standard Stec test. More fundamentally, however, Lady Hale took the view that the ‘approach to both discrimination and justification in this case may be illuminated by reference to other international instruments to which the United Kingdom is party’ in particular the UNCRC. This is considered in more detail below.

Thus the Court made no reference to Lord Mance’s restatement of the law on justification, and continued to refer to a margin of appreciation and the ‘manifestly without reasonable foundation’ test. There is only one passing reference to the Recovery of Medical Costs ruling and no explicit consideration of whether a ‘fair balance’ had been struck.

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78 At [69].
79 At [70].
80 At [71] and [77] respectively.
81 At [92].
82 At [160].
83 At [190].
84 At [192].
85 At [196] et seq.
86 At [213].
87 By Lady Hale at [209].
Mathieson

As noted above, Lord Wilson recognised that disability was a ground for the purposes of Article 14 and one to which a higher level of scrutiny would apply. However, the remainder of the ruling contains no reference to the implications of this finding for the standard of review. Lord Wilson began his analysis of justification with reference to Stec including the margin of appreciation and the “manifestly without reasonable foundation” approach.\(^{88}\) He noted, however, that it did ‘not necessarily follow that the domestic judiciary should afford a margin of equal generosity to the domestic legislature’\(^{89}\) and that the Court had

> at last helpfully recognised that the very concept of a “margin of appreciation” is inapt to describe the measure of respect which, albeit of differing width, will always be due from the UK judiciary to the UK legislature.\(^{90}\)

However, this is the first and last reference to the Recovery of Medical Costs case and again there is no explicit discussion of ‘fair balance’. Indeed, Lord Wilson immediately turned back to case such as RJM and Humphreys where the Court had ruled that the provision of state benefits to the homeless was an “area where the court should be very slow to substitute its view for that of the executive.”

The Secretary of State argued that the suspension was pursuant to the rule against overlapping provision. As in-patients’ disability-related needs were met by the National Health Service, it was argued that the suspension of disability cash benefits was justified. However, the Court was satisfied on the evidence that almost all parents provided more or the same level of care when their child is in hospital compared to when their child is at home and the vast majority had increased costs relating to their child’s disability when they are staying in hospital.\(^{91}\) Accordingly the Court concluded that there was, in effect, no basis for the justification advanced and held that there was a breach of human rights.

Lord Mance, with whom Lord Clarke and Lord Reed agreed, approved this outcome. However, perhaps ironically for the author of the majority judgement in the Medical Costs case, Lord Mance stated that

> Courts should not be over-ready to criticise legislation in the area of social benefits which depends necessarily upon lines drawn broadly between situations which can be distinguished relatively easily and objectively.\(^{92}\)

He emphasised this as an important principle ‘in terms rather more forceful Lord Wilson’. However, he agreed that the justification advanced failed ‘to reflect the modern emphasis

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\(^{88}\) At [25].


\(^{90}\) Ibid citing In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [2015] UKSC 3.

\(^{91}\) We do not discuss here the rather unusual nature of this evidence which was based on a statistically unrepresentative study by an organisation campaigning for the removal of the DLA suspension, a report which had not been before the Upper Tribunal and which the Court of Appeals considered ‘adds little’: [2014] EWCA Civ 286 at [38].

\(^{92}\) At [51].
on the importance of parents, in particular, continuing to provide assistance in connection with bodily functions while their child is undergoing long-term hospitalisation’.  

In Mathieson, the Court’s approach to justification is unclear. The Court applied a more rigorous approach than in SG but did not provide a clear explanation as to why it did so. It might have applied a higher standard on the basis that the disability ground required ‘very weighty reasons’ for justification but, if it did so, this is not explicit in the judgment. It might have done so on the basis that discrimination was direct rather than indirect but again this is not explicit. One might suggest that there was – on the evidence – no rationale for the rule in this case but that only emerges if one gives in-depth consideration to the issue. The same lack of rationale was argued in SG and the main judgment showed no interest in engaging with the issues whereas the Court in Mathieson went to considerable lengths to find that the justification advanced was not supported by evidence. Perhaps one can point to a difference in the legislative aim where that in SG was recent and debated at length (if debateable) while that in Mathieson was ‘broad brush’ and there had been no specific discussion about its application but again this is not made explicit in the ruling. The striking point is that neither case applied the ‘the general principles according to which a court will review legislation for compliance with the Convention rights’ set out in the Medical Costs ruling.

The extent to which other international agreements should be taken into account

In Demir the Grand Chamber of the ECtHR 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.  

In Demir this meant that the Court had regard to the European Social Charter (even though the specific provisions had not been ratified by Turkey).  

This relevance of the UNCRC was raised in SG. Article 3(1) UNCRC provides

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.

It was accepted that Article 3 UNCRC is contained in an international treaty ratified by the UK which is binding on the UK in international law but that it did not form part of English law. It was also accepted that the ECHR should be interpreted, in appropriate cases, in the

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93 At [55].


95 See, for example, Weller v Hungary, 44399/05, 31 March 2009 in which Judge Tulkens suggested that Article 14 should be construed in the light of Article 12.4 of the European Social Charter, which provides that domestic law cannot reserve social security rights to their own nationals (although this was obiter).
light of generally accepted international law in the same field, including treaties such as the UNCRC. However, the Court differed as to the relevance of this provision to the case. Lord Reed saw the argument as involving a replacement of the normal proportionality assessment under Article 14 with a test of compliance with Article 3 UNCRC. He did not see the relevance of the UNCRC in this case of ‘alleged discrimination between men and women in the enjoyment of the property rights guaranteed by A1P1’. 96 Lord Hughes broadly agreed as (with reservations) did Lord Carnwath.97

In contrast, Lady Hale (with whom Lord Kerr agreed) found that, while the Government was keenly aware of the impact the benefits cap would have on children, the rights of children were not at the forefront of the decision-maker’s mind.98 Nor were their best interests treated as a primary consideration. She held that Article 3(1) required that ‘consideration be given to the best interests, not only of children in general, but also of the particular child or children directly affected by the decision in question’.99 Lady Hale concluded that it could not ‘possibly be in the best interests of the children affected by the cap to deprive them of the means to provide them with adequate food, clothing, warmth and housing, the basic necessities of life’.100 It was not sufficient for the Government to argue that children in general might benefit by a shift in welfare culture. She distinguished Humphreys (which had involved payment of child tax credit to the main carer) on the basis that the objective was to ‘concentrate the help for the child where it was most needed and to maximise the amount of public money available to support children’.101 In contrast, the benefit cap broke ‘the link between benefit and need’.102 Furthermore, the more children there were in a family, the greater would be the impact of the cap.

Lady Hale concluded that if the best interests of the children affected was considered as a primary consideration, the disproportionate impact on women of the cap could not be a proportionate means of achieving a legitimate aim. She found that

Families in work are already better off than those on benefits and so the cap is not necessary in order to achieve fairness between them; saving money cannot be achieved by unjustified discrimination; but the major aim, of incentivising work and changing the benefits culture, has little force in the context of lone parents, whatever the age of their children. Depriving them of the basic means of subsistence cannot be a proportionate means of achieving it.103

Lord Carnwath, who also had regard to the interpretative comments of the UN Committee on the Rights of the Child,104 agreed that the Secretary of State had ‘failed to show how the

96 At [87]-[89].
97 At [136]-[47] (Lord Hughes) and [129]-[32] (Lord Carnwath).
98 At [225]. Lord Kerr also discussed the status of international covenants arguing that Article 3 UNCRC should have direct effect but this view was not supported by any other member of the Court.
99 At [226].
100 Ibid.
101 At [228].
102 At [180].
103 At [229].
104 At [105]-[107].
regulations are compatible with his obligation to treat the best interests of children as a primary consideration'. Only Lord Hughes explicitly took the opposite view, agreeing with the Divisional Court and Court of Appeal that there was no breach of Article 3 UNCRC. In his view, the Secretary of State had given careful consideration to the issues and there had been ‘the fullest public debate’.

In Mathieson the Court applied a parallel consideration of the UNCRC to arrive at a ‘harmonious’ interpretation. As the Secretary of State had never conducted an evaluation of the possible impact of the decision on the children concerned, Lord Wilson concluded that there was a breach of the procedural rule concerning the best interests of children which had ‘generated a violation of the substantive right of disabled children to have their best interests assessed as a primary consideration’.

Lord Wilson noted that

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 rights under two international conventions.

However, this does not really clarify what happens when a harmonious interpretation is not so easily arrived at nor the extent to which national law should be read in the light of international conventions in order to do so.

It is indeed clear that the ECtHR will ‘take into account elements of international law ... , the interpretation of such elements by competent organs, and the practice of European States reflecting their common values’. And under s. 2 of the Human Rights Act 1998, UK courts determining a question in connection with a Convention right must ‘take into account’ any judgment, decision, declaration or advisory opinion of the ECtHR. However, it is questionable if the approach proposed by the dissent in SG is appropriate. In effect, this approach would give direct effect in UK law to instruments such as the UNCRC where these are relevant to the interpretation of a Convention right at issue. Arguably this goes far beyond how the ECtHR itself has applied Demir. In his detailed study of the implementation of this ruling by the ECtHR, Lörcher found it ‘impossible to demonstrate consistent use’ by the Court of the Demir approach. Of course, as Lord Wilson noted in Mathieson, ‘an inhibition .. about extending the meaning of convention terms beyond what the ECtHR had “authorised”’ is ‘less keenly felt by this court nowadays’.

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105 At [128].
106 At [148] et seq.
107 At [41].
108 At [44].
109 Nor indeed why the Supreme Court issued what was in effect an advisory opinion on the compatibility of the rule with the UNCRC.
110 Op cit. at p. 46. He noted that Demir has been cited in less than 1% of subsequent rulings although this indeed understates
111 At [22].
Even if this is the case, the dissenters’ approach perhaps overlooks one critical issue. Both Lady Hale and Lord Kerr emphasised that the UNCRC had been ratified by the UK. Lady Hale argued that the court’s ‘approach to both discrimination and justification in this case may be illuminated by reference to other international instruments to which the United Kingdom is party’ including the UNCRC. But Demir is quite specific that ‘it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned’. Thus, in a recent case, the ECtHR took into account International Labour Organisation (ILO) Convention No. 102 on Social Security, although it had not been ratified by Hungary (the respondent State) nor indeed by a majority of Council of Europe States.

In line with the Demir approach the UK courts, in interpreting Convention rights, must ‘take into account’ all international laws which satisfy the test set out above. The courts could, of course, go beyond this requirement in the case of international laws ratified by the UK, or indeed, if one accepts Lord Kerr’s arguments, give them direct effect. However, it is arguable that to do so in the case of unratified international laws would be inconsistent with the separation of powers. Thus it is arguable that to go as far as Lady Hale and Lord Kerr would have gone is a matter of judicial policy rather than something which is required by the jurisprudence of the ECtHR.

The appropriate remedy to adopt having applied proportionality review

Finally, we turn to the remedy chosen by the Court in Mathieson. The Court concluded that the appellant’s rights had been breached but did not read the Regulations on suspension of payment of DLA so as not to apply to children. Lord Wilson suggested that this would have been impossible but, more importantly, he accepted the Secretary of State’s argument that it may not always follow that the suspension of payment of a child’s DLA will violate his or her human rights. Lord Wilson expressed the view that ‘[d]ecisions founded on human rights are essentially individual’ and allowed the Secretary of State to consider whether there are adjustments, otherwise than in the form of abrogation of the provisions for suspension, by which he can avoid violation of the rights of disabled children. Lord Mance also accepted that the remedy should be ‘tailor-made’ and limited to the particular case.

Mathieson is a very specific ruling – almost ‘as applied’ in US terms. The Court did not rule the 84 day rule was inconsistent with the ECHR in general but only in this case (and by

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112 At [213] emphasis added. See Lord Kerr at [255]-[256].
113 Demir at [86].
114 Béláné Nagy v. Hungary, 53080/13, 10 February 2015. United Kingdom has accepted only Parts II to V, VII and X. Indeed, in that case, the Court also relied on the WHO International Classification of Functioning, Disability and Health (ICF) which is not an ‘international law’ in any usual sense of the term.
115 At [49].
116 At [61].
117 See A. Kreit ‘Making Sense of Facial and As-Applied Challenges’, 18 Wm. & Mary Bill Rts. J. 657 (2010) who explains (at 657) that: ‘A facial attack is typically described as one where “no application of the statute would be constitutional.” In contrast, courts define an as-applied challenge as one “under which the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff’s particular circumstances.’
implication similar cases). The Court is certainly correct that the logic of a proportional approach implies a proportional remedy. What is proportionate in one case may not be so in another. But the approach adopted by the Court applies a limited version of proportionality. On the one hand, Lord Wilson appeared to say that if the Mathieson situation was exceptional,\(^{118}\) there would not have been a breach of the ECHR but even though it was (on the evidence) a majority position, the Supreme Court still left it open to DWP to apply the rule where it could be justified.

More broadly, while the UK courts have now developed the concept of proportionality, the idea of a flexible remedy is rather a stranger to common law jurisdictions. As Laws LJ suggested in the Court of Appeal in Mathieson, the approach adopted by the Supreme Court does tend to ‘abolish the brightline rule in favour of an entirely ad hominem approach’\(^ {119}\). As Kreit has pointed out, the distinction in US law between facial and as-applied challenges has led to ‘deep disagreement and confusion among commentators and the courts’.\(^ {120}\) The main point to make here is that, despite the apparent logic of its approach, the Supreme Court would be well advised to consider the potential implications of a proportional approach to remedy before venturing further down that path.

**Discussion**

The Supreme Court might appear to be faced with a difficult challenge to reconcile the approaches of the ‘majority’ and dissent in SG in a manner which does not simply blur over all differences (as the Court was inclined to do in Mathieson). However, this challenge is made much easier by the fact that the Court had already – in the Medical Costs reference – set out a cogent and coherent approach to assessing justification. All the Court needs to do now is to apply it.

As noted above, in that case, the Court set out a four stage approach:

1. whether there is a legitimate aim which could justify a restriction of the relevant protected right,
2. whether the measure adopted is rationally connected to that aim,
3. whether the aim could have been achieved by a less intrusive measure and
4. whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.\(^ {121}\)

And the Court clarified that the ‘margin of appreciation’/ "manifestly without reasonable foundation" test does not apply to the fourth (fair balance) stage.\(^ {122}\) The outcome in Mathieson is certainly consistent with this approach. The Court effectively held that the

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\(^{118}\) *Mathieson* at [29]: ‘is the case of Mr and Mrs Mathieson a hard case, unreflective of the position of most parents in their situation?’

\(^{119}\) *2014* EWCA Civ 286 at [38]. Laws LJ stated that ‘In my judgment the law does not require anything of that kind to be done, and it would be very surprising if it did.’

\(^{120}\) Op cit. at p. 663.

\(^{121}\) *Medical Costs* at [45].

\(^{122}\) It is clear that the Court is referring here to the ‘margin of appreciation’ as a concept of Convention law and that UK courts may still give significant weight to the particular legislative choice.
suspension of DLA was not rationally connected to the legitimate aim of avoiding overlapping benefits. Whether the benefit cap could have withstood the correct applications of this framework must be an open question. While the ‘majority’ might well have been satisfied as to the first three stages, the question of whether, on a fair balance and without the ‘margin of appreciation’, the benefits of achieving the aims of the cap outweigh the disbenefits to claimants is a much more difficult question.

The Court will, of course, be required to resolve these tensions in coming cases, especially in the pending bedroom tax/over-occupational penalty case (MA). Before the Court of Appeal, this case was disposed of by the Court with frequent references to the "manifestly without reasonable foundation" test. Indeed, the Court was entirely correct to apply this approach given the jurisprudence in cases such as Humphreys. At first sight, one might think that the outcome in SG will make it difficult to come to a different conclusion in MA. The decision was by a largely similar court to that which upheld the benefit cap and the main judgment in the Supreme Court in the latter case was along similar lines to that adopted by the Court of Appeal in both cases. Nonetheless, it is submitted that the main judgment in SG does not now correctly reflect the law in the light of the Medical Costs decision (which is not necessarily to say that the result was incorrect). The Court will have to square the circle in the bedroom tax case in applying the correct four stage test and reconciling the outcome with that in the earlier case law. It is submitted that, while international conventions can certainly have a role in interpreting the ECHR, it is neither necessary nor desirable to replace the four stages with a test of compliance with the UNCRC or the CRPD. However, this is certainly an interesting challenge for the Supreme Court.

123 R (on the application of MA and others) v Secretary of State for Work and Pensions.
125 It is unfortunate that two cases decided at the same time by the Court of Appeal will be heard over a year apart by the Supreme Court.