**‘Done because we are too menny’: the two-child rule promotes poverty, invokes a narrative of welfare decadence, and abandons children’s rights**[[1]](#endnote-1)

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*Abstract:*

Among a swathe of major welfare reforms, one has received little academic attention - the two-child rule, restricting claims for key benefits to a maximum of two children. In negating the status of specific children within the framework of subsistence benefits, the measure clashes profoundly with a series of international legal obligations. In particular, the rule is set to increase child poverty, calling into question the role and purpose of the UN Convention on the Rights of the Child in the law-making process. This paper explores problematic recent decisions that risk creating a human rights chasm when it comes to children and social security rights, and argues that existing legal provisions can and should be used to fill that gap. It finds no evidence that the best interests of the child were a primary consideration in the enactment of the two-child rule, and argues that the justificatory narrative of welfare decadence is manifestly without reasonable foundation. If the UN CRC does not bite here, then we must question whether children have any social security rights at all.

*Key words:*

Child poverty; two-child rule; universal credit; child tax credit; UN CRC; best interests duty; judicial review

**Introduction**

On 8 July 2015, then Chancellor of the Exchequer George Osborne announced a dramatic departure in UK welfare law - the two-child rule, which now limits the amount of eligible children for child tax credit and universal credit to two.[[2]](#endnote-2) It was swiftly codified in draft primary legislation, the Welfare Reform and Work Bill 2015.[[3]](#endnote-3) Despite the many proposed amendments to the Bill,[[4]](#endnote-4) the rule survived more or less unchanged in the Welfare Reform and Work Act 2016,[[5]](#endnote-5) but has remained controversial (CPAG, 2017a; Unison, 2017, Mullally et al, 2018). It has been challenged in a judicial review claim (*SC & Ors v SSWP* [2018] EWHC 864 (Admin)). The High Court dismissed most of the claim but for an issue about the way one of the exemptions worked,[[6]](#endnote-6) and the case is now pending before the Court of Appeal.

The exemption for children born as a result of non-consensual conception, or the ‘rape clause’, has generated considerable concern, being potentially insensitive, inoperable, stigmatising, and dependent upon inappropriate conditions (Women’s Aid Federation Northern Ireland 2017; National Alliance of Women’s Organisations 2017; Child Poverty Action Group, 2016 and 2017b; Low Income Tax Reform Group, 2016; Social Security Advisory Committee 2017). There was an e-petition to scrap the rape clause, and a campaign to scrap the clause (Kennedy, Bate & Keen, 2017). Rather than add to the commentary on that exemption (Machin, 2017), this article proceeds from the premise that the provision is symptomatic of a system that has taken a wrong turn, and focuses on the two-child rule itself, which represents no less than a paradigm shift in the welfare state. Bradshaw (2017) forcefully describes it as ‘the worst social security policy ever’. This article suggests it is the most significant violation of human rights that has yet been written into the fabric of the UK social security system - because it is predicated on some humans having nugatory status in the calculation of subsistence benefits. The rule raises pressing and troubling questions about the relationship between social security and human rights, about the duties contained in the UN Convention on the Rights of the Child (UN CRC), and in particular, about whether the Article 3 duty to treat the best interests of the child as a primary consideration means anything.

The evidence points to damaging outcomes for children; the Child Poverty Action Group note that families with three or more children are disproportionately more at risk of poverty already, (CPAG, 2016, 3) while the Institute for Fiscal Studies projects that *this rule alone* will place 200 000 *more* children in poverty by 2021 (IFS, 2016, 32). The rule is starkly opposed to the best interests of the children affected. This article argues that if the targeted impoverishment of children does not engage the UN CRC, then no social security policy will. Yet, the accompanying impact assessment suggested that the rule ‘could’ create benefits for the children affected (DWP et al, 2015). The High Court judgment simply found that those interests had been ‘at the forefront of the debate’ and so the duty had been discharged (*SC & Ors v SSWP,* 209).

But what is required when making children’s best interests a ‘primary consideration’? Taylor notes that it can be difficult to give the duty coherent meaning because of its wide-ranging applications (Taylor, 2016, 45). It can be especially difficult to apply it in the context of decisions taken by a heterogeneous body like Parliament. Is it enough to note that those opposing a measure raised children’s best interests? No, it is not. Following Lord Carnwath’s reasoning in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, (the benefit cap case), once engaged, the UN CRC requires an explanation of how the measure is reconciled with, or weighed up against, those interests.

The next section presents the evidence that children will be significantly worse off as a result of the operation of the two-child rule. To establish that the UN CRC can crystallise into something justiciable, the paper next examines the ECHR rights engaged, and the interpretative role the UN CRC should then play. It notes some of the almost semantic difficulties created by the unusual position of children in welfare systems, as specific but indirect recipients, which can result in states declaring that they have no property rights and no Article 1, Protocol 1 claim. It also suggests that the rule both engages, and falls within the ambit of, the right to private and family life, in Article 8 ECHR, and argues that families with more than two children form an ‘other status’ for the purposes of an Article 14 discrimination claim.

The fourth section examines the role that best interests duty is meant to play in the UK legal system, specifically in the context of welfare law, asking what it means to make children’s best interests a ‘primary consideration’. It includes a content analysis of the parliamentary debates in the House of Commons and the House of Lords, Public Bill Committee hearings, the government’s impact assessment, and the government’s human rights memorandum. The analysis sought to identify anything that could be deemed a ‘consideration’ on the part of the Bill’s proponents, and coded them, in order to produce a picture of the prevalence and weight of each one. While the line between a ‘consideration’ and a ‘primary consideration’ is a fluid one, the data suggests that children’s best interests were some way from primary consideration status. The analysis considers the brief suggestions in the impact assessment that the measure will actually create benefits for the children, by improving the financial resilience of their families, and notes that the claim is manifestly without reasonable foundation.

Instead, the government, and Parliament, must show that the best interests of the child have been outweighed by other considerations. The fifth section argues that overriding interests must at least be rational. Apart from saving money, the two most prominent considerations were the assertions that people on benefits should face the ‘same choices’ as those not on benefits, and that the rule creates more fairness between tax payers and benefit recipients. Neither the ‘same choice’ nor the ‘fairness to taxpayers’ points pass the low bar of a rationality test. Families above and below the welfare line are not making the ‘same’ choice. Moreover, families may be able to afford a third child, but later be hit by events - separation, bereavement, redundancy, long term illness, and so on. They will suddenly need support from a welfare safety net that is now deliberately calculated to not meet their basic needs. The rule appears to favour families who are not only on high incomes, but who can also guarantee that life events like job loss or spousal death will not reduce their capacity to support their children. In other words, they must have high incomes and high *capital*. It is, in short, an aristocratic turn in the law.

The ‘fairness to taxpayers’ argument is also irrational. It is based on a false dichotomy, given that the majority – almost two thirds – of children in poverty have at least one working parent (IFS, 2015); they are taxpayers. Stripping away the irrational objectives, the only remaining aim is that of saving money. But cutting costs cannot be done in any fashion with impunity. Targeting children when cutting benefits without exhausting alternative measures is itself an infringement of Article 4 UNCRC (on public budgeting). The government cannot justify overriding the best interests of the child with an objective that violates another part of the convention.

Before the rule’s coming into force, the UK was already on the verge of violating the UN CRC (UN Committee on the Rights of the Child, 2016, §12) and the International Covenant on Economic, Social and Cultural Rights (UN Committee on Economic, Social and Cultural Rights, 2016, §18). The two-child rule is the tipping point. The violation is such that the particularly affected group – families with more than two children – are gravely disadvantaged, amounting to discriminatory restriction of Article 8 ECHR rights. In negating children’s social security statuses, it is an avowedly de-humanising measure, deployed against a minority group.

**The two-child rule is directly opposed to the best interests of the children affected**

The Joseph Rowntree Foundation reported in 2017 that the rate of poverty in families with three or more children had steadily risen since 2012/13, reaching 39% in 2015/16 – before the two-child rule came into effect. Poverty in lone parent families is also on the rise – from 41% in 2012/11 to 46% in 2015/16 (JRF, 2017, 15). The two-child rule will have a direct and serious impact on these families. It restricts the child element of child tax credit and universal credit to two children, meaning that third or subsequent children born after 1 April 2017[[7]](#endnote-7) are disregarded, where previously they were recognised to trigger a child element. The full child element, calculated according to subsistence needs, is £2780 per child per year. The government’s impact assessment projected that by 2021, 640 000 families will be affected (DWP et al, 2015), meaning at least 1.9 million children will live in families with insufficient money to meet their needs. Of that number, the IFS predict that 200 000 will be pushed into poverty as a result of the rule. Policy in Practice published research in 2017 suggesting that the rule would increase child poverty even further than the IFS had predicted – resulting in 266 000 more children living in poverty, or an increase of 10% (Ghelani & Tonutti, 2017). The Resolution Foundation has predicted that the measure will ‘will continue to drag on living standards improvements’ beyond 2023 (Resolution Foundation, 2018, 32). A coalition of End Child Poverty, the Child Poverty Action Group, and the Church of England predict that by 2025, 900 000 families, or around 3 million children will be affected (End Child Poverty et al, 2018). Families already living in poverty will face deeper and more dire circumstances, while those living close to the poverty line will be pushed below it if they have a third child. The coalition concludes that ‘if you set out to design a policy that was targeted to increase child poverty, then you could not do much better than the two-child limit’ (ibid, 2). They forecast that by 2021/22 *more than half* of families with three or more children would be living in poverty.

Child poverty matters. And not only because of the immediate physical effects of not having the heating on (Hills, 2011), food insecurity and attendant health risks (Royal College of Paediatrics and Child Health & CPAG, 2017; Richardson, 2018), or living in poor or precarious housing (Shelter, 2010). Child poverty is also linked to an achievement gap in education (Ferguson et al 2007; Cardiff Council, 2013; National Education Union & CPAG, 2018); it is associated with chronic physical health problems (Cooper & Stewart, 2017) mental health problems (Ayre, 2016) and long-term life outcomes (Griggs & Walker, 2008; The Children’s Society, 2013). The effects of income poverty are more acute for some groups, with people with disabilities and lone parent families in poverty more likely to suffer material deprivation (JRF, 2017). The IFS reported in 2015 that ‘the proportion of children of working lone parents who are materially deprived went from a quarter in 2010–11 to a third in 2013–14’ (IFS, 2015, 89). The National Children’s Bureau has found that poverty has a significant social impact upon children, damaging personal and social relationships, with family, friends and peers (NCB, 2016). The Children’s Society (2011) has published research showing that children in low-income households are ‘considerably less likely to have a good level of wellbeing than other children’.

The two-child rule is set to increase and deepen child poverty according to available, credible forecasts – and *there are no forecasts that suggest otherwise*. On being pressed in March 2018 as to how the rule should be reconciled with the government’s claim that policy-making gives primary consideration to the best interests of the child, Lord Bates, the Minister of State in the Department for International Development, did not dispute suggest the analysis, cited by Baroness Lister, that the rule would ‘worsen child poverty’. Instead, he stated the government’s aim was to ‘introduce an element of fairness’ and that people should have to make ‘very difficult decisions’, similar to those made by people not on benefits, when choosing whether to have a third child.[[8]](#endnote-8)

That the two-child rule causes to hardship to the children in its scope is implicitly acknowledged through the creation of exceptions to the rule.[[9]](#endnote-9) The exceptions do not focus on need, but purely on whether the parent can be held responsible for the birth of the third child – cases of multiple births, or conceptions resulting from rape, or kinship care. There is no suggestion that these families would otherwise suffer special financial hardship that does not apply to other families with three children. The existence of the exceptions is recognition that the measures cause financial hardship, but some people should be deemed to not deserve to suffer.

The concept of desert and the narrative of the undeserving poor go hand-in-hand with welfare reform, and have played a prominent role in the political presentation of the two-child rule. When Mick Philpott was sentenced in 2013 for killing his six children, George Osborne asked why the taxpayer was subsidising ‘lifestyles’ like his (Dominiczak, 2013) – drawing clear lines between welfare receipt, poor people, large families and moral degeneracy. Other politicians backed him up; Priti Patel said that ‘society has to look at the way benefits are used and abused. *The Philpott case typifies that*’ (ibid, emphasis added). The argument that an extreme, atrocious multiple homicide case ‘typifies’ anything about welfare receipt contributes further to the construction of a welfare-moral depravity link – or a discourse of ‘welfare decadence’. Dominic Raab MP made the connection even more explicitly; ‘we would be abdicating our responsibility as a society if we did not look at whether there is some link [to the crimes] with the climate of dependency that our bloated welfare system has helped to create’ (ibid). Then Prime Minister David Cameron also commented that ‘what George Osborne said [about the Philpott case] was absolutely right… we should ask some wider questions about our welfare system, how much it costs and the signals it sends’ (Tapsfield, 2013). This foreshadowed the narrative that having more children when you are in receipt of benefits is a form of welfare decadence. The 2015 summer Budget speech included the statement ‘each extra child brings an additional payment of £2,780 a year. It’s important to support families, but it’s also important to be fair to the many working families who don’t see their budgets rise by anything like that when they have more children’.[[10]](#endnote-10)

The misleading comparison between benefit recipients and those above the welfare line is examined later, in the section on logical fallacies. But for now we should note that the suggestion that welfare reform should aim to alter behaviour, or instil more responsibility, is especially problematic when applied to children. Children do not choose to be born. Disregarding a person’s subsistence needs is a novel approach in the history of the UK welfare state. Even the benefit cap, which results in some overall payments being reduced regardless of need, does not identify a swathe of the population who should be excluded ex ante from core benefit calculations. The most comparable measures, which simultaneously acknowledge a subject’s underlying welfare needs while discounting them, are sanctions, supposedly imposed in response to non-compliant behaviour. But here, the non-compliant act of the subject is the act of being born. The responsibilisation agenda would appear to have taken a curious turn, if the age of welfare responsibility were set at minus nine months. More realistically, it seems that children are being punished for the actions of their parents, in contravention of the principles outlined by the Supreme Court in *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2011] UKSC 4,(33) and *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 (10).

The negation of children’s subsistence needs is a departure from international human rights and children’s rights norms - as brought into rather sharp focus through a brief comparison with the other Council of Europe members. No country in Western Europe has adopted any comparable child limit or anti-natal welfare policy (CPAG, 2018, 21). [[11]](#endnote-11) The UK’s closest bedfellows in this regard are Romania[[12]](#endnote-12) and Serbia[[13]](#endnote-13) – and in both countries the relevant benefits are capped at *four* children. And there is a risk that the cap has a disproportionate impact upon Roma communities; the World Bank recommended removing the ‘bias against large families’ in Romania, to promote Roma inclusion (World Bank Group, 2014, 32).

There is very little evidence to suggest that the UK’s two-child rule – the most anti-natal welfare policy in Europe - would be compatible with the ECHR, or the UN CRC, especially considering the degree to which the interests and voices of children have been filtered out of the process. As a piece of international law, UK courts are wary of attributing any independent weight to the UN CRC; rather it can only be secondarily engaged, as an interpretative prism for ECHR rights. The next section will look which ECHR rights are at issue, in order to engage the best interests duty.

**The best interests duty should apply - using ECHR rights to bring the UN CRC into play**

The task of finding the ECHR to be engaged in order to trigger the UN CRC highlights the problem that, within UK case law, there is a significant children’s rights gap when it comes to social security and human rights. Children apparently have no claim to Article 1, Protocol 1 rights (the provision on rights to property engaged by welfare benefits legislation) in the context of child benefits that are legally the property of their parents, while their parents are deemed unable to trigger the UN CRC. Added to this, we have a new finding in the Court of Appeal of England and Wales, that young children cannot assert independent Article 8 rights in a social security context. This section explores the different routes for engaging the ECHR, through A1P1 and Article 8, and analyses the current gaps in protection, to argue that these can and must be bridged.

*The Article 1, Protocol 1 problem*

UK courts seem settled that children cannot mount A1P1 claims for child-directed benefits. In *Stec v United Kingdom* (Admissibility) [2005] ECHR 924, the ECtHR found that social security benefits are property for the purposes of A1P1. Non-contributory benefits can also fall within the scope of A1P1. But UK courts have held that children will only have a claim insofar as the benefit is *their* entitlement in law. This is highly problematic in the context of family benefits, whose very purpose is the protection of child welfare but which are typically paid to primary carers. In *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250, the (three-year old) child did have an A1P1 claim because the benefit in question, disability living allowance, was his entitlement in law. Tax credits, however are the parents’ entitlement. The difference of legal ownership, practically, is little more than semantic – in both cases the benefits are claimed by a parent; in both cases the benefits are paid to the parents. In both cases entitlement only arises through, and is in respect of, the children. In *Humphreys v HM Revenue and Customs* [2012] UKSC 18 (25)*,* the Supreme Court recognised that ‘the ‘aim of child tax credit is to provide support for children... The benefit attaches to the child rather than the parent.’ In *McLaughlin, Re Judicial Review* [2018] UKSC 48, the exclusion of unmarried parents from widowed parents’ allowance was challenged; this is another benefit paid to a parent, intended to protect the welfare of children – in this case, in the event of bereavement. Treacy J, in the High Court of Northern Ireland noted the restriction was ‘inimical to the interests of children’ (*McLaughlin’s Application* [2016] NIQB 11, 72). The Court of Appeal of Northern Ireland disagreed, finding it to be legitimate different treatment as between married and unmarried *parents*, rather than unlawful discrimination as between children (*McLaughlin, Re Judicial Review* [2016] NICA 53). Commenting on the case, Simpson notes that a focus on the recipients, while disregarding the *intended beneficiaries* is artificial (Simpson, 2018, 8). Nevertheless, children have, according to the courts (including the High Court addressing the challenge to the two child rule), no A1P1 claim for a benefit ‘attaching’ to them (*SG*, 100). So while the majority in the Supreme Court in *McLaughlin* found the marriage condition to be unlawful, and discriminatory against children on the grounds of their ‘birth status’, they relied upon Article 8 instead.

This limit to A1P1 means that it is possible for States to deny children have any property rights at all in family benefits, even where they trigger the entitlement and the benefits are expressly directed at them. The ECtHR has stated that ‘For a claim to be capable of being considered an “asset” falling within the scope of Article 1 of Protocol No. 1, the claimant must establish that it has a sufficient basis in national law... Where that has been done, the concept of “legitimate expectation” can come into play’ (*Blumberger v Latvia* [2008] ECHR 1075, 64). The consequence of this is that States can argue that there is *no duty not to discriminate against children*, since children cannot rely on Article 14 ECHR if they cannot themselves invoke A1P1.

The parents, however, cannot mount a discrimination claim on behalf of the children, and cannot themselves invoke the UN CRC. In *SG*, the claimants challenged the benefit cap on the ground that it discriminated against lone parents, disproportionately impacting upon women. It was argued that the relevant ECHR provisions should be interpreted in the light of the UN CRC, with regard to the damaging effects that such discrimination and disadvantage experienced by lone parents would also have upon their children. The majority of the Supreme Court found that the best interests duty had not been complied with. However, the court ruled that the UN CRC did not sufficiently bite in a case fundamentally about the rights of women, not of children, so the challenge failed.

If the UN CRC could only be applied to social security measures that accord children legal property rights in their own name, this would mean there was no duty to consider the best interests of children when making swingeing benefit cuts impacting directly on children, if those cuts were analysed as infringements of property rights. It would be a technical way to circumvent the best interests duty, in order to adopt a ‘no interests’ approach to children in the context of welfare. This would create a significant protection gap for a sizeable, vulnerable population in the member states of the Council of Europe.

In *Sc & Ors*, Mr Justice Ouseley appeared to not only deny that the children had an A1P1 claim, but also to suggest that the parents would not even fall within the ambit of A1P1, because that provision can only protect against the loss of *existing* rights, (e.g. the reduction or withdrawal of a benefit) and cannot be used to challenge future changes affecting not-yet crystallised rights. As the two-child rule only affected claims for future third-plus children, by the time they were born, the parents had no right to lose. A brief, rudimentary thought experiment shows how little sense this makes. Imagine the government announced that for babies born from next year onwards, to be counted for child tax credit they must be ethnically white British. Or they must be male. By the time next year came round, the parents of newly-born ethnic minority babies, and female babies, had no right they could say they had lost. It is inconceivable that States would escape any duties of non-discrimination in social security by only applying discriminatory rules to not-yet-crystallised rights. Indeed, the case law from the ECtHR[[14]](#endnote-14) and the UK Supreme Court[[15]](#endnote-15) shows that social security policies affecting future, but not-yet-crystallised, entitlements *can* be challenged as infringing A1P1 and Article 14. In *Stec* the ECtHR stated ‘the relevant test is whether, *but for the condition of entitlement* about which the applicant complains, he or she *would have had* a right, enforceable under domestic law, to receive the benefit in question’ (55).

Changes to future social security policy do fall within the ambit of A1P1. If it is not possible for children to mount their own A1P1 claims for benefits ‘attaching to them’ but not assigned to them by law, this should not mean that States are free to discriminate against children. The loss of family income, attaching to children, leads to very real material losses for those children, and this should not be rendered non-justiciable. It is arguable that even if only parents can mount an A1P1 claim in the context of family benefits, such challenges must still be analysed in accordance with the best interests of the affected children. In other words, Article 3 UNCRC is a vital interpretative prism for Convention rights and disputes *impacting upon* children, not just for rights *asserted by* the children in their own names, especially where the welfare framework prevents that assertion.

The UN guidance would appear to endorse the broader approach, stating that the duty kicks in ‘[w]henever a decision is to be made *that will affect* a specific child’ (UN Committee on the Rights of the Child, 2013, 4). Even so, following *SG*, the chances of UK courts evaluating ECHR rights in accordance with the UN CRC where a child is not the direct claimant seem rather slender. So benefit cuts targeting children fall into a human rights gap; children cannot mount A1P1 claims, and parents cannot invoke the UN CRC. In an attempt to avoid the gap, it is possible to instead focus on the children’s Article 8 rights, explored next.

*Using the ambit of Article 8 to argue benefit rules discriminate against children*

Being deprived of material resources, and being placed at risk of poverty has an impact upon family and private life. Successful bedroom tax cases (*R (Carmichael and others) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550) have relied upon falling within the ambit of Article 8; the reduction in Housing Benefit has implications for a family’s ability to maintain their home, and interferes with sleeping arrangements. In *Okpisz v Germany* (2006) 42 EHRR 32, the ECtHR stated the principle that welfare benefits, and specifically child benefits, can fall within the ambit of Article 8: in ‘granting child benefits, states are able to demonstrate their respect for family life within the meaning of Art.8 of the Convention; the benefits therefore come within the scope of that provision’ (32).

A new benefit cap case currently before the Supreme Court, *DA & Ors, R (On the Application Of) v Secretary of State for Work and Pensions*, relies on the children’s Article 8 rights to bring the UN CRC into play. Rather than the broader sex discrimination claim in *SG*, it is a challenge to the effects on single parents of children under the age of two, and on the children themselves. The rationale for the narrower focus is that lone parents with children under the age of two have significantly greater difficulty moving off the cap and into work due to the costs and complications of childcare. The claim was successful in the High Court; Justice Collins concluded:

‘*the claimants… find it, because of the care difficulties, impossible to comply with the work requirement. Most lone parents with children under two are not the sort of households the cap was intended to cover and, since they will depend on DHP, they will remain benefit households. Real misery is being caused to no good purpose*.’

([2017] EWHC 1446 (Admin), 43.

The Secretary of State appealed, and the Court of Appeal split, deciding two to one in favour of the government ([2018] EWCA Civ 504). Sir Patrick Elias gave the lead judgment, which in effect turned on whether the different focus to *SG* could bring the UN CRC and the Article 3 best interests duty, into the frame. In a curiously novel passage, he found that the children had no independent Article 8 rights, because their rights were ‘inextricably intertwined with those of their parents’ (97). What was at issue, according to Elias, was a claim of discrimination against a set of lone parents, and relying on Article 8 rather than A1P1 did not alter that. That the children’s rights were subsumed into the parents’ was ‘particularly so in this case where the children are so young’ (128). He went on to suggest that there was no material difference in the effects upon these children compared to children aged two and above in workless households, and that to find this group more affected would involve an ‘element of arbitrariness’ (131).

This position is problematic. Firstly, in finding that children under the age of two in lone parent families are in no different a position to older children, the judge did not engage with the wealth of evidence to the contrary, listed in Justice McCombe’s dissenting judgment. Secondly, and more significantly, the finding that children have no Article 8 interests that should be examined where their rights and interests are bound up with those of their parents, is a radical, rights-denying position. The suggestion that those rights are less justiciable when ‘the children are so young’ is likely to cause the UN Committee on the Rights of the Child some disquiet. In declaring that ‘young children are rights holders’, the Committee reported concern that ‘States parties have not given sufficient attention to young children as rights holders and to the laws, policies and programmes required to realize their rights during this distinct phase of their childhood’. (UN Committee on the Rights of the Child, 2005). It is also a significant departure from the basic principles of the UN CRC, including that ‘childhood is entitled to special care and assistance’ (UN CRC, preamble) and the Declaration of the Rights of the Child that the child ‘needs special safeguards and care, including appropriate legal protection’ (ibid).

To fall within the ambit of Article 8, an issue must have ‘more than a tenuous connection with the core values protected by Article 8’ (*Smith v Lancashire Teaching Hospitals NHS Foundation Trust & Ors* [2017] EWCA Civ 1916, 55). In light of the wealth of evidence of damaging effects of family caps and the damage wrought by child poverty upon the personal development of children, any finding that a rule that so explicitly targets children (more explicitly so than the benefit cap) does not fall within the ambit of Article 8 cannot be credibly contemplated. It would be tantamount to denying children any human rights interest in family benefits, or any human rights protections from poverty.

The Elias analysis cannot hold – there is no basis for assimilating children’s rights into those of their parents, or for claiming they have lost the character of children’s rights, so as to evade the scope of the UN CRC. In the context of the two-child rule, the approach taken to A1P1 – that children cannot invoke it for child benefits – along with the approach taken to the UN CRC – that parents cannot invoke it; and that taken to Article 8 in the Court of Appeal – that children have no independent Article 8 rights related to welfare – create a child-rights chasm in human rights social security litigation. Indeed, in *McLaughlin*, the Supreme Court has taken the approach that the fact we are dealing with children’s rights, and specifically those in the UN CRC, far from undermining an Article 8 claim, *reinforces* (para 40) a finding that benefits intended for children, albeit paid to parents, fall within the ambit of Article 8.

In the lead judgment, Lady Hale reflected that UK courts have made ‘rather heavy weather of the ambit point’ in the context of social security (para 18). She quoted the *Okpisz* formulation that child benefits are a demonstration of respect for family life, so fall within the ambit of Article 8, and also noted the ECtHR’s requirement in *Aldeguer Tomás v Spain* (2017) 65 EHRR 24 (para 72) that ‘the notion of family life “not only includes dimensions of a purely social, moral or cultural nature but also encompasses material interests”’. The court considered the ambit test put forward by Sir Terence Etherington MR in *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916, that

*‘55… the state has brought into existence a positive measure which, even though not required by article 8, is a modality of the exercise of the rights guaranteed by article 8, the state will be in breach of article 14 if the measure has more than a tenuous connection with the core values protected by article 8 and is discriminatory and not justified’.*

Lady Hale suggested that while this may be too restrictive, relying as it does on a domestic concept of ‘core values’, there was no problem applying it to widowed parent’s allowance - a positive measure not required by Article 8, but which is a modality of the exercise of the rights that provision guarantees. It has more than a tenuous connection with the core values protected by Article 8, because ‘securing the life of children within their families is among the principal values contained in respect for family life’ (para 22). She added that there was ‘no need for any adverse impact other than the denial of the benefit in question’ for the situation to fall within the ambit of Article 8, in order to seek to engage Article 14. Lord Mance emphasised that ‘widowed parent’s allowance is fundamentally aimed at securing the needs and well-being of children’ (52).

This analysis would apply equally in the context of the two child rule; child tax credit and the child element of universal credit are positive measures not required by Article 8, but which are a function of the exercise of Article 8 rights, with more than a tenuous connection to the core values of that provision, since they exist solely to protect the welfare of children and are ‘fundamentally aimed at securing the needs and well-being of children’. In so doing, these child-centred benefits allow children to continue to live with their families, and to avoid homelessness and destitution.

Parents need to be able to invoke the UN CRC where there is ample evidence that an A1P1 matter has a relevant and significant impact upon children. Alternatively, courts need to at least recognise children’s independent Article 8 rights, where benefits directed at their welfare fall within the ambit of Article 8. Their interests are not subsumed into, and certainly do not simply dissolve within, those of their parents. Another, slightly more nuanced, approach would be to alter how the affected group is constructed. We could recognise that the ‘inextricably intertwined’ nature of the rights and interests of children and parents (especially lone parents), is a reason in favour of the UN CRC having a broader, not narrower, application. Rather than artificially considering the claimant to be either parent or child, we might construct the claimants to be *families*, as family benefits are usually calculated according to family units. Being a ‘member of a family with more than two children’ could be a status (under the ‘other status’ heading) for the purposes of Article 14. By covering parents and children together, this could bring the rule within the ambit of A1P1 *and* the UN CRC. It also allows focus on both the children’s and parents’ intertwined Article 8 rights, logically considering the right of *families* to *family life*.

There is some authority for identifying certain size families as groups at risk of discrimination. The UN Committee on Economic, Social and Cultural Rights, in reporting on the UK in 2016, noted that it was ‘particularly concerned about the adverse impact of these changes and cuts on the enjoyment of the rights to social security and to an adequate standard of living’ for ‘disadvantaged and marginalized individuals and groups, including women, children, persons with disabilities, low-income families and families with two or more children’ (UN CESCR, 2016, 40). Here, ‘families with two or more children’ are identified as a group at risk of marginalisation, alongside groups with other protected characteristics. The proposed approach here offers a more narrowly defined group than that identified by the UN CESCR – families with three or more children. Such families suffer discriminatory treatment under the two-child rule, and in particular the children are treated significantly differently to children in families with one or two children. It is not only the negated third-plus children who suffer discrimination, though their non-status is the most problematic feature and effect of the rule. The first and second children are discriminated against too, because parents must spread their income over all their children; they have far less welfare resource per child than would smaller families.

As well as discriminating against children in larger families, the rule discriminates indirectly against children in families with a religious objection to the use of contraception, forming another ground under Article 14 ECHR for discrimination. The House of Lords Secondary Legislation Scrutiny Committee[[16]](#endnote-16) raised this with the Department for Work and Pensions. The DWP response was that ‘[a]ll families, regardless of their background and beliefs, need to think carefully and ensure that they can afford to provide for a new child in their household’ (House of Lords, 2017, §40). This slightly robotic statement did not engage with the disparate impact at issue. The Committee pointed this out bluntly – ‘this does not allow for cultural or religious views which do not allow for contraception’ (ibid). The measure also indirectly discriminates against children of ethnic minority families; the government’s impact assessment acknowledged that ethnic minority households ‘on average have larger families’ (DWP et al, 2015).

*Engaging Article 8 directly*

As well as falling within the ambit of Article 8 in order to engage an Article 14 discrimination claim, the rule engages and infringes Article 8 directly. The test for engaging Article 8 is whether there is ‘outside interference’ with development ‘of the personality of each individual in his relations with other human beings’, and their ‘the right to establish and develop relationships with other human beings and the outside world’ (*Botta v Italy* (1998) 26 EHRR 241, §32; *S and Marper v UK* (2009) 48 EHRR 50, 66). An attempt on the part of the state to discourage people not at the top of the socio-economic scale[[17]](#endnote-17) from having families with more than two children, is such an interference. The parents’ perspective is unlikely to help to trigger the UN CRC following *SG*. So the focus would be on the ability of the children in those families to establish and develop relationships with siblings. Experts giving evidence to the High Court in the two-child rule case voiced concerns about the rule incentivising abortion, (*SC & Ors*, 47, 75), and religious leaders including 60 Church of England bishops, signed a letter to *The Times* stating that there are ‘likely to be mothers who will face an invidious choice between poverty and terminating an unplanned pregnancy’ (Mullally, et al, 2018).

However, evidence from studies on family welfare caps in US states, shows that, apart from one increase in abortions (Romero & Fuentes, 2010), the caps in different states did not have a significant effect upon poor women’s reproductive behaviours (Romero & Agénor, 2009). Instead, they triggered different Article 8 issues. The main effect, according to Berkeley Center of Reproductive Rights and Justice (2016, 17) is to intensify poverty, ‘among mostly young, poor, single mothers of color and their children, making it difficult to survive and impossible to thrive’. The policies had damaging effects upon the children concerned, showing a tendency to ‘destabilize housing and food security while threatening the health and well-being of the poorest children’ (ibid). Romero and Agénor (2009) argue that the caps violate 8 international human and reproductive rights documents, while Bouie (2014) termed them ‘the most discriminatory law in the land’, finding that ultimately ‘family cap laws do nothing but punish the poor for being poor’. Dinkel (2011, 395) found caps to be a manifestation of ‘punitive’ welfare reform, pointing to the ‘grave effects on children’s social, developmental and health needs’.

Both the non-recognition of children and the ensuing increase in poverty engage Article 8. The ECtHR ruled that state recognition of individuals for social security purposes engages Article 8 in *Christine Goodwin v UK* (2002) 35 EHRR 447. The Court assessed a challenge to the UK social security system’s refusal to recognise a changed gender identity that would lead to receipt of an earlier state retirement pension. The Court was not convinced by arguments that allowing earlier uptake of the pension (at greater cost to the state) would ‘cause injustice to others’ in the national insurance system. The Court added: ‘society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth’ (91). It is arguable that a failure to recognise the welfare status of third-plus children is at least as great an interference with their Article 8 rights as would be according them the wrong status with delayed benefits. That non-recognition then amplifies child poverty, with deleterious impacts upon housing, nutrition, family stability, health, and emotional and mental state, which all damage personal development.

Having engaged Article 8, or at least engaged Article 14 and fallen within the ambit of Article 8 (and arguably A1P1), the rule triggers the UN CRC, and specifically the Article 3 best interests duty. On its face, as argued earlier, the rule works in direct opposition to the best interests of the children affected. But it is necessary to consider exactly what the ‘best interests’ duty requires; is it merely enough to say those interests crossed the mind of the legislator, while legislating against them? No – it is not. The next section looks at what the duty entails. It examines the concept of something being a ‘primary consideration’, and offers an analysis of the various considerations at play during the enactment of the two-child rule.

**Investigating whether the best interests of the child were a ‘primary consideration’**

What does it mean to make children’s best interests a ‘primary consideration’ in decision-making? Article 3.1 of the UN CRC states:

‘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’.

This broad formulation – ‘all actions concerning children’, including those of ‘legislative bodies’, fairly straightforwardly encompasses law-making actions of the State. But it is not entirely straightforward discerning how it is supposed to play out. Technically, the acting body when passing Acts of Parliament, is Parliament. But it is impossible to describe the body of parliament as acting, or considering anything, in any unitary fashion. The problem is evident in Mr Justice Ouseley’s finding in *Sc and Ors* (209) that parliament had ‘plainly’ complied with the best interests duty:

‘*The best interests of the child were* ***at the forefront of the debate*** *and the desire to tackle the root causes of child poverty. There was a broad and general judgment about the degrees of impact and where it would fall; much of the debate was centrally focused on children. There is plenty of scope for argument about whether the legislation is indeed in the best interests of the child. But that is not the question.* ***The question is whether it was a primary consideration.******It plainly was****.*’

This broad-brush assessment was not supported with analysis or evidence of the debate in question, nor a reflection on what the best interests duty entails. While the deleterious impact of the children was part of the debate, those impacts were raised in both houses of parliament in opposition to the measure. It may be that the best interests of the child were a primary consideration for some members of parliament – but is that enough to discharge the duty? Moreover, we cannot know how mindful the majority was of these concerns.

Some consideration of the UN guidance on the best interests duty suggests that it is not enough to point to concerns raised by an outvoted minority, and that we do not need to look into the minds of politicians to discern their hierarchy of considerations. Instead, what we have to look for is positive engagement on the part of the ‘actor’ -Parliament - with children’s best interests, and an *explicit* evaluation as to whether the action is in those interests or not. The duty carries a burden of evidence to show genuine consideration, including a duty to show explicitly how the best interests of the child have been respected, and how they have been weighed against other considerations. In the General Comment on the UN CRC Article 3 duty, the UN Committee on the Rights of the Child (2013, §6) underlined that ‘the child’s best interests is a threefold concept’. This comment is ‘the most authoritative guidance’ on the interpretation of Article 3 UN CRC, according to the Supreme Court (*SG*, 105). The three elements of the duty are: (i) a substantive right to have best interests assessed and taken as a primary consideration; (ii) a fundamental interpretative legal principle, so that between competing interpretations, that which best serves the best interests of children should be chosen; and (iii) a rule of procedure.

The explanation of (iii) - the procedural right - is that:

*‘Whenever a decision is to be made that will affect… an identified group of children… the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned... States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases.’*

Lord Carnwath interpreted this in *SG* (108) as follows:

 ‘*the evaluation needs to consider, where relevant, the interests both of children in general and of those directly affected by the action. It also needs to indicate the criteria by which the "high priority" given to children's interests has been weighed against other considerations. In so far as that evaluation shows conflict with the best interests of the children affected, it needs either to demonstrate how that conflict will be addressed, or alternatively what other considerations of equal or greater priority justify overriding those interests.’*

To identify whether the duty has been complied with, we do not need to look into the minds of Parliament – we need to look for the explicit assessment and explanation of how the interests are respected. We also need to look for the explanation of *either* how the rule is in the best interests of children, and which criteria have been used; *or*, how although the rule is not in those interests, children’s rights have been weighed against other considerations.

It is not enough to have internally taken objections based on the child’s best interests on board – there must be evidence of an explicit evaluation. Parliament is not the only actor - the government also has to comply with the best interests duty, as the actor preparing the legislation, and responsible for the impact assessment and human rights memorandum. But it did not take a clear stance on what was in the children’s best interests. On the one hand, the government emphasised the importance of other considerations, and impicitly acknowledged the hardship the rule creates by creating ‘deserving’ exceptions. But on the other, it suggested that the rule is in the best interests of children. This is a having-and-eating cake position that does not stand up to scrutiny.

The General Comment places duties of explanation upon *State parties*; parliament, led by the government, ought to present explicit evidence of a children’s rights evaluation. My search for evidence of this looks at the four debates on the Welfare Reform and Work Bill in the House of Commons, and nineteen debates in the House of Lords. There were also eleven sittings of the Public Bill Committee dedicated to the Bill. For each transcript, I searched for mentions of the two-child rule, and drew out and coded all considerations put forward in favour of, or justifying, the rule, including all responses to objections, to seek arguments that the rule was either in the best interests of the child, or that those interests had been considered but outweighed. To broaden the range of data caught, the collection included several ‘general’ considerations that were attached to the rule, but spoke to the Bill as a whole, or government’s overall programme, rather than the rule itself. This was complemented with a similar analysis of the government’s impact assessment, and the human rights memorandum (DWP, 2015).

I divided the considerations up into three types: (i) rationale of the rule; (ii) mitigation of its effects and (iii) reasons for opposing amendments. The results show that the government did not engage positively with the best interests duty, even when responding to concerns explicitly about those interests. Nor was there a meaningful evaluation of those interests on behalf of Parliament, which decided as a body to enact the rule, but did not, as a body, even decide whether the child’s best interests were being served, or were instead outweighed.

The materials indicate that it was not only the procedural element of the duty that was neglected, but also the substantive duty to actually make the best interests of the child a primary consideration. It is not clear in the UN CRC what constitutes a *primary* as opposed to a standard, consideration, but the best interests of children were accorded such sparing consideration on the part of the Bill’s proponents, it would be difficult to characterise them as having any primacy. The focus is on support or justification of the Bill because we are looking for evidence *either* that the measure serves the best interests of the child, *or* that those interests have been considered and outweighed – both would be positions in favour of the measure. As the majority of Parliament supported the measure, if the best interests of the child were a primary consideration for Parliament as a whole, we should expect to see *some* mention of them on the part of that majority..

I identified 21 considerations in the ‘rationale’ group. The best interests of the child was not one of them. However, two considerations raised in the government’s impact assessment (not in the parliamentary debates) could speak to the best interests of the children directly affected. They are the submissions that the measure ‘will increase financial resilience’, so supporting ‘improved life chances for children’ (DWP et al, 2015, §33); that it ‘could have a positive effect on overall family stability’ (p1). While the validity of these claims is examined later, it is worth noting that none of these statements were supported with any evidence. For now, the main question is whether these mentions are enough to suggest that the best interests of the child were a primary consideration. They are not. Each point was made just once, and only in the impact assessment. By way of illustration, other considerations that got also just one mention in the analysed materials included concerns about rapid population growth,[[18]](#endnote-18) concerns about poor people having children as ‘cash cows’,[[19]](#endnote-19) and a need to avoid the benefits system becoming unpopular.[[20]](#endnote-20) It is unlikely that either parliament or the government would wish to endorse any one of these as being a ‘primary’ consideration.

The considerations that received the most mentions across all materials analysed were were saving money (30 mentions); making benefit recipients face the same choice/take the same responsibilities for their choice to have children (also 30 mentions); and striking a fairer balance between taxpayers and benefit recipients (23 mentions). The table of results is below, at fig. 1. While mentions were made of anticipated wider social benefits, with an expected positive impact upon children generally – overall economic prosperity (5 mentions), the reduction of poverty, and a focus on the root causes of poverty (one mention each), this is not sufficient to discharge the best interests duty, which requires that the interests of the *specific children affected* are made a primary consideration. The frequency of mentions in itself cannot tell us whether something was a primary, secondary or latent consideration. But it is indicative, and the child’s best interests are not mentioned explicitly *at all* in support or defence of the measure. Those issues that might be construed as implicitly speaking to those interests, are both infrequent and brief.





With regard to considerations of mitigation (fig. 2), there was a strong emphasis on the continued existence of other benefits, and no discussion of the impact of an overall loss. The foremost consideration was the fact that the measure did not affect existing claimants, whose children had been born before April 2017.[[21]](#endnote-21) Of course, that does not mitigate the effect upon those children born after that point, and the knock-on effects of straitened family finances for their elder siblings. Nor, as explained above in relation to the High Court judge’s misunderstanding, does a ‘future claims only’ policy prevent the rule from falling within the ambit of, and falling foul of, human rights law. This emphasis upon the exclusion of existing claims and on the existence of exceptions belies a certain lack of faith in assertions about the merits of the rule. If the rule were good for family stability and financial resilience, we might expect those advantages to be shared as widely as possible.



The best interests of the child also did not feature in the considerations mentioned in parliamentary debates when responding to proposed extra exceptions within the Bill. The debate included the discussion of one accepted amendment – to include an exception for kinship carers.[[22]](#endnote-22) All the other proposed extra exceptions were rejected; families with a cultural/religious opposition to contraception should, like all families ‘think carefully’ before having additional children. The parents of disabled children, adopting parents, and young adult care-leavers should all face the ‘same choices’ as those not on benefits. There is a mention of not wanting the system to ‘be perceived as unfair’, echoing the consideration as to rationale for the rule that the system should not be ‘unpopular’. The gendered effects of the rule were swept aside with the suggestion that as the benefits are ‘household’ payments, they should not be constructed as being paid to women. Administrative difficulties were cited with some proposed exemptions, with complexity getting three mentions, and risk of fraud/error/manipulation getting another three.

In sum, the absence of any explanation as to how the best interests of the child have been considered, and the obfuscation over whether it considers the rule to be, or not to be, in the best interests of the children affected, indicate a failure on the part of government and parliament to comply with the procedural duty to explicitly evaluate the possible impact on the children concerned. The materials also do not provide evidence of compliance with the substantive duty to actually make the best interests of the children a *primary* consideration. This is in the broader context of concerns over processes of parliamentary scrutiny in welfare reform legislation. McKeever (2016, 131) has noted the ‘profound’ implications of a ‘pattern of reducing parlimentary scrutiny’ in the context of social security. If parliamentarians fail to scrutinise legislation for compatibility with international human rights obligations – and specifically, children’s rights obligations, this heightens the risk that resulting legislation will infringe those rights, placing an ever greater onus upon the courts to step in. Parliament and government risk abdicating their duties as relevant actors within the framework of the UN CRC by kicking human rights scrutiny up to the judiciary, or, at the other extreme, in other social security contexts, by kicking it down to front line decision makers, as with discretionary housing payments (Meers, 2015), or right to reside decisions (O’Brien, 2017).

The government actually made a conscious decision to disregard evidence about the deleterious effects of the two-child rule, when it conducted a consultation on the exemptions to the rule in 2016. A significant number of respondents made submissions about the effects of the rule as a whole, including The Children’s Society (2016); Citizens Advice Scotland (2016); CPAG (2016); and the Equality and Human Rights Commission, whose submission did not engage with the consultation questions or the exceptions, but outlined concerns about the potentially ‘regressive’ measure as a whole, criticised the quality of the impact assessment, and called for a full human rights and equality assessment (EHRC, 2016). The government’s consultation response, on noting the ‘many’ respondents who raised concerns about the rule as a whole reiterated the rule’s aims –‘to restore fairness in the benefit system’ and make benefit recipients make ‘the same financial decisions as those uspporting themselves solely through work’. It added that an impact assessment had been conducted, and concluded that ‘comments in consultation responses addressing only the overall policy itself are not reflected in this document’. (HM Government, 2017, §4).

Mr Justice Ouseley’s findings in *SC* that the best interests duty had been ‘plainly’ discharged must be contrasted with the findings of the Supreme Court in *SG*. There, the majority found that the duty had been neglected, in the context of the setting of the benefit cap. Lord Carnwath stated (§126-8):

‘*The cap has the effect that for the first time some children will lose these benefits, for reasons which have nothing to do with their own needs, but are related solely to the circumstances of their parents. It is difficult to see how this result can be said to be consistent with the best interests of the children concerned, or in particular with the first and seventh principles in* Zoumbas*[[23]](#endnote-23) …* *Accordingly I remain of the view that the Secretary of State has failed to show how the regulations are compatible with his obligation to treat the best interests of children as a primary consideration*.’

But the challenge failed, because Lord Carnwath then found the duty was not engaged in the context of a claim of sex discrimination against lone parents. This tipped the majority from 3:2 against the government back to 2:3 in favour of it. The kernel of the argument in this paper is essentially that if the benefit cap would have failed the best interests duty in *SG*, but for the claim being primarily about women, then the two-child rule must be found to fail it, as a matter of logic, as well as one of robust legal principle. The rule deliberately redounds upon children; it explicitly negates the relevance and welfare personhood of third-plus children, while driving children in larger families into poverty. The case against it is rooted in children’s rights – as was that of the appellants in *McLaughlin*. In that case, Lady Hale found that widowed parent’s allowance had a ‘direct link with children’, so there ‘cannot be much doubt’ that it was ‘an action concerning children’ for the purposes of Article 3 UN CRC. She further invoked the Article 26 UN CRC duty upon the state to ‘recognise for every child the right to benefit from social security, including social insurance’. The denial of benefits was implicitly treated as obviously constituting a disadvantage. In particular ‘[d]enying children the benefit of social insurance simply because their parents were not married to one another is inconsistent’ with Article 2 UN CRC duty to ‘respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s … birth or other status’ (para 40). The same rationale should apply in the context of the two-child rule – that denying children the benefit of social security simply because they were born third or later, is not only against those children’s best interests, but is also inconsistent with Articles 2 and 26 of the UN CRC.

In failing to decide whether the rule is either in the best interests of children, or that those interests were outweighed, the government has by default, not complied with the procedural duty. But if it belatedly chooses one or the other line of argument during the course of judicial review proceedings, the argument presented must at the very least be rational – or not ‘manifestly without reasonable foundation’, to adopt the test for justification used in Article 14 ECHR cases (*Humphreys* §19). The standard of review should arguably be rather higher given that the interaction is between the UN CRC and the fundamental rights in Article 8. Where Article 8 rights are directly engaged, states have a narrower margin of appreciation – they must strike a ‘fair balance’ between interests (*Kryvitska and Kryvitskyy v Ukraine* [2010] ECHR 1850, 44). If the decision as to whether Article 8 has been infringed hangs on the question of whether Article 3 UN CRC has been infringed, then it would be appropriate to adopt the same standard of review. However, for the suggestion that the two-child rule *serves* the best interests of affected children, the question of which standard of review to adopt is academic; the claim is manifestly without reasonable foundation.

The argument briefly raised in the impact assessment that the measures would enhance life chances, through increasing financial resilience, is unsubstantiated rhetoric, in defiance of the available evidence. If people reliant upon benefits have more than two children, there is no evidence to suggest being put at greater risk of (more intense) poverty leads to increased resilience or to improved life chances. Nor can it be seriously contended that *children and babies* should be expected to become financially resilient, yet they are the demographic most affected. In any case, the overwhelming effects of child poverty are negative, as explored earlier. In making a half-hearted positive case for poverty, the impact assessment ignores the wealth of evidence on this rather obvious point. The further suggestion that the measures might enhance family stability is equally speculative; the assessment states that the measure ‘could’ have that affect, and offers no reason for imagining that it will. Poverty has been shown to increase the risk of family *in*stability (Conger et al, 2010).

The government might argue that while those caught by the measure might be worse off, it would be by influencing families to decide *not* to have more children, that the measure improves financial resilience and family stability. If that is the argument, then the justification relies upon an admission of a different direct engagement of Article 8 ECHR, so that the ‘choice’ faced by families is a choice as to which aspect of private and family life should be infringed. As the Public Law Project stated, third-plus children could ‘only be said to benefit to the extent that parents decide not to have them in the first place’ (Burton, Clarke and Spencer, 2015). And the justification must fail anyway because the wealth of evidence from the US shows that caps do not significantly alter reproductive behaviours.

It would be an uphill struggle to develop the case that the measure is in the best interests of the children affected – it is a veritable primer for what ‘manifestly without reasonable foundation’ means. Instead, the government has to argue that the best interests have been considered, but outweighed by other primary considerations. Those primary considerations themselves must also be rational, and at the least not manifestly without reasonable foundation, and most likely, must represent a fair balance of interests. The key considerations put forward, apart from saving money, are based on logical fallacies, as explored in the next section.

**When are children’s best interests outweighed? The ‘same choice’ and ‘fairness’ logical fallacies**

If mounting an argument that the child’s best interests were a primary consideration, but were outweighed, the more dominant primary considerations must have some credibility. A prominent, much reiterated rationale for the two-child rule, appearing in the Hansard materials, the impact assessment, the human rights memorandum, and in the Budget speech, is that of ensuring people on benefits are faced with the ‘same choice’ about whether to have a third child as people who are not on benefits. The former, until recently, saw their income go up ‘automatically’,[[24]](#endnote-24) whereas the latter did not – and this, it was suggested was not fair.

This is a narrative of ‘welfare decadence’. In an inverted politics of envy, it constructs welfare recipients as being in an enviable financial position, somehow at an advantage compared to those earning enough to live above the welfare line. That advantage, the logic goes, should be removed. But the comparison is based on a fundamental error. If a family is earning enough that on having a third child they would still be above the welfare line, and so not see any increase in their income, then that family is earning a very healthy wage. Under the ‘old’ regime, the income level at which a claimant with three children, working at least 30 hours per week, would no longer be entitled to tax credits (and so not see their income go up ‘automatically’) is £39 725[[25]](#endnote-25) – and that is assuming no childcare costs or disability elements. With childcare costs, that level goes up to £66 359.[[26]](#endnote-26)

For a lone parent to have earned this much, and so be considered able to ‘afford’ her three children she would have to have been in the top six percentile points of earners in the UK, based on HMRC 2015/16 figures. That is, she would have to have been earning more than 94% of the population (HMRC, 2018). A couple both working would *each* have to earn more than 72% of the population, with a combined household income in the ninth decile group (ONS, 2017). Anyone earning less than that (and paying the eligible childcare costs) *would* have gained some entitlement – and seen their income ‘automatically’ go up, on having a third child. Supporting more than two children solely through work is an option just for a privileged few in the population. It is some way beyond credible to argue that these parents just need to earn more. Lone parents working full time on a low wage cannot just walk into jobs paying at least £45 000 more. CPAG note that a family with just two children, with two parents working *full time* for the minimum wage, still need social security support to bring their income up to an acceptable standard (CPAG, 2016, §5).

The idea that a group of high earners were being hard done by, because poorer people received more benefits when they had more mouths to feed is bizarre. High earners’ incomes did not go up when they had more children because they had sufficient earnings to meet the fundamental needs of their children. The rhetoric that benefit recipients should make the ‘same choice’ as high earners implies that the two-child rule is somehow an equalising measure. But this is elaborate Newspeak. It is the *benefit* that partly *equalises* unequal families, by endeavouring to make sure that having a child does not drive a family into poverty, and so removes an element of financial peril from childbearing. The removal of an equalising measure is a divisive act, widening and deepening inequalities between families by reintroducing that element of financial peril. Imagine two families each faced with the prospect of a third child. If family A would, by default, fall below the poverty line, whereas family B may need to downgrade their fine wine subscription, they not faced with the ‘same’ choice.

The ‘same choice’ is doubly a misnomer. It is not the *same,* and for many it is not even meaningfully a ‘choice’ to have a child they cannot afford. Parents trying to comply with the new reproductive responsibilisation agenda may fall foul of it. Firstly, there is no exemption for a failure in contraception, even though no method of contraception is 100% effective, (Amy & Tripathi, 2009) and even sterilisation is no guarantee, with one in 200 women conceiving afterwards (Date et al, 2014). There will always be accidental conceptions. It cannot seriously be envisaged that people who fall within the scope for benefit eligibility should, to be good, responsible citizens, be celibate to avoid the risk of conceiving an unsupported child.

Second, circumstances change; the welfare state typically steps in at times of need, but now will not do so. Families with a sufficient income to remain above the welfare line, or who decide they can make ends meet, may decide to try for a further child. But their income may later drop unexpectedly – a parent may become redundant and have difficulty finding another job; they may become chronically ill, forcing them to stop work for a long time; or, one of the earning parents may die, leaving the bereaved parent and children in suddenly much starker financial circumstances. And there are no exemptions for these unpredictable changes of circumstances. In none of these scenarios can the parents at the outset be said to have exercised a ‘choice’ to have an unsupported third child. The only way for a family to have a third child and guarantee that their means would not fall below those needed to meet the basic needs of all the children, is for that family to not only have a high income, but also to have substantial assets or capital, to keep their means high in the event that their income dropped due to unemployment, chronic illness or spousal death. Looked at in this light, the rule takes on a distinctly aristocratic air. Inherited wealth becomes the only likely reliable source of protection.

The espoused objective of achieving greater ‘fairness’ between tax-payers and benefit recipients was also given primacy in the debates and is equally logically flawed. If we look again at the relatively high level of income up to which families were entitled to tax credits on having a third child, it is clear that the tax payer/benefit recipient distinction is a false dichotomy. As many opponents to the measure made clear, figures suggested that nearly two thirds of families in poverty had at least one working parent. With the advent of the two-child rule, bringing more low and medium earners below the poverty line, there is every possibility that that proportion will increase. Attempting to set ‘workers’ up against ‘scroungers’ is no new political trick, (Garthwaite, 2011; O’Brien, 2015; Patrick, 2016) but it is woefully disingenuous. The vast majority – 66%[[27]](#endnote-27) - of families with three or more children who were on tax credits in 2015-16 were working (HMRC, 2017, 18). The latest figures show that within the first year of operation, 59% of those families in receipt of benefits affected by the rule are working families (HMRC & DWP, 2018, 7) and will typically be both tax-payers and benefit recipients (some working families may not feature in the figures if their entitlement would only have been triggered by a third child, and has now not been triggered at all).

If we strip away these manifestly unreasonable primary considerations then we are left with only one primary consideration – that of saving money. While a legitimate objective, it cannot in itself justify a decision to take money away from children against their best interests. Treating the one aim as automatically outweighing the other would reduce the best interests duty to an absurdity. Here, Article 4 of the UN CRC is instructive, requiring State parties to undertake such measures to the ‘maximum extent of their available resources’ to give effect to economic, social and cultural rights. The ‘maximum extent’ is an important point, and is explained in General Comment 19 (UN Committee on the Rights of the Child, 2016, §31) on public budgeting for the realisation of children’s rights:

*‘In times of economic crisis, regressive measures may only be considered after assessing all other options and ensuring that children are the last to be affected, especially children in vulnerable situations. States parties shall demonstrate that such measures are necessary, reasonable, proportionate, non-discriminatory and temporary and that any rights thus affected will be restored as soon as possible.’*

A desire to save money cannot in itself trump the best interests of the child. The two-child rule infringes Article 4, because children are the first, not the last to be affected, and children in vulnerable situations will be affected more acutely. It is discriminatory against children in general, allowing their status to be rendered nugatory for the purpose of subsistence benefits, and against particular groups of children according to family size, religion and ethnicity. And it is not temporary, with no plans to restore the removed benefit. Nor has the government has shown the measure to be necessary, reasonable and proportionate. And there is no evidence that ‘all other options’ have been considered for saving money (or generating revenue) in other ways.

The government’s only claim to ‘proportionality’ is a misguided one. Lord Freud, then Minister of State for Welfare Reform, reported to the House of Lords that the ‘average number of dependent children in families in the UK in 2012 was 1.7, so the Government feel that it is fair and proportionate to limit additional support provided by the taxpayer through child tax credit and the child element of universal credit to two children.’[[28]](#endnote-28) But it is not possible to justify measures that have a harsh impact on a minority by pointing out that they are a minority. That is not proportionality; that is simply a description of how marginalisation and discrimination work. The government’s argument treats proportionality as a proxy for political acceptability to the majority of the electorate.

Rather, proportionality is about showing that any harmful discriminatory effects are kept minimal – that they are of a scale and nature that can be justified by the legitimate aim. It is related to the concept of necessity, and the question of whether the aim could be achieved through other, less harmful means. As well as hurting children first, being discriminatory, not temporary, not necessary, and not chosen as a last resort having exhausted other options, the rule further infringes Article 4 UN CRC because it creates disproportionate harm – remembering that it alone will place over 200 000 more children in poverty by 2021. A budgeting decision that in itself infringes Article 4 UN CRC, as a matter of logic and consistency, cannot, without more, be a legitimate justification under Article 3 UN CRC.

**Conclusion**

The two-child rule is a dramatic and damaging departure for the welfare state. It disregards the needs of specific children and disentitles them from necessary subsistence support. This paper has interrogated what is required by the UN CRC duty to make the best interests of the child a primary consideration, and explored when and how the duty should be triggered. On all plausible constructions, the measure is patently opposed to the best interests of the children affected, the government has failed lamentably to make those interests barely a consideration, never-mind a primary consideration, and Parliament has failed to undertake an explicit children’s rights evaluation of the measure.

The best interests duty (and the UN CRC in general) is engaged, by virtue of the ECHR rights at play; it then forms an interpretative prism as to whether those rights have been infringed. The rule engages Article 8, given the stated intention to influence choices about family size, and also due to the significant effects upon the children’s development. The rule is set to increase and intensify child poverty, which will lead to malnutrition, ill health, stress and anxiety, family break up, problems with housing and increased levels homelessness, and reduced educational attainment and life chances. It also engages Article 14 (in the ambit of Article 8), as it allocates rights in a way that discriminates against children in general, by demoting their status with regard to human rights protection. Moreover, it falls within the ambit of A1P1 and Article 14 as it allocates benefits in a way that discriminates against members of families with more than two children, and against children and families from ethnic and religious minorities.

The engagement of the ECHR triggers the best interests duty in the UN CRC. Even allowing for some breadth of definition, it is difficult to see how on any interpretation the best interests of the child were a primary consideration in this case. An analysis of the debates in the House of Commons and the House of Lords, the hearings of the Public Bill Committee, and the published associated materials – the impact assessment and human rights memorandum - show that the best interests of the child were not mentioned in support or justification of the measure, either to find the measure to be in those interests, or to find those interests outweighed. From the wide range of considerations put forward, two could be construed as impliedly speaking to the children’s best interests, but each was only mentioned once, and only briefly, with no supporting evidence. The most pressing considerations, judging by frequency of mentions, were saving money, making benefit-receiving families make the same choices as those not on benefits, and creating more fairness between taxpayers and benefit recipients.

In evaluating whether the best interests duty has been complied with, we do not need to second-guess what was in the minds of politicians, because compliance entails giving an explicit account of how that duty has been met. In the absence of any such account, it would seem that at the very least, the procedural dimension of the duty has been neglected. Parliament has not documented any assessment of the best interests of the child, and the government has even hedged its bets rather on whether it considers the rule to be in, or against, the best interests of children. This is not a tenable position. No breezy rhetoric about financial resilience or family stability can in the space of a sentence undermine the evidence as to the quantity of children whose quantifiable needs will not be recognised in the allocation of key subsistence benefits, or the evidence on the damaging effects of child poverty. Claiming it will do them good in the long run cannot be a serious legal argument.

If we conclude that the measure therefore goes against the best interests of the children affected, then we need to question how those interests were outweighed. Opposing considerations must be subject to some degree of judicial review – a state cannot simply declare that it has found other factors more important and close down the discussion. The argument that the rule ensures families on benefits face the same choice as families not on benefits is misleading, and based on a logical fallacy. It does not place families in the same position – it creates even more divergent positions, bearing in mind just how much a family needs to earn before they are deemed able to support three children solely through work. The situations, and the ‘choices’ of families above and below the benefit line are starkly different. Moreover, the language of ‘choice’ fails to take account of changing circumstances. In adjusting the system to deliberately not meet their needs, we are recasting ‘responsible’ parents of three or more children as those with substantial capital or assets behind them, hefty enough to act as a lifetime buffer against the loss of income.

The ‘fairness to taxpayers’ consideration is also manifestly without reasonable foundation, given that the large majority of families affected are working (tax-paying) families. This leaves one consideration to displace the best interests of the child – the aim to save money. But in targeting children first, not last, and failing to exhaust other options, or to treat it as a temporary measure, the ‘budgeting’ argument infringes Article 4 UN CRC. It cannot therefore realistically be in compliance with Article 3. A bare, money-saving aim is not an adequate justification for saving money at the expense of children; it is more tautology than justification. And it is a fundamental misunderstanding of discrimination law to claim that it is proportionate to discriminate against a minority group, *because they are a minority*.

The policy is based on a misleading and corrosive narrative of welfare decadence, and invokes an inverted politics of envy, suggesting that low-income families are somehow enriched by the benefits system when they have children, because the affluent do not see a commensurate increase in their already high pay. It punishes children for the act of being born, which either creates a ludicrous antenatal age of welfare responsibility, or in practice means punishing children for the actions of their parents – against the principles laid down in *ZH Tanzania*. The rule is irrational in its objectives, its expanse, its execution and lack of exceptions. It contravenes international human rights instruments, with which the UK already had a shaky relationship. There is no methodical engagement with Articles 2, 3 or 26 of the UN CRC or sound legal justification – only intuitive prejudice, distortions and obfuscation. It does not equalise choices – it is welfare segregation, entrenching and deepening existing inherited socioeconomic inequality in society. It has a distinctly aristocratic whiff since only the landed gentry and super-rich can guarantee that a total loss of income would not dent their means. If this rule does not infringe the UN CRC best interests duty, no social security policy will.

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**Notes**

1. The quote is from Thomas Hardy’s furious critique of class and poverty, *Jude the Obscure* (London: Wordsworth, 2000) 298. [↑](#endnote-ref-1)
2. George Osborne, House of Commons Hansard, 8 July 2015, Vol 598, column 335. [↑](#endnote-ref-2)
3. Clauses 11-12. [↑](#endnote-ref-3)
4. The full list of amendments to the whole Bill, not just on the two-child rule, can be found here: [↑](#endnote-ref-4)
5. Sections 13-14. [↑](#endnote-ref-5)
6. The exemption for kinship carers only applied where the child in kinship care was the third (or later) child to enter the household. So, if a young childless couple became kinship carers to two children, they would then not be entitled to CTC/UC for any biological children they later had. This was found to be irrational. [↑](#endnote-ref-6)
7. The rule also excludes third children born earlier but included on new claims for UC after that date: s14 of the Welfare Reform and Work Act 2016. [↑](#endnote-ref-7)
8. House of Lords Hansard, 26 March 2018, Vol 790, col 616. [↑](#endnote-ref-8)
9. Reg 2, of the Social Security (Restrictions on Amounts for Children and Qualifying Young Persons) Amendment Regulations 2017 SI 376; Reg 5 of the Child Tax Credit (Amendment) Regulations 2017 SI 387. [↑](#endnote-ref-9)
10. Above, n2. [↑](#endnote-ref-10)
11. See also information on family benefits in the European Commission ‘Your rights: country by country’ tool, (European Commission, 2018), and the European Social Policy Network Thematic Reports on Social Investment (ESPN, 2015). [↑](#endnote-ref-11)
12. Family support allowance in Romania (*alocație pentru susținerea familiei*)is a benefit that is paid to families on low incomes to support the family and raising and looking after children (European Commission, 2016, 13). The increase per child is capped at four children. [↑](#endnote-ref-12)
13. Child allowance and childbirth grants are limited to the first four children in the family (Bradshaw & Hirose, 2016, 35). [↑](#endnote-ref-13)
14. In *Stec & ors v United Kingdom (Admissibility)* [2005] ECHR 924, 18 one of the cases concerned future entitlement; also *Koua Poirrez v France* ECHR 459. [↑](#endnote-ref-14)
15. *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117, (8). [↑](#endnote-ref-15)
16. The Committee was considering the Social Security (Restrictions on Amounts for Children and Qualifying Young Persons) Amendment Regulations 2017 Child Tax Credit (Amendment) Regulations 2017). [↑](#endnote-ref-16)
17. Words chosen carefully; it is not just those at the lower end of the scale affected, but many middle income families too. [↑](#endnote-ref-17)
18. House of Lords Hansard, 17 November 2015, Vol 767, col 89, Lord Hodgson. [↑](#endnote-ref-18)
19. Ibid, col 81, Lord Farmer. [↑](#endnote-ref-19)
20. House of Lords Hansard, 7 December 2015, Vol 767, col 1349, Lord Freud. [↑](#endnote-ref-20)
21. Though this point is slightly more complicated; the rule does have retrospective effect, encompassing children born earlier, as far as future new claims for Universal Credit are concerned. [↑](#endnote-ref-21)
22. Above, n9. [↑](#endnote-ref-22)
23. *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690: “The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR… A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent”. [↑](#endnote-ref-23)
24. House of Lords Hansard, 7 December 2015, Vol 767, cols, 1328, 1346, Lord Freud. [↑](#endnote-ref-24)
25. Where the maximum tax credits are: £545 family element; £2 780 child element x three; £2 010 couple/lone parent element; £810 30 hour element = maximum £13 655 tax credits. This tapers as income increases at a rate of 41%, taking us to the maximum taper point of £33 305; added to this is the £6 420 threshold of earnings below which there is no working tax credit eligibility, which takes us to £39 725. [↑](#endnote-ref-25)
26. With the maximum tax credits above at £13 655, add the maximum childcare costs, £210 per week or £10 920 = £24 575. Apply the taper = £59 939, and add the lower threshold = £66 359. [↑](#endnote-ref-26)
27. 573 000 working families; 298 000 not working. [↑](#endnote-ref-27)
28. House of Lords Hansard, 7 December 2015, Vol 767, col 1328.

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