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**Problems with the “manifestly without reasonable foundation” test**

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**Abstract**

Examines, following the Supreme Court ruling in *R. (on the application of DA) v Secretary of State for Work and Pensions,* the use of the “manifestly without reasonable foundation” test in domestic judicial review challenges. The application of this benchmark in a series of human rights based challenges to social welfare reforms – such as the high profile “bedroom tax” and “benefit cap” policies – has been pivotal to their outcome. This paper argues that the application of the test is problematic as it is a formulation derived from the margin of appreciation doctrine and does not transpose to domestic application. In the alternative – even if it is the correct test to apply in some circumstances – it is to be applied far more flexibly than currently and that a “very weighty reasons” benchmark applies for some classes of discrimination.

**Subject**

Human rights

**Other related subjects**

Social security, Proportionality, Judicial review, Discrimination

**Keywords**

Disability Discrimination; Margin of appreciation; Subsidarity; Benefit cap; Bedroom Tax.

Human rights based challenges to social welfare measures engage a jurisprudence of restraint. Faced with a claimant arguing a breach of their human rights – usually a discrimination based challenge under Article 14, taken with Article 8 (Right to Respect for the Family Life) or the first part of the first protocol (A1P1 – Right to Property) – and the Government arguing that the interference is lawful, the courts have wrestled continually with this fundamental question: how does a court assess whether the discrimination caused by a social welfare rule or policy is justified?

Lord Wilson’s lead judgment in *R. (on the application of DA) v Secretary of State for Work and Pensions**[[2]](#footnote-2)* sought to provide a definitive answer. In deciding that the benefit cap policy did not discriminate unlawfully against lone parents and their children contrary to Article 14 ECHR (taken with Article 8), the majority concluded that European Court of Human Rights (ECtHR) derived authority “mandates inquiry into the justification of the adverse effects of rules for entitlement to welfare benefits by reference to whether they are *manifestly without reasonable foundation*” (MWRF)[[3]](#footnote-3). Lord Wilson declared, perhaps optimistically, “let there be no future doubt about it”.[[4]](#footnote-4)

This paper argues for continued doubt over the application of this MWRF bar and lends support to Lord Kerr’s dissenting judgment in *DA*. First and most fundamentally, the formulation is derived from the ECtHR’s margin of appreciation doctrine and does not transpose easily to use in the domestic courts. Second, even if the MWRF test is the correct one to employ in some circumstances, its relevance and function differs depending on the context of the case; particularly when dealing with discrimination on the grounds of gender and/or disability where “weighty reasons” for discrimination are required. Third, even if these first two arguments fail, the reality of the MWRF test is not as high a bar as is often implied in judicial reviews against social welfare policies. The application of a margin of review is a relevant factor among all other relevant factors to be considered as part of a stringent proportionality assessment. Its application should not supplant the application of a proper proportionality analysis by the Court. After a *precis* of the test, each of these arguments will be dealt with in turn.

This detailed critique of the applicability of the MWRF benchmark is animated by an overarching concern that domestic courts have been too willing to supplant a proper proportionality analysis with one overarching question: is the measure manifestly without reasonable foundation? This evades any meaningful assessment by the court and sets an artificially high bar for those seeking to challenge social welfare policies. If the MWRF standard persists, these claimants will be denied the adequate protection of their human rights that the ECHR requires.

**The MWRF test and the proportionality assessment**

Case law on the margin of appreciation afforded by the ECtHR to member states suffers from a reputation problem. As it “bursts in regional human rights cases in an asymmetric and heterogeneous way”, [[5]](#footnote-5) the doctrine has faced criticism for its “casuistic, uneven, and largely unpredictable nature.”[[6]](#footnote-6) As scholars and lawyers work towards greater coherence and consistency in its application, a key formulation that derives from this vertical relationship of subsidiarity between the state and the international court – the MWRF test – has infiltrated the judicial review of human rights challenges at the domestic level in the UK.

Most high profile judicial review challenges to welfare reforms over the last decade have been discrimination based. Using either the first part of the first protocol (A1P1 – Right to Property) and/or Article 8 (Right to Respect for the Family Life) to leverage Article 14 (Prohibition of Discrimination), the courts have been required to consider the differential treatment of certain groups – particularly women and disabled people – by policies like the “bedroom tax” and benefit cap.

A difference in treatment under Article 14 needs to be justified. The approach, stemming from *Stec v United Kingdom*,[[7]](#footnote-7) is to determine whether there is an “objective and reasonable justification”. This requires both a legitimate aim and “a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”[[8]](#footnote-8) To determine such a justification, the courts have fashioned a four-stage proportionality analysis that incorporates an assessment of the legitimate aim, its connection to the means or alternative ways of achieving the aim, and a final balancing stage. These are outlined, as well as elsewhere,[[9]](#footnote-9) by Lord Sumption in *Bank Mellat:*

“(1) is the difference in pursuit of a sufficiently important objective; (2) is there a rational connection between the difference and the objective; (3) could a less intrusive measure have been used without unacceptably compromising the objective; (4) having regard to all these matters and to the severity of the consequences is the difference of treatment such that a fair balance has been struck”.[[10]](#footnote-10)

This is not, however, the end of the matter. In the context of a social welfare measure – sitting comfortably in the realm of socio-economic policy – an additional gloss has been applied to this proportionality assessment to account for the greater margin afforded to the state in the fields of economic or social strategy. It is through the preservation of this margin that the “manifestly without reasonable foundation” bar has evolved. The position is set out in *Stec,[[11]](#footnote-11)* where the ECtHR considered the justification of sex discrimination in the phasing out of differential retirement ages in the UK. When outlining the approach to assessing proportionality and the usual requirement for “very weighty reasons” to justify a difference in treatment on the basis of sex, the Court went on to determine that:

“The scope of this margin will vary according to the circumstances, the subject matter and the background…a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs…the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation”.”[[12]](#footnote-12)

Importantly, this formulation is not to supplant the proportionality assessment (even if some domestic decisions appear to have done so since). Although the MWRF margin is to be taken in to account by the court in assessing the aim of the measure and the means employed to achieve it, the court must still undertake a full proportionality assessment, having regard to all relevant factors. As characterised by Lord Mance in *Re Recovery of Medical Costs*, the MWRF margin applies to the first three of the stages outlined above, but it is “important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced”.[[13]](#footnote-13)

It is this MWRF formulation that has found itself transposed from its ECtHR origins into the decisions of the UK domestic courts. They have reached continually for this formulation in challenges to social welfare measures. This journal’s case digests return routinely to the phrase,[[14]](#footnote-14) and Cousins’ recent analysis of ECHR proportionality assessments alongside his further analysis in this issue of the MWRF test, underscore the “frequent references” to the MWRF benchmark in social security challenges.[[15]](#footnote-15) Nowhere is this more apparent than in the suite of challenges against the UK Government’s so-called “bedroom tax” policy. The underpinning regulations introduce a housing benefit penalty for under-occupation for those living in the social rented sector[[16]](#footnote-16), 14% of the eligible rent for under-occupying by one bedroom, 25% for two or more. These challenges have been characterised by a focus on whether resulting discrimination can be justified and – when determining this – what margin is accorded by the Court to the Government. In the domestic context, a majority of the UKSC has held that such a policy is unlawful (i.e. unjustified discrimination) if it is “manifestly without reasonable foundation”.[[17]](#footnote-17) Two unsuccessful claimants took their case to the ECtHR, where the application of a different benchmark for gender-based and disability discrimination – the requirement for “weighty reasons” – led to a successful appeal in respect of a claimant requiring an additional room for a domestic violence sanctuary scheme.[[18]](#footnote-18)

I argue that are three problems with the application of this MWRF test: (i) the benchmark is a creature of the ECtHR margin of appreciation doctrine and does not transfer into the domestic context, (ii) it admits of significant qualifications in the context of social welfare (by, for instance, giving way to “weighty reasons” in an array of different contexts), and (iii) even if it is the correct test, it is not as high a bar to apply as is implied in domestic judicial review decisions. I will deal with each of these points in turn.

1. The MWRF test does not transfer into the domestic context.

To adopt the MWRF test in the domestic review of proportionality is to adulterate a test developed as part of the margin of appreciation doctrine. It is a means to delineate the capacities of the ECtHR and the state, “not a domestic public law mechanism”.[[19]](#footnote-19) As stated by Lord Kerr in his dissenting judgment in *DA*, the MWRF formulation is a “creature of the European Court of Human Rights”.[[20]](#footnote-20) It is designed to capture how the convention system should be subsidiary to the safeguarding of human rights at the domestic level, especially so for economic and social measures, and as a result, “goes hand in hand with supervision under the Convention system.”[[21]](#footnote-21)

Importantly, this subsidiarity is not just to the national authorities, but also to other organs of the state – domestic courts in particular. This is what Speilmann characterises as the “systemic objective” of the margin of appreciation.[[22]](#footnote-22) A “measure of responsibility” is deferred to domestic courts to uphold human rights, allowing them to balance competing interests and scrutinise the proportionality of interferences. This margin then allows the ECtHR to “supervise the review conducted by the domestic courts”.[[23]](#footnote-23) The standards it passports, therefore, do not apply in the same way to the assessment of ECHR compliance by domestic courts. As Greer argues, as a “fundamentally transnational device, the margin of appreciation can have no direct domestic application”.[[24]](#footnote-24) The principle is stated clearly and concisely in *A v United Kingdom**[[25]](#footnote-25),* where the court clarifies that:

“The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of state at the domestic level.”[[26]](#footnote-26)

Of course, adopting Lord Hope’s reasoning in *AXA General Insurance Limited and others v The Lord Advocate and others*,[[27]](#footnote-27) even if the margin of appreciation is part of the “supervisory jurisdiction” of an international court and therefore is “not available to national courts when considering the convention”,[[28]](#footnote-28) the Court should still consider important questions of balance, including the nature of social and economic measures, in the context of a proportionality assessment. In the same way that international courts recognise their limitations in respect of national institutions, so too should the domestic courts recognise their limitations in the face of the executive and legislature.

This does not, however, mean that benchmarks derived from the margin of appreciation can supplant a proper assessment of proportionality. Domestic courts are the ECHR’s “administrators of first resort”; being exposed to the domestic context in way that cannot easily be recreated at the supranational level.[[29]](#footnote-29) As observed by Pannick in the wake of the passing of the Human Rights 1998, a domestic court must “comply with *its* responsibility to give a judgment consistent with the Convention”,[[30]](#footnote-30) even where they think it appropriate to accord a degree of deference to the legislature and/or executive.[[31]](#footnote-31) Otherwise, there is a danger that a proper proportionality analysis gives way to applying a formulation derived from the margin of appreciation doctrine. In *DA[[32]](#footnote-32)* and *R. (on the application of Carmichael) v Secretary of State for Work and Pensions*,[[33]](#footnote-33) a majority of the Supreme Court do exactly this, seeking instead to answer the narrow question: is the approach of the Secretary of State “manifestly without reasonable foundation”?[[34]](#footnote-34)

So what standard, if any, should be applied to measures of social and economic strategy if the application of this MWRF test is misguided? Lord Kerr’s conclusion in *DA* is that in the final balancing stages of a proportionality exercise, the court should ask whether “the Government has established that there is a reasonable foundation for its conclusion that a fair balance has been struck” between the rights of the individual and the interests of the community.[[35]](#footnote-35) His conclusion is merely a restatement of what a robust proportionality assessment, taken through the four stages outlined by Lord Sumption above, naturally requires. The court can and should account for the particulars of an economic and social measure within a vigorous assessment of proportionality, without need for recourse to a formulation designed for an alien context.

The alternative therefore, is for the court to consider the four stages of the proportionality assessment detailed by Lord Sumption in *Bank Mellat*[[36]](#footnote-36)and in many other instances:[[37]](#footnote-37) (i) the measure pursues a legitimate aim, (ii) whether there is a rational connection between the measure and the legitimate aim, (iii) whether a less intrusive measure could have used without compromising this aim, and (iii) having regard to all of these issues, whether a fair balance been struck between the severity of the consequences and the measure’s progression of the aim. The assessment of any measure’s status as “socio-economic” or otherwise falls to be considered – alongside any other relevant factors – in the determination of this final stage of assessing whether a fair balance has been struck. To replace this holistic assessment with a recourse to the MWRF formulation is to fail to undertake a meaningful proportionality assessment at all.

1. The MWRF test is flexible and admits of qualifications.

Even if this margin of appreciation derived benchmark is one that is valid to adopt in the domestic context, it is not a static test to be applied with equal zeal for all cases as soon as the court is dealing with a social welfare measure. As outlined in *Stec*, the scope of the margin varies “according to the circumstances, subject matter and background”.[[38]](#footnote-38) Under this “apparently fluid remit”,[[39]](#footnote-39) the extent of the margin differs in relation to the discrimination at issue (for instance, gender or disability-based discrimination), or even in relation to other contextual factors in the case itself (for instance, the specific benefit payment at issue). For many of those groups affected most acutely by social welfare policies – particularly disabled people, women, and children – a higher standard than the MWRF test is liable to apply.

Variation in the application of the MWRF is well established outside of the Article 14 discrimination context. In *Connors v United Kingdom,[[40]](#footnote-40)* in relation to Article 8 (Right to Respect for the Family Life),the ECtHR noted that “the margin will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights”.[[41]](#footnote-41) The ECtHR set out the general principle as follows:

“the Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature’s judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation…Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant.”[[42]](#footnote-42)

This same context-led malleability applies to the assessment of proportionality under Article 14. There are two strands to this reasoning evident in ECtHR decisions. The first is the grounds of discrimination at issue. As outlined above, *Stec* indicated that the “scope of the margin will vary according to the circumstances” and that “as a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the convention”.[[43]](#footnote-43) This principle has subsequently been underscored in *Carson and Others v. the United Kingdom[[44]](#footnote-44),* where the court determined that individuals do “not require the same high level of protection against differences in treatment based on this ground [residence] as is needed in relation to differences based on an inherent characteristic, such as gender or racial or ethnic origin”.[[45]](#footnote-45)

In addition to sex and ethnicity,[[46]](#footnote-46) the requirement for “very weighty reasons” to justify discrimination has also applied to other categories of discrimination, such as sexual orientation[[47]](#footnote-47), birth status,[[48]](#footnote-48) and nationality.[[49]](#footnote-49) The Court’s approach here is not to introduce an arbitrary classification of discrimination to which different standards apply, but instead to enshrine the principle that for discrimination against particularly vulnerable groups, the margin afforded to the state inevitably has to narrow. The reasoning is set out clearly in *Guberina v Croatia*;[[50]](#footnote-50) a case dealing with discrimination in Croatian property taxes on the grounds of disability:

“…if a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs.”[[51]](#footnote-51)

The ECtHR has ascribed a requirement for “weighty reasons” for discrimination against those with disabilities on multiple occasions. This is true for both physical and mental disabilities.[[52]](#footnote-52) In the context of welfare benefits, this is particularly significant. Disability benefits have been subject to substantial revision and resulting reductions in the UK,[[53]](#footnote-53) with other reforms – particularly to housing benefit – having an especially acute impact on disabled people, what some have called “disablist austerity”.[[54]](#footnote-54) Indeed, the impact of austerity on those with disabilities has animated other critiques of the domestic’s court assessment of proportionality and – as part of this – the adoption of the MWRF benchmark.[[55]](#footnote-55) Amos’ arguments on the “second division of human rights adjudication” faced by those affected by austerity measures seeking to assert their social rights return to the ECHR’s core promise to “make it possible for the weakest voice to be heard”.[[56]](#footnote-56) The adversities faced by such groups of claimants are recognised by the ECtHR in this significant variation to standard of review.

On occasion, the court has gone further than looking at the discrimination ground at issue by seemingly qualifying the application of the MWRF benchmark in relation to other contextual factors – in particular the specific benefit payment at play. In *Andrle v The Czech Republic*[[57]](#footnote-57)the ECtHR considered whether a different pensionable age for women and men caring for children was justified sex discrimination. The court revisits the familiar MWRF formulation, before qualifying it significantly in relation to pension benefits:

…pension systems constitute cornerstones of modern European welfare systems. …The inherent features of the system – stability and reliability – allow for lifelong family and career planning. For these reasons the Court considers that any adjustments of the pension schemes must be carried out in a gradual, cautious and measured manner. Any other approach could endanger social peace, foreseeability of the pension system and legal certainty.[[58]](#footnote-58)

The court adopts this significant qualification – the “gradual, cautious and measured” riders – as part of their assessment of the MWRF foundation benchmark. The centrality of pensions to the welfare state, therefore, effectively softens the margin of appreciation. We see a similar approach reflected again in *Valkov v Bulgaria*,[[59]](#footnote-59) where the court refers to the possible “impairment of the essence of his pension rights” when outlining the MWRF test in relation to A1P1.

1. The MWRF test is not as high a bar for a claimant to pass as is often implied.

Given the frequency of references to this MWRF formulation, what does this benchmark actually mean for a court’s assessment of justification? In the UK, Lady Hale’s judgment in *Humphreys v The Commissioners for Her Majesty's Revenue and Customs*[[60]](#footnote-60)sounds a cautionary note, suggesting that the application of the MWRF standard does not mean that the rule under consideration “should escape careful scrutiny”.[[61]](#footnote-61) There are two questions that need answering here. First, does the MWRF actually add anything to the standard “objective and reasonable justification” bar, and if so, what? Second, is the MWRF test confined to a particular stage of a proportionality assessment?

On the first question, the ECtHR authority is clear that the test does not supplant a full proportionality analysis or passport a specific threshold to pass. Instead, the court should evaluate all relevant issues, as they would do in any assessment of proportionality. For instance, *Bah v United Kingdom*[[62]](#footnote-62) is drawn on frequently by domestic courts as an authority on the application of the MWRF test.[[63]](#footnote-63) An examination of this decision, however, reveals that even in the ambit of the MWRF benchmark, the court must still adopt a context-sensitive and flexible approach. When assessing the justification of discrimination on the grounds of immigration status, the court underscores the finely textured approach when applying the MWRF test to the case itself, noting that:

“…while differential treatment on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality…given that the subject of this case...is predominantly socio-economic in nature, the margin of appreciation accorded to the Government will be relatively wide”.[[64]](#footnote-64)

Indeed, in the application of the proportionality assessment to the case, it is not clear that the imposition of the MWRF imposes a particular standard at all. The court concludes by noting that the “the differential treatment to which the applicant was subjected was reasonably and objectively justified”;[[65]](#footnote-65) applying the familiar test for a proportionality assessment.

Turning to the second question, the issue of whether the MWRF threshold confines itself to first three stages of a proportionality assessment (the assessment of the legitimate aim, the connection of the means to this aim, and the availability of less interfering means), but preserves the final “balancing” stage for the court, occupied Lord Kerr’s dissenting judgment on justification in *DA.[[66]](#footnote-66)*

He concludes that although he considered the MWRF test applied to all stages of the assessment in *SG,* he "was wrong to have done so”.[[67]](#footnote-67) Drawing on Lord Mance’s analysis in *Re Recovery of Medical Costs for Asbestos Diseases* (in the context of A1P1),[[68]](#footnote-68) he points to the distinction between assessing the pursuit of a legitimate aim, and a “balancing of the interests of the state against the impact which a measure interfering with a Convention right has on those affected by it”.[[69]](#footnote-69) To apply a MWRF test to the latter would not be appropriate.

Although Lord Kerr’s concerns are rooted in the domestic application of a test derived from the margin of appreciation doctrine, there is support for his distinction within ECtHR authority. In *Valkov v Bulgaria[[70]](#footnote-70),* in the context of A1P1, the court underscored that the MWRF applies to the assessment of the motivation for the measure, but that a “fair balance” still must be struck:

The margin of appreciation available to the legislature in implementing such policies should therefore be a wide one, and its judgment as to what is “in the public interest” should be respected unless that judgment is manifestly without reasonable foundation. However, any interference must also be reasonably proportionate to the aim sought to be realised. In other words, 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. That balance will be lacking where the person concerned has to bear an individual and excessive burden.[[71]](#footnote-71)

It is clear, therefore, that the application of the MWRF formulation is far from the end of the matter. To take the answers to these two questions together, the MWRF test does not supplant a proportionality assessment, nor impose a threshold to be heeded across all stages of a proportionality assessment. Instead, it serves simply as an indicator that the court is in the ambit of the socio-economic domain, and this should be accounted for – alongside all other relevant factors – in the course of the proportionality assessment.

**Conclusion**

If the MWRF test continues to dominate in the judicial review of social welfare measures, an additional benchmark has been introduced for claimants and they are denied access to a full, rigorous assessment of the justification of interferences with their human rights. As a formulation imported from the margin of appreciation doctrine within the ECtHR, its use by domestic courts is inappropriate and distorts their exercise of proportionality assessments. As argued by Riddell, it is a test that can work “strongly in favour of the Secretary of State” and to the detriment of those whose human rights are at issue.[[72]](#footnote-72)

Even if my argument on this test’s alien status in the domestic context fails and the MWRF benchmark is appropriate for domestic use in some circumstances, two other arguments hold. First, a higher standard applies to certain groups – such as discrimination on the ground of gender or disability – where “weighty reasons” apply, and second, the standard it applies is not as unassailable as reflected in judicial review challenges to austerity measures to date. In no context should the test supplant a detailed consideration of the proportionality of a measure. If the court’s majority judgment in *DA* is to be taken on its face, there is a danger that in considering human rights challenges to social and economic measures, particularly in the ambit of Article 14, domestic courts in the UK will subsume the protections within the ECHR into one overarching question: is the measure manifestly without reasonable foundation? If the test continues to be applied in its current guise, in almost all cases, the answer will be no.

This critique of the applicability of the MWRF benchmark and concerns that its use evades any meaningful assessment by the court of social welfare policies speaks to the broader animating concern of this paper. As argued by Simpson:

“The political debate on the future of the Human Rights Act 1998 is the headline-grabber, but the continuing political and judicial debate regarding the roles of the judiciary and legislature in determining the social rights of citizenship should not be ignored.”[[73]](#footnote-73)

As a proxy for deference, the continued domestic use of the MWRF standard is at the forefront of this debate about the capacity of the courts to intervene in the context of social welfare measures. If the MWRF standard persists, this balance between the role of judiciary and the legislature is tilted too strongly in favour of the latter.

1. The author would like to thank the two anonymous reviewers for their valuable input on the submitted version. [↑](#footnote-ref-1)
2. [2019] UKSC 21 [↑](#footnote-ref-2)
3. Ibid [59] (Lord Wilson). [↑](#footnote-ref-3)
4. Ibid [65]. [↑](#footnote-ref-4)
5. Francisco Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties* (Bril 2019) 146. [↑](#footnote-ref-5)
6. Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (Council of Europe Publishing, 2000) 5. [↑](#footnote-ref-6)
7. (2006) 43 E.H.R.R. 47 [51]. [↑](#footnote-ref-7)
8. *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42 [22] (per Lady Hale). [↑](#footnote-ref-8)
9. See, in particular, *R. (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 [33] (per Lady Hale), and *Re Recovery of Medical Costs for Asbestos Diseases* [2015] UKSC 3 [51] (per Lord Mance), the latter with reference to justification in an A1P1 context. [↑](#footnote-ref-9)
10. *Bank Mellat v HM Treasury* [2014] AC 700 [20] (per Lord Sumption). [↑](#footnote-ref-10)
11. *Stec* (n 6). [↑](#footnote-ref-11)
12. Ibid [52]. [↑](#footnote-ref-12)
13. *Re Recovery of Medical Costs* (n 8)[52] (per Lord Mance). [↑](#footnote-ref-13)
14. See – among very many others – Jed Meers and Alice Welsh, ‘Going cap in hand (Case Comment)’ (2019) 26(3) J.S.S.L D72-D73; Tom Royston and Charlotte O’Brien, ‘You move you lose (Case Comment)’ (2018) 25(3) J.S.S.L D78-D80; and Tom Royston and Charlotte O’Brien, ‘New bedroom tax exception (Case Comment)’ (2018) 25(1) J.S.S.L D24-D25. [↑](#footnote-ref-14)
15. Mel Cousins, ‘Social security, discrimination and justification under the European Convention on Human Rights’ (2016) 23(1) Journal of Social Security Law 20-41, 40. [↑](#footnote-ref-15)
16. See Reg.B13 Housing Benefit Regulations 2006 [↑](#footnote-ref-16)
17. *R. (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 [38] (per Lord Toulson]. [↑](#footnote-ref-17)
18. *J.D. and A v. The United Kingdom Applications nos. 32949/17 and 34614/17* (ECtHR, 24 October 2019). [↑](#footnote-ref-18)
19. Alastair Mowbray, ‘Subsidiarity and the European Convention on Human Rights’ (2015) 15 Human Rights Law Review, 313-341, 329. [↑](#footnote-ref-19)
20. *DA* (n 3) [164] per Lord Kerr. [↑](#footnote-ref-20)
21. See the Brighton Declartion accompanying Protocol 15 (introduced in 2013), quoted in: Nikos Vogiatzis, 'When Reform Meets Judicial Restraint Protocol 15 Amending the

    European Convention on Human Rights' (2015) 66 N IR LEGAL Q 127, 131; and Pascual-Vives (n 1) 147. [↑](#footnote-ref-21)
22. Dean Spielmann, ‘Whither the Margin of Appreciation?’ (2014) 67(1) M.L.R, 49-65, 63. [↑](#footnote-ref-22)
23. Ibid. [↑](#footnote-ref-23)
24. Greer (n 2) 34. [↑](#footnote-ref-24)
25. (2009) 49 E.H.R.R. 29. [↑](#footnote-ref-25)
26. Ibid [184]. [↑](#footnote-ref-26)
27. [2011] UKSC 46. [↑](#footnote-ref-27)
28. Ibid [32] (Lord Hope). [↑](#footnote-ref-28)
29. Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015) 48. [↑](#footnote-ref-29)
30. Emphasis in the original text. [↑](#footnote-ref-30)
31. David Pannick, ‘Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment’ [1998] Public Law 545-551, 549. [↑](#footnote-ref-31)
32. (n 3). [↑](#footnote-ref-32)
33. [2016] UKSC 58. [↑](#footnote-ref-33)
34. Ibid[66] (per Lord Toulson) and *DA* [88] (per Lord Wilson). [↑](#footnote-ref-34)
35. *DA* [177] (per Lord Kerr). [↑](#footnote-ref-35)
36. *Bank Mellat v HM Treasury* [2014] AC 700 [20] (per Lord Sumption). [↑](#footnote-ref-36)
37. See, for instance, *Re Recovery of Medical Costs* (n 8)[52] (per Lord Mance). [↑](#footnote-ref-37)
38. *Stec* (n 6) [52]. [↑](#footnote-ref-38)
39. Alice Diver, ‘Putting Dignity to Bed? The Taxing Question of the UK’s Housing Rights Relapse’, in Diver, A and Miller, J (eds), *Justiciability of Human Rights Law in Domestic Jurisdictions* (Springer 2016) 333-362, 339. [↑](#footnote-ref-39)
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41. Ibid [80]. [↑](#footnote-ref-41)
42. Ibid [82]. [↑](#footnote-ref-42)
43. *Stec* (n 6) [52]. [↑](#footnote-ref-43)
44. (42184/05) (2009) 48 E.H.R.R. 41. [↑](#footnote-ref-44)
45. Ibid [80]. [↑](#footnote-ref-45)
46. *Biao v Denmark* (38590/10) (2017) 64 E.H.R.R. 1. [↑](#footnote-ref-46)
47. *JM v United Kingdom* (2011) 53 EHRR 6. [↑](#footnote-ref-47)
48. *Sommerfeld v Germany* (31871/96) (2004) 38 E.H.R.R. 35. [↑](#footnote-ref-48)
49. *British Gurkha Welfare Society v United Kingdom* (44818/11) (2017) 64 E.H.R.R. 11. [↑](#footnote-ref-49)
50. *Guberina v Croatia* (23682/13) (2018) 66 E.H.R.R. 11. [↑](#footnote-ref-50)
51. Ibid [73]. [↑](#footnote-ref-51)
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55. See, for instance, Alice Diver, ‘Putting Dignity to Bed? The Taxing Question of the UK’s Housing Rights ‘Relapse’’ in Diver, A and Miller, J (eds), Justiciability of Human Rights Law in Domestic Jurisdictions (Springer 2016) 333-361. [↑](#footnote-ref-55)
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57. (6268/08)(2015) 60 E.H.R.R. 14. [↑](#footnote-ref-57)
58. Ibid [51]. [↑](#footnote-ref-58)
59. (2033/04) (2016) 62 E.H.R.R. 24. [↑](#footnote-ref-59)
60. [2012] UKSC 18 [↑](#footnote-ref-60)
61. Ibid [22] (Lady Hale). [↑](#footnote-ref-61)
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63. See, for example: *Turley v London Borough of Wandsworth, Secretary of State for Communities and Local Government* [2017] EWCA Civ 189 [22] (Underhill J); *R. (on the application of HC) v Secretary of State for Work and Pensions* [2013] EWHC 3874 (Admin) [48]-[51], [64] (Supperstone J); and *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 [77] (Lord Sumption and Lord Reed). [↑](#footnote-ref-63)
64. *Bah* (n 50) [47]. [↑](#footnote-ref-64)
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66. (n 3). [↑](#footnote-ref-66)
67. Ibid [174].. [↑](#footnote-ref-67)
68. (n 8) [174] (Lord Mance). [↑](#footnote-ref-68)
69. (n 3) [176] (Lord Kerr). [↑](#footnote-ref-69)
70. (n 47). [↑](#footnote-ref-70)
71. Ibid [91]. [↑](#footnote-ref-71)
72. Robert Riddell, ‘Key Developments in Domestic Social Security Law in 2017–2018: An Overview’ (2018) 23(2) Judicial Review, 106-118, 113. [↑](#footnote-ref-72)
73. Mark Simpson, ‘Social rights, child rights, discrimination and devolution: untangling the web’ (2018) 40(1) Journal of Social Welfare and Family Law, 3-20. [↑](#footnote-ref-73)