The professional diversity deficit: the UK Supreme Court’s social security law blind spot

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Abstract: It is no secret that the Supreme Court lacks demographic diversity. But there is very little commentary on a different diversity gap – that of professional experience. UK Supreme Court judges are typically drawn from lucrative areas of legal practice, creating a pronounced professional practice gap in the realm of social security law. None of the sitting Supreme Court judges have ever acted in a reported security case for social security claimants against the State. This creates a problem of perspective; would we really expect a panel of Goliath advocates to give David a fair hearing? This article highlights the hitherto under-explored evidence of a professional deficit on the court, and argues that this cannot help but have an influence upon judicial perspectives. One such possible influence is the ‘alegalisation’ of social security law – the treatment of it as not-law but as a matter of pure politics. Here, the article analyses how the line is drawn in key cases, in which it seems the court feels responsible for defending some ‘pure law’ human rights, while defending the courtroom *from* other human rights claims – those relating to social security. But poverty is a human rights issue, and human rights are (still) a matter of law. We need to bring social security expertise and claimant perspectives to the bench if we are to reassert the legal nature of social security rights.

1. Introduction

Judges are not born, they are made. And they are not made in a societal vacuum. They are shaped by their experiences and constrained by the parameters of their own perceptions. As such, it is widely recognised that the male tilt on the bench is problematic – gender being ‘the inescapable backdrop to all our experiences’, Erica Rackley noted it has to be a factor in how one judges,[[2]](#footnote-2) and there is an extensive literature in agreement.[[3]](#footnote-3) Given the importance of “backgrounds, communities and experiences”,[[4]](#footnote-4) studies have pointed to the importance (and lack of) racial/ethnic diversity in the higher courts,[[5]](#footnote-5) and the slow progress on gender and racial diversity,[[6]](#footnote-6) while the lack of diversity with regard to other protected characteristics, sexual orientation[[7]](#footnote-7) and disability,[[8]](#footnote-8) have received some attention. However, the question of professional diversity remains unexplored – but the ways in which one learns and trains to become a lawyer, and the kind of lawyer one becomes cannot but contribute to one’s perceptions of the law.

Arvind and Stirton have shown the importance of (broadly defined, measurable) ideological differences between Supreme Court judges to “the outcome of cases and the direction in which the law evolves”.[[9]](#footnote-9) Building on this, Malleson proposes seeking greater ‘values diversity’ within the judiciary, rather than focusing solely on demographic diversity, and abandoning the ‘don’t ask, don’t tell’ approach which tends to promote value-homogeneity.[[10]](#footnote-10) While acknowledging the complexity of ascertaining which values to select for, and the difficulty of how to incorporate values into the selection process, Malleson argues that doing so would “ultimately strengthen the Court's legitimacy in making decisions in the fuzzy space between law and politics in which it must adjudicate”.[[11]](#footnote-11)

How that fuzzy space is defined and delineated is informed by what one thinks the law is. Professional diversity would involve different engagements with, and perceptions of, the law, and potentially introduce subtle degrees of ideological and values diversity. Chris Hanretty’s extensive study of judicial behaviour on the Supreme Court found that judges’ legal specialisations were profoundly influential;

“Legal outcomes (understood in the broadest sense) are therefore not dictated or even constrained by a monolithic, universal conception of what the law requires, but rather conceptions of what the law requires, as refracted through different specializations.”[[12]](#footnote-12)

However, in spite of being a key factor, “explaining more of the court’s work than political differences between judges”, the nature of UKSC judges’ specialisations – and lack of diversity thereof, has not been examined.

This article begins the process of analysing this factor, by drawing out evidence of UKSC judges’ histories as lawyers before they were judges, to show not only areas of specialisation, but also areas in which there is any, or no, recorded experience at all. This piece does not seek to unpick the ways in which this and other factors interact to create complex judicial identities, or to isolate causal links with specific outcomes – such tasks being beyond the scope of a single article (or, possibly, lifetime). In any case, it would be impossible to measure the effects of having a social security practice background on current UKSC judges in the absence of any such experience. Rather, it has the more modest aims of identifying a professional deficit in the experiences and specialisations of the Supreme Court when it comes to social security law, and reflects that this likely plays a part in the Court’s ‘alegalising’ of social security; judges who have not encountered it as law, are less likely to treat it as such. This is a substantive, rather than purely procedural argument in favour of professional diversity; a broader range of legal experiences could enhance judicial engagement with social security law, not just provide the optics of legitimacy.[[13]](#footnote-13) A study of judges at the European Court of Human Rights, by Dzehtsiarou and Schwatz, reached “striking” findings of “just how consistent the judges are in affirming both the value of collegiality and the view that professional diversity can enhance the quality of the Court’s deliberations”.[[14]](#footnote-14)

The next section looks at the experiences of the current UKSC justices when in legal practice. Judicial constructions of the law reflect the ways in which judges have experienced professional prestige. Despite claims of wide or varied practices in their public biographies,[[15]](#footnote-15) I could not find any evidence of any of the justices having *ever* acted in a reported case *for* *a claimant* in a social security case. Further, apart from Lord Sales, who was First Treasury Counsel and so acted for the State in a vast range of cases, I found no evidence of any of the other justices having acted *at all* in any state social security benefit case. This experience deficit, and potential anti-claimant perspective, is important. Simply trusting in the prodigious intellects of judges to compensate for ignorance and lack of relevant perspectives is perhaps naïve. That social security law accounts for such a large swathe of disputes, litigation,[[16]](#footnote-16) and public expense, and yet is treated as something that can be picked up as you go along, reflects a lack of respect for the discipline, and an indifference to the understanding required of claimants’ perspectives.

The scepticism of the Supreme Court when it comes to considering social security law as law has rarely been as explicit as it was in the case of *SC,*[[17]](#footnote-17)and the mechanisms by which social security questions became relegated to the realm of politics are examined in the third section of this article. That case considered the two-child rule limiting key subsistence benefits to a maximum of two children to be a matter for Parliament, in which there were simply no legal means for the courts to intervene. Former UKSC judge Jonathan Sumption hailed the ruling as a redrawing of the boundaries between the legal/justiciable and the political.[[18]](#footnote-18) However, the notion that there can be a clear line between politics and the law – and the tendency to dump matters of social security on the non-legal side of it – is misleading. It is a political choice, helping to entrench existing power dynamics in society, protecting the executive and the legislature from scrutiny when they infringe the rights of a socio-economically disadvantaged minority. In the context of children in particular, it abrogates the duty to protect *disenfranchised* minorities. This article argues that diversity of professional experience is vital, if matters of social security, human rights and poverty are to get a fair hearing.

The treatment of poverty as a political problem in *SC* contrasts with the attitude taken in the *UNISON*[[19]](#footnote-19) case on employment tribunal fees, where Lord Reed decried the effects upon people living below minimum income standards – an approach analysed in section 4 of this article. It is striking that while tribunal fees made much smaller inroads than the two-child rule into a person’s means of subsistence, they attracted much stronger criticism (drawing upon anti-poverty discourse). The court imbued the human right to a fair hearing with an importance that it does not accord the right to non-discriminatory access to enough money for food and heating; the lack of social security expertise on the bench may contribute to this lack of understanding of the pivotal importance of social security for human rights.

We have to recognise that poverty is a matter of human rights, and that human rights are in turn, a matter of law. And to get to that point, we have to recognise that socio-economic rights are legal rights, and not treat them as the grubby poor cousin of lofty ‘true’ legal rights. But to get there we have a difficult starting point. Section 5 of this article argues that we need to bring different perspectives to the bench – perspectives that bring with them more humility and more empathy. We need greater diversity of experience and of expertise if we are going to protect equality-based rights in social security law.

2. The professional deficit on the current Supreme Court

In spite of occupying a large part of the legal proceedings in England and Wales, social security law is not taught as part of a standard law degree or course;[[20]](#footnote-20) it is excluded from many lawyers’ legal horizons from the start. But that professional distance is perpetuated for the lawyers who become Supreme Court justices. Social security law is treated as something that they can pick up as they go along. The biographical summaries give a flavour of the justices’ experiences,[[21]](#footnote-21) but to find out about the experiences of the current (as of January 2025) Supreme Court justices[[22]](#footnote-22) when they were in practice, I searched Westlaw for all reported cases in which each were listed as a legal representative,[[23]](#footnote-23) using their surnames and dates of practice, and then trawled through the results eliminating those with inapplicable first names/initials, or cases where the surname appeared as part of a name of a solicitors’ organisation.[[24]](#footnote-24) This was to ensure that cases where the legal representative is not listed with any initials were included, which results in a potentially overinclusive list but was especially necessary for those who practised in Scotland, where a large number of the case reports list barristers only by surname.

I then referred to the case categorisation used on that database as a guideline for finding social security cases. “Social security benefits” and “social security administration” are available classifications, as a subset of “Health and Social Welfare”. I checked any case listed as a social security case to ensure it really was one, (excluding the occasional erroneous listing),[[25]](#footnote-25) and then checked any case listed under the broader heading of Health and Social Welfare to catch any possible extra social security cases. Each case can be tagged in multiple categories, so searching for those categories should not exclude cases with additional designations. However, to make the results as inclusive as possible, I checked each case tagged as a ‘public and constitutional law’, and ‘equality and human rights law’ case (and any listed as ‘unclassified’) to check social security cases were not missed, which did slightly increase the number assigned to Lord Philip Sales. This is by no means an exhaustive account; despite my efforts to mitigate erroneous case tagging, I might have missed mis-tagged cases, and the name searches may have been overinclusive (should different lawyers share the same name) or underinclusive (of different variations names not accounted for in the search methods). And it does not take account of unreported cases, and/or representation that did not lead to hearings. But the analysis is a useful yardstick, indicative of the justices’ previous practices. The categorisation is displayed in figure 1 below.

Robert Reed’s judicial experience includes being “Principal Commercial Judge” in the Scottish Outer House Court of Session. The list of reported cases in which he appears to be listed as a representative (n=131) does not include social security cases. Two cases are tagged as health and social welfare, and are about health care and child abuse. Patrick Hodge’s subject-specific judicial experience includes being Commercial Judge and the Scottish Judge in Exchequer Cause; a Scottish Intellectual Property Judge and a Judge in the Lands Valuation Appeal Court. The reported cases in which he acted as legal representative do not include social security cases. They include seven cases classed as health and social welfare cases – six on healthcare, one on nursing accommodation.

The Supreme Court website tells us that David Lloyd Jones’s practice included international law, EU law and public law. None of the reported cases in which he appears to have acted are classified as social security cases. The six listed health and social welfare cases were all health care cases. Michael Briggs practised in commercial and chancery work, and was in charge of the Chancery Modernisation Review. The reported cases in which he acted include four hearings tagged as health and social welfare cases, one on breach of contract in the pharmaceutical industry, three on terms of employment of medical professionals. The list does not include any social security cases. It includes three cases listed as public and constitutional law, one on trust property on the British Virgin Islands, one on GP contractual rights, and one on a confidentiality agreement and London Regional Transport.

Of all the judges, it is unsurprising that the one with the largest, and most varied, portfolio of reported cases as a practitioner was Philip Sales, as he was First Treasury Counsel before being appointed to the High Court. Of the 304 reported cases/hearings in which he appears to have acted, ten hearings involved social security benefits.[[26]](#footnote-26) In each one he acted for the government. Nicholas Hamblen practised at the commercial bar, and was a nominated Commercial Court Judge. His reported cases do not include any social security, health and social welfare, equality and human rights or public and constitutional law cases. George Leggatt specialised “mainly in commercial cases” before becoming a judge.[[27]](#footnote-27) Of the 104 reported cases/hearings in which he acted, none are social security cases. Three are designated health and social welfare cases – about a personal injury action against a pharmaceutical company; product liability for pharmaceuticals, and one about liability for schools in cases of abuse. Andrew Burrows has “written many books and articles especially on contract, tort, unjust enrichment, and statute law”.[[28]](#footnote-28) Burrows had not acted in any social security, health and social welfare or equality and human rights cases. The one case listed as public and constitutional law is about corporation tax.[[29]](#footnote-29)

It is slightly harder work to discover cases in which Ben Stephens acted, and it may be that Westlaw is insufficiently inclusive of Northern Ireland tribunals and lower courts. Of the reported cases/hearings identified, none were about social security, health and social welfare, equality and human rights, or public and constitutional law. Dame Vivien Rose’s judicial experience includes being a High Court Judge in the Chancery Division; President of the Upper Tribunal (Tax and Chancery Chamber); and she was a nominated judge of the Financial List. Of the reported cases in which she is listed as a legal representative, one was described as on health and social welfare but was an intellectual property case. None of the cases involved social security, or equality and human rights, or public and constitutional law. David Richards was a High Court Judge (Chancery Division), a chairman of the Competition Appeal Tribunal in 2004 and chairman of the Insolvency Rules Committee. The reported cases in which he acted include no social security cases, equality and human rights or public and constitutional law cases. Ingrid Simler is the only judge other than Philip Sales to have acted in a single reported social security benefits case (also for the government) – a statutory sick pay case;[[30]](#footnote-30) however, SSP is a payment made *by employers*, not the State. She has not acted in any other social security cases.

So where does all of this leave us? Of the 1213 reported cases in which a current Supreme Court justice appears to have acted as a legal representative, 10 involved some aspect of social security, and only 9 involve social security benefits paid by the State. Each one of those 9 hearings was one of Philip Sales’s cases as Treasury Counsel. Not one of the justices of the Supreme Court has ever acted in a reported social security case *for* a claimant *against* the State. This is a significant experience and expertise gap. While the justice system requires its highest judges to be, to some extent, Jacks (and Jills) of all trades, it is inescapable that they are drawn from a small pool of professional experience (a large amount of commercial and corporate work) – where they have good claim to be experts – and that the area of social security is seriously unrepresented among judicial backgrounds. Figure 2 shows how many judges have acted as representatives in each of the areas:

That almost no current Supreme Court judges have practiced in social security law (or otherwise studied it), and none have represented claimants against the State, presents challenges which have not been hitherto acknowledged. It is not just a question of familiarity; is also problematic that, to the extent that the interests of those they have acted for are relevant, they are stacked up on one side. Of course, in apex courts it is not possible to have all possible areas of law represented at all times, and Opeskin argues for retaining strong elements of generalization in apex courts.[[31]](#footnote-31) But that does not mean we should not give any thought to which areas are represented, and whether we have a degree of inadvertent specialization as a result of drawing from such a narrow range of specialisms, especially when there is a ready supply of social security specialists (both practical and academic) in the Upper Tribunal (Administrative Appeals Chamber). Nor should it prevent us asking whether a branch of law that occupies such a vast swathe of litigation, and in which individual Supreme Court decisions can have immediate and life-long impacts for millions of people, should be properly excluded.

Having spent careers focusing on the legal interests of people and organisations with money is likely to influence one’s experiences and constructions of, the laws that matter. Lord Leggatt said in an international commercial contract case, that it was:

“*a striking feature of the English proceedings that the trial, the appeal to the Court of Appeal and the appeal to the Supreme Court have all been heard in just over seven months. This is a vivid demonstration of the speed with which the English courts can act when the urgency of a matter requires it*.”[[32]](#footnote-32)

Cases involving claimants with big money are “urgent”. Cases involving huge amounts of benefit claimants, less so. There was a gap of more than two years between the two-child rule Court of Appeal and Supreme Court judgments,[[33]](#footnote-33) despite the rule’s widespread reach – recent figures show 1.6 million children are affected by the rule.[[34]](#footnote-34) The Master of the Rolls, Geoffrey Vos, caused something of a stir when he gave a speech on dispute resolution implying different standards of justice applied to different values of claim; that “large disputes” might require a “more just and perhaps objectively correct solution” than small claims.[[35]](#footnote-35) He since clarified that he meant non-litigious resolutions for “very small” on platforms such as ebay, wherein if “they elevate a very small claim into a costly court battle that is disproportionate in both court time and party expense, the system sometimes has to put its foot down”.[[36]](#footnote-36) The problem is that any individual social security claim can too easily appear to be closer to the “very small” end of the financial justice spectrum. Increasing professional diversity on the Supreme Court could enhance understanding of the importance of social security law – with the caveats that much would still depend on judicial leadership,[[37]](#footnote-37) with non-traditional judges having sufficient courage and encouragement to ‘step out of line’.[[38]](#footnote-38)

1. *SC* and the alegalisation of social security

The drawing of an inappropriate line between politics and the law was particularly evident in the Supreme Court’s two-child rule judgment in *SC*. The rule was a pet project of David Cameron’s Conservative government, with then-Chancellor of the Exchequer George Osborne announcing in 2015 his intention to limit key subsistence benefits to only the first two children in a family.[[39]](#footnote-39) This rule made its way into the Welfare Reform and Work Act 2016,[[40]](#footnote-40) and the Social Security (Restrictions on Amounts for Children and Qualifying Young Persons) Amendment Regulations 2017[[41]](#footnote-41) and the Child Tax Credit (Amendment) Regulations 2017.[[42]](#footnote-42) Put bluntly, it is a human rights disaster of a policy. Families with three or more children were already at greater risk of poverty anyway, so that “you could not design a policy better to increase child poverty than this one.”[[43]](#footnote-43) What is more, in increasing and deepening child poverty, it effectively announces a choice to ignore the UN Convention on the Rights of the Child.

The damage the two-child rule is causing *to children* was clearly predicted[[44]](#footnote-44) and is being well documented.[[45]](#footnote-45) That damage goes to the heart of children’s human rights – rights to adequate housing, food, heating, health, education and to social and personal development.[[46]](#footnote-46) Studies show that the measure is directly responsible for driving more families into poverty, and for driving already struggling families deeper into poverty. Testimonies document the multiple ways in which children experience, and suffer from, this poverty.[[47]](#footnote-47) The rule was challenged before the Supreme Court in *SC* on a number of grounds, namely breaches of: the Article 8 ECHR right to respect for private and family life; the Article 12 ECHR right to found a family; the Article 14 ECHR rights to non-discriminatory enjoyment of Articles 8 ECHR and Article 1, Protocol 1, the right to property. The appellants claimed that the measure discriminated against women, children, and children living in households with more than two children. The Supreme Court disagreed on all counts. It is suggested that the fact that not one of the judges in the UKSC has engaged with social security law *as law* when in practice, other than to defend the government’s (political) interests forms an important backdrop to this alegalising process. For the sake of completeness, the judges hearing *SC* were Lords Reed, Hodge, Lloyd Jones, Sales, and Stephens, and two former UKSC judges not discussed above in the section on current judges – Lord Kitchin and Lady Black. Using the same search techniques reveals that neither had acted in a reported social security law case. Lady Black’s specialism, family law, was at least different to the dominant ones of her peers. Lord Kitchin’s practice “covered all aspects of intellectual property including patents, trademarks, copyright, designs and trade secrets” and his pre-Supreme Court judicial experience was in Chancery and the Patents Court.

An absence of social security law expertise may have contributed to the difficulty the judges had in *SC* seeing just how inappropriate the Secretary of State’s belief was that the two-child rule could make people at or below the poverty line “face the same choices” as the wealthy when it came to family size. As Cohen-Rimer[[48]](#footnote-48) argues, paternalism and a focus on choice “leads to ill-fitting rules – laws that involve factual and legal assumptions that have no basis in the reality of the very people they are designed to serve”. Cohen-Rimer’s focus is on legislators, who fail to recognise that “people living in poverty – even 3rd-generation poverty” have “profoundly different” lived experiences to them.[[49]](#footnote-49) Legislators therefore “assume they can ‘walk in the shoes’ of people-in-poverty”.[[50]](#footnote-50) The same is true, I argue, of a judiciary assuming they can walk in the shoes of a social security claimant. The appellants’ argument that the rule bites even when families make rational “choices” but then experience bereavement, or illness, or family separation, or unemployment, was met with the rather cavalier dismissal that “[h]ow far the welfare system should go to protect families against the vicissitudes of life is a matter on which opinions in our society differ greatly, and of which Parliament is the best judge.”[[51]](#footnote-51) Elite actors misunderstand poverty and the role that social security plays in alleviating it and so protecting key human rights; they have a simply different understanding of reality.[[52]](#footnote-52)

This section will focus on the mechanisms by which the court characterised the issue as one of politics rather than law through: (i) a fatalistic approach to the ‘inevitability’ of discriminating against women and children in the realm of social security, thereby characterising the interests of social security claimants as pitted against the economic interests of society; (ii) the treatment of discrimination claims as means to smuggle politics into the courtroom; (iii) the automatic assumption that the government’s aims are legitimate; (iv) the disclaiming of any proper powers of judicial review; and (v) the inappropriate reliance on ‘democracy’ as the answer.

1. The inevitability of discriminating against women and children

The key legal hook for the claimants challenging the two-child rule, was via discrimination contrary to the European Convention on Human Rights, as incorporated by the Human Rights Act 1998. By weakening the prohibition of discrimination, the court weakens the legal credentials of the claim. It does this through creating a novel justification – discrimination was inevitable. In this approach, the fact of disproportionate impact was used not as evidence of prima facie discrimination, but as evidence that discrimination was unavoidable:

*“In short, more women than men are affected because more women than men are bringing up children. That is an objective fact. There is no suggestion that that is itself the result of discrimination on the ground of sex.”*[[53]](#footnote-53)

This blunt statement of ‘objective fact’ demolishes the foundations of indirect discrimination,[[54]](#footnote-54) which does not require a discriminatory motivation, it stems from disproportionate impact. The prohibition of indirect discrimination is meant to embody the principle that situations which are not alike should not be treated as alike, so preventing measures that disadvantage one group more than others.[[55]](#footnote-55) It has been the subject of significant case law from the European Court of Human Rights (ECtHR),[[56]](#footnote-56) the EU[[57]](#footnote-57) and in the UK.[[58]](#footnote-58) But the Supreme Court in *SC* dispensed with the question by noting that “it was inevitable, if the aims of the legislation were to be achieved, that there would be a greater numerical impact on women than on men.”[[59]](#footnote-59) Such a gendered impact was found to be “inherent in any general measure which limits expenditure on child-related benefits”. But rather than providing an explanation, this point underlines the fact that the measures will hurt women and children first. The court’s juridical fatalism in justifying discrimination – it is inevitable, therefore it is lawful – follows naturally on from the logic that welfare policy is political, therefore it must be lawful, and that discrimination cannot be avoided. It is ‘TINA’ for judges (‘There Is No Alternative’),[[60]](#footnote-60) when clearly, in fact, there is, but recognizing this may be easier if one has a background in interrogating and challenging social security measures.

The inevitability defence was also deployed against claims of discrimination against children. Disproportionate impact upon children was “of course, an inevitable consequence of the measure” because the households affected contain three or more children.[[61]](#footnote-61) The structural disadvantages experienced by women and children are not natural, unavoidable phenomena, and they do not provide a catch-all defence to discrimination claims. Campbell suggests that the Supreme Court has in this case “put across a particular vision of society that… sees supporting women’s caring roles as coming at the expense of the country’s economic well-being and tax-payer fairness”.[[62]](#footnote-62) This vision frames social security as a cost to be borne, depending on political goodwill. It is the view of social security, and recipients thereof, as a containable, separate category, that allows it to be treated as ‘alegal’ – as a function of the government’s beneficence, not as a matter of legal entitlement. In the various cautions expressed about the “risk of undue interference by the courts in the sphere of political choices”[[63]](#footnote-63) we could replace the word ‘political’ with the word ‘charitable’ and it would not affect (and might even sharpen) the reasoning. The fact that the court discussed types of birthday parties as the main disadvantage caused to children[[64]](#footnote-64) gives some insight into how little the court understands the role that social security plays in fulfilling human rights. It is not a matter of nice perks; social security goes to subsistence needs to ensure equality across broad areas of life.[[65]](#footnote-65) In defining social security as a matter of (charitable) politics rather than law, judges are Othering social security recipients.[[66]](#footnote-66) While characterised as ‘judicial restraint’, it suggests a legal purism – that the law is above the grubby realm of politics.[[67]](#footnote-67)

(ii) Discrimination claims as a vehicle for smuggling politics into the courtroom

Delivering the lead judgment, Lord Reed positioned the court as defenders at the gates against the invasion of political issues under the guise of discrimination. In noting that “almost any legislation is capable of challenge under Article 14”,[[68]](#footnote-68) he effectively hollowed out that provision. Lord Reed sounded a note of caution, that “challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom”,[[69]](#footnote-69) adding that they were “usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament.”[[70]](#footnote-70) Article 14 was described as usually the “favoured ground of challenge” and “such cases present a risk of undue interference by the courts in the sphere of political choices.”[[71]](#footnote-71)

The description of ‘campaigning organisations’ who ‘act’ as solicitors serves to undermine their claims to be legitimate lawyers – rather, they are (failed) political lobbyists in disguise, seeking to turn the court into a platform. But the treatment of social security questions as alegal, properly kept out of the courtroom, is out of step with the way that many people encounter the law. Social security constitutes a significant proportion of interactions with the justice system; the social security and child support tribunal accounted for 42% of tribunal interim receipts (cases accepted) in July-September 2023,[[72]](#footnote-72) far more than each of the other tribunal branches. By way of context, the outstanding case load for tribunals in England and Wales in March 2024, excluding immigration tribunals, was 653,000 – this is well over a third of the number of cases filed in the civil courts in 2023 (1.7 million).[[73]](#footnote-73)

If we accept that the administration of social security is properly a matter of law, it makes little sense to designate the rules being administered as a primarily, or even solely political issues.

(iii) Automatically legitimate aims

The court failed to acknowledge that the *aim* proclaimed by the Secretary of State, “to address the “unfair and unreasonable aspect of the child tax credit system, namely that recipients were guaranteed a rise in income for every additional child they might choose to have, without limit” i.e. to stop social security from increasing with family size, and the *measure* are practically one and the same. Once you have endorsed that aim, you have greenlit the measure. While claiming to have no role in assessing “what is fair and affordable”,[[74]](#footnote-74) the court nevertheless equated the rule with fairness, describing the aim as ensuring “that the scheme is fair and reasonable, *by* limiting the extent to which recipients of child tax credit are guaranteed a rise in income if they have additional children”.[[75]](#footnote-75) The failure to scratch even the surface of the claim to fairness effectively endorses the Secretary of State’s approach of “welfare decadence”, a narrative that suggests social security recipients are at an advantage compared to those living above the welfare line,[[76]](#footnote-76) again revealing a poor understanding of the centrality of social security to legal rights.

In addressing the purported need to make the system fairer (for those wealthy enough to not need social security), the judgment uses the phrase “without limit” *four times* when referring to social security recipients having children.[[77]](#footnote-77) It is Othering language; it is biologically nonsensical while carrying implications of promiscuity, fecklessness, and sociological threat.[[78]](#footnote-78) It constructs social security as a societal problem, and claimants as anti-society actors, rather than recognizing the core role social security plays in safeguarding human rights. The judgment gives the main example of disadvantage caused for children as an inability to have “birthday parties at commercial venues” (a child-focused equivalent of suggesting cancelling streaming subscriptions, and buying fewer fancy coffees).[[79]](#footnote-79) But the genre of birthday party is on a much longer list of worries for families pushed deep below the poverty line.[[80]](#footnote-80)

(iv) Disclaiming of proper powers of proportionality review

The court rejected outright, without a need for a justification assessment, claims that the measure discriminated against children as compared to adults. The only child-focused discrimination claim that reached the stage of justification, was that the measure discriminated against children living in households with more than two children. The court then moved to a justification assessment; having found the stated aims legitimate the next step was a proportionality review. However, the court then announced that was not a question for them, as the “assessment of proportionality… ultimately resolves itself into the question as to whether Parliament made the right judgment”which “cannot be answered by any process of legal reasoning” and there were “no legal standards” against which the court could assess how interests had been weighed.[[81]](#footnote-81)

The treatment of the proportionality component of a discrimination justification assessment as completely beyond judicial review is a radical rewriting of the workings of discrimination law, and a significant blow to the protections supposedly provided by the courts. It effectively shields a vast amount of social security decisions from judicial review, as proportionality is the tool by which different interests in the human rights context are balanced, an exercise hitherto allocated to judges. This is not judicial restraint – it is activism. It disregards the duties under the Human Rights Act 1998, a Parliamentary instrument, which incorporates the ECHR, including the requirement a right to an effective remedy, “notwithstanding that the violation has been committed by persons acting in an official capacity”.[[82]](#footnote-82) This includes violations of the prohibition of discrimination in Article 14, which applies to social security law when applied in combination with the right to respect for private and family life (Article 8)[[83]](#footnote-83) and/or the right to the protection of property (Article 1 Protocol 1).[[84]](#footnote-84) To land on the line that social security discrimination is ok if the State thinks it is fair rather strips these provisions of meaning or effect. While these and other matters may involve a wide margin of appreciation for States,[[85]](#footnote-85) “it is not all-embracing.”[[86]](#footnote-86)

Social security is treated as a subject for parliamentary scrapping, using “parliamentary methods of resolving disputes”, which are “very different from judicial methods, aimed at the production of decisions arrived at by an independent and transparent process of reasoning”.[[87]](#footnote-87) It is not a matter for lucid legal brains. As the courts could not expect Parliament “to conform to a judicial model of rationality”, nor insist on politicians’ “transparent and rational analysis”,[[88]](#footnote-88) it was considered inappropriate to review those decisions using such rational analysis. In other words, these were not legal questions so should not be subject to legal analysis: the judgment concludes that there are “no legal standards” for balancing the interests at issue. But this stark alegalising stands in sharp contrast with warnings about the “broad discretionary power” conferred on the courts by the principle of proportionality. In order to avoid “undue interference” with the legislature, the court has interpreted that power as being no such power at all, begging the question as to what is *due* interference when it comes to human rights and social security. The court’s approach in *SC* is that Parliamentary democracy is the only real authority here

(v) Inappropriate reliance on ‘democracy’ as the answer.

Parliamentary decisions are accepted as legitimate “not because of the quality or transparency of the reasoning involved, but because of the democratic credentials of those by whom the decisions are taken”. Democracy is the answer because it takes “account of the values and views of all sections of society”.[[89]](#footnote-89) But that is not quite true. The political process explicitly excludes some sections of society. Democracy does not inherently protect the disenfranchised from breaches of their human rights. Children are the primary targets of the measure at issue and they *cannot vote*. A core rationale for human rights law is protecting minorities from the (democratic) tyranny of the majority.[[90]](#footnote-90) This guiding principle must be stronger still when it comes to disenfranchised minorities.[[91]](#footnote-91) Children are in a special category in that regard, and face “real difficulties… in pursuing remedies for breaches of their rights,”[[92]](#footnote-92) so that their “economic, social and cultural rights, as well as civil and political rights, must be regarded as justiciable,”[[93]](#footnote-93) which rather contradicts the announcement that there are “no legal standards” to judicially review such rights.

Children are vulnerable to the vicissitudes of democratic systems.[[94]](#footnote-94) A century ago, the Geneva Declaration of Human Rights 1924 provided that children “must be the first to receive relief in times of distress.”[[95]](#footnote-95) The Universal Declaration of Human Rights later noted the need for “special care and assistance” in childhood (and motherhood).[[96]](#footnote-96) The Article 4 budgeting duty in the UN Convention on the Rights of the Child, asserts the core principle that economically “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.”[[97]](#footnote-97) Children’s best interests should also be a primary consideration “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies” under Article 3 UNCRC, and States are required to recognise every child’s “right to benefit from social security” (Article 26 UNCRC). The UNCRC is not directly incorporated into UK law, but has played an interpretative role in shaping ECHR rights.[[98]](#footnote-98) In reasserting the supremacy of the legislature in matters of social security, the UKSC dismissively described the ECtHR’s engagement with international legal instruments as an “eclectic approach”,[[99]](#footnote-99) which could not be used to create a duty of judicial review where the Court had opted for a position of deference.[[100]](#footnote-100)

The only concession made to the UNCRC was a finding that the best interests of the child was a relevant consideration, but the court found that all that was required to consider it was that Parliament *knew that children would be harmed.* By that token alone, we should take it that the interests were taken into account and weighed up (and eclipsed). Lewis Graham conducted an analysis of the Supreme Court’s recent public law cases, and found greater deference to the legislature on matters defined as political, and where human rights claims are made,[[101]](#footnote-101) and there are fewer starker examples than in *SC.*

A hint at the difference professional diversity could bring to human rights scepticism in the context of social security, may be found in the contrasting approach Lady Hale took when dissenting in the case of *SG* – the case challenging the benefit cap.[[102]](#footnote-102) In that case, the majority decided in favour of deference to Parliament. The judgment in that case of Lord Reed presages the later inevitability approach he took in *SC*; “since women head most of the households at which those aims are directed, it appears that a disparity between the numbers of men and women affected was inevitable if the legitimate aims were to be achieved”. Accepting the government aims as legitimate, there was no way of not discriminating – the “greater number of women affected results from the inclusion of child-related benefits within the scope of the cap. If those benefits had been excluded from the cap, the legitimate aims of the cap would not have been achieved”.[[103]](#footnote-103)

Lady Hale, whose background includes academic expertise in social welfare law, instead viewed the question through the legal prism of human rights – highlighting the connection between social security and actual breaches early on:

*“The prejudicial effect of the cap is obvious and stark. It breaks the link between benefit and need. Claimants affected by the cap will, by definition, not receive the sums of money which the state deems necessary for them adequately to house, feed, clothe and warm themselves and their children.”[[104]](#footnote-104)*

She pointed to the reasons the cap had disproportionate impact upon women as evidence of discrimination, not as a defence to it.[[105]](#footnote-105) She then pointed out that having reasons for introducing the scheme as a whole do not discharge the justification duty – the discriminatory effects must be justified. She went on to interrogate the legitimacy and appropriateness of the objectives put forward by the State, rather than accepting them without question, and did so in light of the best interests of the child. This robust proportionality review resulted in her concluding that:

*“the indirect discrimination against women inherent in the way in which the benefit cap has been implemented cannot be seen as a proportionate means of achieving a legitimate aim. Families in work are already better off than those on benefits and so the cap is not necessary in order to achieve fairness between them; saving money cannot be achieved by unjustified discrimination; but the major aim, of incentivising work and changing the benefits culture, has little force in the context of lone parents, whatever the age of their children. Depriving them of the basic means of subsistence cannot be a proportionate means of achieving it.”[[106]](#footnote-106)*

This is a wholly *legal* analysis, of legal rights at issue, breaking down the important legal steps in reviewing discrimination claims. It recognises that social security rights are matters of law as well as politics, and does not trust Parliament to do its own proportionality review. Nor does it treat socioeconomic human rights with suspicion, or as vessels for smuggling political issues into court. It is this perspective – that social security law is law, and is a pivotal source of human rights protection for so many people, which is now missing from the bench. In *SC* we see that now, the Supreme Court considers that when it comes to children’s social security rights, Parliament must know best – but this approach contrasts strongly with rights the court defines as truly legal ones.

4. True legal rights: *UNISON*

Measures that plunge people into poverty are a matter of pure politics, it seems – except, when true legal rights are at stake, in access to the courts. In *UNISON*,[[107]](#footnote-107) the Supreme Court took great interest in the deprivations that would be created by a particular measure – the introduction of employment tribunal (ET) fees. The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013[[108]](#footnote-108) introduced fees for making a claim to an employment tribunal, and/or appealing to the employment appeals tribunal. A ‘type A’ claim from an individual claimant to the ET would cost £390, and type B claim £1200 (with larger fees for group claims). An appeal to the Employment Appeal Tribunal (EAT) would cost £1600. This obviously created significant access to justice issues,[[109]](#footnote-109) which formed the basis of the challenge in *UNISON*. The court considered a substantial amount of evidence about the impact that the fees had had upon the number and value of claims, and survey evidence on the chilling effect of the fees upon potential claimants.

The Fees Order had been adopted pursuant to an Act of Parliament,[[110]](#footnote-110) and had itself been laid before,[[111]](#footnote-111) and debated and approved by both Houses of Parliament.[[112]](#footnote-112) It followed on from a 2011 government consultation, *Resolving Workplace Disputes*, [[113]](#footnote-113) which announced the intention to introduce fees and led to a further consultation specifically on fees *- Introducing fees in the Employment Tribunals and the Employment Appeal Tribunal*. The Ministry of Justice stated that the aims of the measures were to: “support and encourage early resolution of workplace disputes and in order to transfer some of the cost burden from the taxpayer to the users of the system”. [[114]](#footnote-114) Since coming into force, “employment tribunal fees” was the topic of five House of Commons debates.[[115]](#footnote-115) However, the Supreme Court judgment expended few (no) words on the importance of parliamentary sovereignty. The panel hearing the case was different to that in *SC* – all but one are now *former* Supreme Court justices, but the common denominator is Lord Reed, who gave the lead judgment in both cases (and with whom the other judges in *UNISON* – Lords Neuberger, Mance, Wilson, Kerr, Hughes, and Lady Hale – concurred).

The words Parliament/parliamentary are used seventeen times in the judgment, and they are broken down as follows: once in a technical sense (referring to an Act of Parliament); twice to refer to Parliament’s role in adopting the legislation; once to refer to Parliament’s role in another case; and *thirteen* times to outline how the fees (adopted by Parliament) actually frustrate Parliament’s intentions to ensure other laws are upheld. The word ‘democratic’ is used twice, both times in the context of the explanation of how important access to courts is for upholding democratic values. It is striking how little concern Lord Reed expressed in *SC* for upholding Parliament’s intentions as expressed in the Human Rights Act 1998.

The court was able to pay heed to questions of means, and of poverty, without having to engage with questions of social security or socio-economic rights. The issue was not actually the laws that determine resources, but laws that would require claimants to make incursions into their resources in order to access tribunals. The Supreme Court was persuaded by UNISON’s construction of hypothetical claimants; for the first, they noted that her actual monthly income was already below the net monthly income required for an acceptable living standard according to the Joseph Rowntree Foundation,[[116]](#footnote-116) and reflected that to pursue an employment tribunal claim she would have to “suffer a substantial shortfall from what she needs in order to provide an acceptable living standard for herself and her child”. The second hypothetical claimant would have to “make further inroads into living standards which are already below an acceptable level if a claim is to be brought”.[[117]](#footnote-117)

A low standard of living is only important here as a barrier to accessing a branch of the justice system; not the laws that create the low standard of living. The judgment continues: “the question arises whether the sacrifice of ordinary and reasonable expenditure can properly be the price of access to one’s rights”.[[118]](#footnote-118) The idea that one can (properly or improperly) weigh up ordinary and reasonable expenditure on the one hand and “one’s rights” on the other, assumes that being able to meet ordinary and reasonable expenditure *is not a right in itself*. The only rights discussed throughout the judgment are employment rights, and access to justice/courts and rights of audience. The elevation of the truly legal right of access to justice over socio-economic rights is evident in the decrying of “the assumption that the administration of justice is merely a public service like any other”. Here is the problem central to the *SC* case. As far as the Supreme Court is concerned, social security *is* “merely a public service”. So access to employment tribunals is treated as significantly more important in law than access to minimum subsistence for a human being for the whole of their childhood – because it is treated as being more legal in nature.

5. We need social security expertise and claimant perspectives on the bench

Intelligence and starry careers in lucrative areas of law are not enough to ensure a fair consideration of social security law – they are not enough to ensure consideration of social security *as* law. Cohen-Rimer argues that legislators should be exposed to people in poverty to “reduce the bias, stereotyping, and stigma attached to this collective, rendering legislators less likely to be judgmental toward individuals’ choices”.[[119]](#footnote-119) I argue that the judiciary needs similar exposure, and what is more, there is ample opportunity to acquire it as a lawyer. By selecting our senior judges from a narrow pool of professional expertise, having encountered a socio-economically limited range of clients, we risk cultivating “aporaphobia” in the Supreme Court. Aporaphobia is a term coined by Adela Cortina,[[120]](#footnote-120) to describe prejudice against the poor, and the belief that the “poor person is in all cases an unprofitable person”.[[121]](#footnote-121) This belief seems to underpin the rationale of the two child rule, and any measure that advocates reproductive restraint on the part of the poor.[[122]](#footnote-122)

The illusion of choice has such a hold in the *SC* judgment because there is no possibility of empathy. The process of othering social security as not-law, as alegal, is bound up with the process of othering social security claimants, and treating the children involved as appendages, or the equivalent of unwise purchases. They are not treated as *legal* subjects with *legal* rights that must be protected in the absence of any democratic political agency. The failure to recruit any judge who has acted for social security claimants in any reported case entrenches a privilege-facing view of the law. It is one that minimises the importance of social security law, and underestimates and sidelines the deeply complex, legal arguments to which it gives rise. It pushes the idea of the clever generalist too far, and beyond plausibility, given the ready recruitment of specialists in other areas of law, from a pool whose work has typically lined up *against* the interests of the affected cohort – by working against claimants for the State, or by working with those institutionally bent on reducing their corporate tax burdens, for example.

In *SC*, the apparent judicial distrust of increasing uses of discrimination or human rights law in social security claims, perhaps fails to take account of the effects of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. As a result of LASPO, human rights law is often the only tenable ‘way in’ to court for social security claimants. It took almost all welfare benefit matters out of scope of legal aid,[[123]](#footnote-123) and led to a plummet in ‘matter starts’ (new legal aid cases) for welfare benefit cases,[[124]](#footnote-124) making it harder to appeal beyond the First and Upper Tribunal. Social security has thus been systematically ‘alegalised’, and claimants have had judicial doors slammed in their faces. Injecting some social security experience into the senior judiciary would help to reassert a *law-based* approach to social security, so we can reinstate the idea of rights, as opposed to statutory beneficence or charity, shifting the debate from ideas of “personal failures of the poor”[[125]](#footnote-125) to structural, societal failures to address poverty.[[126]](#footnote-126) Numerous studies have argued for greater incorporation of claimant voices into system design. Patrick and Simpson note the importance of claimant experiences of *indignity* before developing positive commitments to dignity.[[127]](#footnote-127) Just as claimant perspectives are important to system design, so are they important to challenges to and assessments of the system.

Conclusion

The engraving of bright lines between the legal and the political is not a politically neutral act; it reflects a particular perspective, and entrenches a privilege-facing approach to law. It would be a fiction to claim that judges’ ideas about the law are unaffected by how they were taught law, how they have trained, and how they have practised within the law. How they have interacted with the law obviously shapes what they understand it to be. And their lack of interaction with social security law likely informs the position that it is not really law at all.

Faced with arguments invoking discrimination law in a social security law context, the court had to perform some logical contortions in order to define the whole issue as a matter of politics, for Parliament. This included recasting robust evidence of disproportionate impact as an “explanation” of “inevitable” discrimination. The particular risks posed to women and children when scything off sections of the welfare state should give cause for legal concern, not be a justification in itself for hacking away. When it came to justifying discrimination against children in families with more than two children, the court adopted and reiterated the Secretary of State’s claimed ‘legitimate aims’ without going behind the assumption of welfare decadence that underlies the government’s claims about making people on social security benefits ‘face the same choices’ as those too wealthy to be eligible for benefits. By using the phrase “without limit” four times when referring to social security recipients having children, the court othered those families. In delegating the proportionality aspect of judicial review to Parliament, it treated social security as a matter for the parliamentary rabble, and not an issue on which claimants are entitled to the “transparent and rational analysis” that other claimants can expect of the courts on truly legal matters. And in emphasising the importance of deferring to the democratic imperative it ignored the fact that those most harmed have no democratic voice. In contrast, there was no consideration of judicial deference in *UNISON*, where the ability to realise ‘true’ legal rights was found essential for a functioning democracy*. UNISON* spoke to the judicial preference for treating poverty as an important point of context when it came to access to justice, but not a focal point for rights in itself. The case treated access to employment tribunals as a more *legal* right than access to resources, or ‘mere’ public services.

The professional practice backgrounds of the Supreme Court judges, when examined through the reported cases in which they appear to have acted as representatives, reveal a yawning gap when it comes to social security law. None have ever acted in a reported social security case for a claimant against the government, and only one – Philip Sales – has acted at all in reported cases on state social security cases – each time for the government. And the interests they have represented will often be explicitly stacked up against, or more subtly at odds with, social security claimants, because of occupying a different professional world.

We need more professional diversity in our senior judiciary; if we stop assigning prestige to careers on the basis of the monetary value of cases, then we might stop assigning importance to cases on the basis of the monetary value of claimants. The clever generalist argument falls down if what we actually have is similar specialists with a universal blind spot. The lack of social security law expertise likely informs the Supreme Court’s construction of the subject as alegal. One possible long-term mitigation is introducing social security law into standard legal teaching and training, but we cannot, and do not need to, wait the decades that would take to yield fruit before making changes. Injecting some relevant experience into the bench could help to reassert social security, human rights and discrimination, as matters of law meriting judicial review, not grounds for parliamentary impunity.

1. Enormous thanks to the anonymous peer reviewers and the editors, who have helped me immeasurably with previous drafts. Remaining errors are all mine. [↑](#footnote-ref-1)
2. E. Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Abingdon: Routledge, 2013). [↑](#footnote-ref-2)
3. E.g. see the contributions to U. Schultz & G. Shaw, *Gender and Judging* (Oxford: Hart, 2013); also S. Kenney, Gender and Justice: Why Women in the Judiciary Really Matter, (Abingdon: Routledge, 2013); H. Sommerlad, “The “Social Magic” of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession” (2015) 83(5) Fordham Law Review, 2325. [↑](#footnote-ref-3)
4. B. Hale, “Law Maker or Law Reformer: what is a Law Lady For?” (2005) 40 Irish Jurist, 1; Baroness Hale quoting Rt Hon Beverley McLachlin PC, Chief Justice of Canada. [↑](#footnote-ref-4)
5. E. Boldt; C. Boyd; R. Carlos; M. Baker, “The Effects of Judge Race and Sex on Pretrial Detention Decisions.” (2021) 42(3/4) *The Justice System Journal*, 341; H. Edwards, “Race and the Judiciary”, (2002) 20(2) *Yale Law & Policy Review*, 325; H. Sommerlad, “Judicial Diversity: Complexity, continuity and change” in G. Gee & E. Rackley, *Debating Judicial Appointments in an Age of Diversity*, (London: Routledge, 2017). [↑](#footnote-ref-5)
6. E. Rackley, “A Short History of Judicial Diversity” (2023) 76(1) *Current Legal Problems*, 265; The Law Society Judicial diversity: Report shows little progress for women and ethnic minority candidates 13 Jul 2023: “New statistics from the Ministry of Justice reveal that progress on improving judicial diversity needs speeding up”. [↑](#footnote-ref-6)
7. Leslie J Moran, ‘Sexual Diversity in the Judiciary in England and Wales: Research on Barriers to Judicial Careers’ (2013) 2(4) Laws 512. [↑](#footnote-ref-7)
8. D. Foster & N. Hirst “Doing diversity in the legal profession in England and Wales: why do disabled people continue to be *unexpected*?” (2022) 49(3) *Journal of Law and Society*, 447. [↑](#footnote-ref-8)
9. T.T. Arvind & L. Stirton “Legal ideology, legal doctrine and the UK’s top judges” (2016) *Public Law* 418. [↑](#footnote-ref-9)
10. K. Malleson, “Values diversity in the United Kingdom Supreme Court: abandoning the ‘don't-ask-don't-tell’ policy”, (2022) 49(1) *Journal of Law and Society,* 3. [↑](#footnote-ref-10)
11. Ibid, 22. [↑](#footnote-ref-11)
12. C. Hanretty, *A Court of Specialists: Judicial Behavior on the UK Supreme Court*, (New York: OUP, 2020). [↑](#footnote-ref-12)
13. See Erica Rackley on diversity “improving the judicial product”, above, note 2, 169-177. [↑](#footnote-ref-13)
14. K. Dzehtsiarou & A. Schwartz “Electing Team Strasbourg: Professional Diversity on the European Court of Human Rights and Why it Matters” (2020) 21(4) *German Law Journal*, 621, 638. [↑](#footnote-ref-14)
15. The Supreme Court ‘Biographies of the Justices’ https://www.supremecourt.uk/about/biographies-of-the-justices.html. [↑](#footnote-ref-15)
16. Ministry of Justice *Tribunal statistics quarterly*, July – September 2023, published 14 December 2023: https://www.gov.uk/government/statistics/tribunals-statistics-quarterly-july-to-september-2023/tribunal-statistics-quarterly-july-to-september-2023. [↑](#footnote-ref-16)
17. *SC, CB and 8 children, R. (on the application of) v Secretary of State for Work and Pensions & Ors* [2021] UKSC 26. [↑](#footnote-ref-17)
18. Former UK Supreme Court justice, Jonathan Sumption wrote: “The essential feature of the Supreme Court’s recent decisions on public law has been a renewed emphasis on the centrality of Parliament in our constitution”, and the *SC* challenge failed “essentially because the allocation of resources is a matter for Parliament and for ministers answerable to Parliament”. ‘Letters’, 44(3) *London Review of Books,* 10 February 2022. [↑](#footnote-ref-18)
19. *UNISON, R (on the application of) v Lord Chancellor* [2017] UKSC 51 (26 July 2017). [↑](#footnote-ref-19)
20. The professional requirements with regard to course content are very general and flexible: Solicitors Regulation Authority & Bar Standards Board *Joint statement on the academic stage of training*, September 2021, https://www.sra.org.uk/become-solicitor/legal-practice-course-route/qualifying-law-degree-common-professional-examination/academic-stage-joint-statement-bsb-law-society/ [↑](#footnote-ref-20)
21. The Supreme Court, above, note 15. [↑](#footnote-ref-21)
22. Lord Philip Sales; Lord Robert Reed; Lord Patrick Hodge; Lord David Lloyd Jones; Lord Michael Briggs; Lord Nicholas Hamblen; Lord George Leggatt; Lord Andrew Burrows; Lord Ben Stephens; Lady Vivien Rose; Lord David Richards; Lady Ingrid Simler. In the text below they are referred to without judicial titles (as it pertains to their pre-judicial careers); nor is ‘QC’ used as the study includes pre-silk practice. [↑](#footnote-ref-22)
23. Searching for them as ‘counsel’ omitted some cases so expanded the search to where they were listed as ‘any’ form of legal representative. [↑](#footnote-ref-23)
24. The exception to this approach was for David Richards, whose surname and dates returned 1000 entries, so I then searched using his first name and surname, initial and first name, and first name plus middle initials and surname. This means any entries where he was listed by surname alone would not be returned, but as his practice was not based in Scotland, this risk should be low. [↑](#footnote-ref-24)
25. #  E.g. *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2014] EWHC 4302 (Ch) is a tax case, not a social security case.

 [↑](#footnote-ref-25)
26. *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657; *Campbell v Secretary of State for Work and Pensions* [2005] EWCA Civ 989; *M v Secretary of State for Work and Pensions* [2004] EWCA Civ 1343; *Campbell v South Northamptonshire DC* [2004] EWCA Civ 409 (Sales acted for the second respondent – the Secretary of State for Work and Pensions); *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623; *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406; *Esfandiari v Secretary of State for Work and Pensions* [2006] EWCA Civ 282; *Secretary of State for Work and Pensions v M* [2006] UKHL 11; *R. (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813; and its earlier hearing in the High Court, *R. (on the application of Hooper) v Secretary of State for Work and Pensions* [2002] EWHC 191 (Admin); C-184/99 *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies Louvain la Neuve*

EU:C:2001:45 [↑](#footnote-ref-26)
27. Supreme Court, above, note 15. [↑](#footnote-ref-27)
28. Ibid. [↑](#footnote-ref-28)
29. *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2013] EWHC 3249 (Ch). [↑](#footnote-ref-29)
30. *Revenue and Customs Commissioners v Thorn Baker Ltd* [2007] EWCA Civ 626. [↑](#footnote-ref-30)
31. B. Opeskin, “The Relentless Rise of Judicial Specialisation and its Implications for Judicial Systems”, (2022) 75(1) *Current Legal Problems*, 137. [↑](#footnote-ref-31)
32. *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, 24. [↑](#footnote-ref-32)
33. EWCA judgment handed down 16 April 2019; UKSC judgment 9 July 2021. [↑](#footnote-ref-33)
34. #  Department for Work and Pensions & HMRC: *Official Statistics* “Universal Credit and Child Tax Credit claimants: statistics related to the policy to provide support for a maximum of two children, April 2024”, 11 July 2024 <https://www.gov.uk/government/statistics/universal-credit-and-child-tax-credit-claimants-statistics-related-to-the-policy-to-provide-support-for-a-maximum-of-2-children-april-2024/universal-credit-and-child-tax-credit-claimants-statistics-related-to-the-policy-to-provide-support-for-a-maximum-of-two-children-april-2024>.

 [↑](#footnote-ref-34)
35. ‘The Future for Dispute Resolution: Horizon Scanning’ *The Society of Computers and Law*; Sir Brian Neill Lecture 2022, 17 March 2022. [↑](#footnote-ref-35)
36. British and Irish Commercial Bar Association, Keynote address, 31 March, 2022, para 28. [↑](#footnote-ref-36)
37. R. Hunter & E. Rackley, “Judicial leadership on the UK Supreme Court”, (2018), 38(2) *Legal Studies*, 191. [↑](#footnote-ref-37)
38. R. Hunter, “More than Just a Different Face? Judicial Diversity and Decision-making”, (2015), 68(1) Current Legal Problems, 119, 127. [↑](#footnote-ref-38)
39. George Osborne, House of Commons Hansard, 8 July 2015, Vol. 598, col. 335. [↑](#footnote-ref-39)
40. C.7. [↑](#footnote-ref-40)
41. S.I. 2017 No. 376. [↑](#footnote-ref-41)
42. S.I. 2017 No. 387. [↑](#footnote-ref-42)
43. Josephine Tucker, Senior Policy and Research Officer at Child Poverty Action Group, giving oral evidence to the House of Commons Work and Pensions Select Committee, 12 December 2018. [↑](#footnote-ref-43)
44. Resolution Foundation (2018), The Living Standards Outlook 2018. Report. Retrieved 29 August 2018: [https://www.resolutionfoundation.org/app/uploads/2018/02/Outlook -2018.pdf](https://protect.checkpoint.com/v2/r02/___https%3A//www.resolutionfoundation.org/app/uploads/2018/02/Outlook%20-2018.pdf___.YzJlOnVsc3RlcnVuaXZlcnNpdHk6YzpvOjJlNTE2ZDAxZWMxY2RlN2NhM2FmMmQ0MmYxZDk3NTU2Ojc6NTA2Yzo0ZWM0N2VjZDE4NWNlZjc1ZmQ3NzViYzY4Yjc1YjBmNWEwY2ZlNjYyMGQ5NTI5YjA0Zjg0ZTNiNGM1OTEzOWRmOnA6VDpO); End Child Poverty, CPAG & The Church of England (2018). *Unhappy birthday! The two- child limit at one year old* (London: End Child Poverty, 2018). Retrieved 18 July 2018: http://www.cpag.org.uk/sites/default/files/uploads/Unhappy-birthday-report-on- two-child-limit-final.pdf. [↑](#footnote-ref-44)
45. The Resolution Foundation estimates that half of families with three or more children were living in poverty by 2021/2, up from a third in 2012/3: The Living Standards Outlook 2022, 8 March 2022, https://www.resolutionfoundation.org/publications/the-living-standards-outlook-2022/

The Child Poverty Action Group reported in 2023 that the two-child limit was “pushing 1.1 million children deeper into poverty”, Briefing *Six years in: The two child rule*, April 2023, https://cpag.org.uk/news/six-years-two-child-limit. [↑](#footnote-ref-45)
46. R. Patrick, K. Andersen, M. Reader, A. Reeves, K. Stewart, “Needs and entitlements welfare reform and larger families” *Benefit Changes and Larger Families Project,* Final Report 2023, https://www.nuffieldfoundation.org/wp-content/uploads/2020/02/Needs-And-Entitlements-Welfare-Reforms-And-Larger-Families.pdf. [↑](#footnote-ref-46)
47. Ibid. Also, see the Changing Realities “Living archive”: [https://changingrealities.org/archive](https://protect.checkpoint.com/v2/r02/___https%3A//changingrealities.org/archive___.YzJlOnVsc3RlcnVuaXZlcnNpdHk6YzpvOjJlNTE2ZDAxZWMxY2RlN2NhM2FmMmQ0MmYxZDk3NTU2Ojc6MDAwZTo1MWU3M2VkYTZhNjZjMGMxZTk3YjM0Yjk3ZTY3MTIxMDE3NmM1ZmFkODAzYzIzMTY3NTQyNzNmMTY2MWEzODNmOnA6VDpO). It is a “participatory online project working with over 100 parents and carers living on a low income across the UK”. [↑](#footnote-ref-47)
48. Y. Cohen-Rimer (2023) ‘What’s Choice Got to Do With It? Addressing the Pitfalls of Using Choice-Architecture Discourse Within Poverty Law’ 86(4) *Modern Law Review* 951, 952. [↑](#footnote-ref-48)
49. Ibid, 975. [↑](#footnote-ref-49)
50. Ibid. [↑](#footnote-ref-50)
51. *SC*, 206. [↑](#footnote-ref-51)
52. Fran Bennett highlights the importance of lived experience to create a “a richer form of knowledge and better-informed practice” in the context of poverty. F. Bennett & M. Roberts “The merging of knowledge? Lived experience of poverty and its place in public debate” (2024) 32(3) Journal of Poverty and Social Justice, 480. While an exploration of socio-economic backgrounds on the bench is beyond this paper, it is suggested that at least having some judges who have worked with people with such experiences would be a start. [↑](#footnote-ref-52)
53. *SC*, 197. [↑](#footnote-ref-53)
54. Meghan Campbell (2021) ‘Might makes right: the ‘two-child limit’ and justifiable discrimination against women and children’, 43(4*) Journal of Social Welfare and Family Law*, on the gendered nature of poverty. [↑](#footnote-ref-54)
55. P. Craig *EU Administrative Law* (2nd ed, Oxford: OUP, 2012), Ch 17, s. 4. [↑](#footnote-ref-55)
56. *Thlimmenos v Greece* (2001) 31 EHRR 15; *J.D. and A v. The United Kingdom* [2020] HLR 5; *Taddeucci and McCall v Italy* [2016] ECHR 51362/09. [↑](#footnote-ref-56)
57. Case C‑237/94 *O’Flynn* EU:C:1996:206; Case C-73/08 *Bressol*, EU:C:2010:181; Case C‑27/23 *FV v Caisse pour l’avenir des enfants*, EU:C:2024:87, Opinion of AG Szpunar 25 January 2024. [↑](#footnote-ref-57)
58. *Rex (Jwanczuk) v Secretary of State for Work and Pensions* [2023] EWCA Civ 1156; *Essop and others v Home Office* [2017] UKSC 27; *GM v Secretary of State for Work and Pensions* [2022] UKUT 85 (AAC). [↑](#footnote-ref-58)
59. *SC*, 195 [↑](#footnote-ref-59)
60. On TINA theories see R. Queiroz (2018) ‘Neoliberal TINA: an ideological and political subversion of liberalism’, 12(2) *Critical Policy Studies*, 227. [↑](#footnote-ref-60)
61. *SC*, 61. [↑](#footnote-ref-61)
62. Campbell (2021), above, note 54, 469. [↑](#footnote-ref-62)
63. *SC*, 162. [↑](#footnote-ref-63)
64. *SC*, 12. [↑](#footnote-ref-64)
65. Thanks to the peer reviewer who made this point. [↑](#footnote-ref-65)
66. On the creation of the ‘Other’, see E. Said (1978) *Orientalism* (New York: Random House). On Othering and demonisation in the context of social security claiming, see e.g. S. Wright (2016) “Conceptualising the active welfare subject: welfare reform in discourse, policy and lived experience” 44(2) *Policy & Politics* 235: “A core aspect of ‘Othering’ is the dehumanising effects of large- scale stigmatisation that equates the shameful experience of poverty while claiming benefits with unapproved behaviours, which then may be absorbed into self-image”, 239, and R. Patrick (2016) “Living with and responding to the ‘scrounger’ narrative in the UK: exploring everyday strategies of acceptance, resistance and deflection” 24(3) *Journal of Poverty and Social Justice* 245. [↑](#footnote-ref-66)
67. Lord Burnett of Maldon, Lord Chief Justice gave a speech on ‘Institutional Independence and Accountability of the Judiciary’, the *Lionel Cohen Lecture*, 30 May 2022, and said “Judges should be allergic to politics.” [↑](#footnote-ref-67)
68. *SC*, 162. [↑](#footnote-ref-68)
69. Ibid. [↑](#footnote-ref-69)
70. Ibid. [↑](#footnote-ref-70)
71. Ibid. [↑](#footnote-ref-71)
72. Ministry of Justice (2023), above, note 16. [↑](#footnote-ref-72)
73. Worth noting that only 15% of those civil cases were defended, with a ‘minority’ requiring a hearing. G. Sturge “Court statistics for England and Wales”, House of Commons Library, 13 September 2024, <https://researchbriefings.files.parliament.uk/documents/CBP-8372/CBP-8372.pdf>, 9. [↑](#footnote-ref-73)
74. *SC*, 208. [↑](#footnote-ref-74)
75. *SC,* 204, emphasis added. [↑](#footnote-ref-75)
76. C. O’Brien (2018) ‘“Done Because We Are Too Menny” The Two-Child Rule Promotes Poverty, Invokes a Narrative of Welfare Decadence, and Abandons Children’s Rights’ 26(4) *International Journal of Children’s Rights* 700, 726. [↑](#footnote-ref-76)
77. *SC*, 191; 198; 201; 205. [↑](#footnote-ref-77)
78. On the stigmatising language associated with birth limits, see Bouie, J. (2014), “The most discriminatory law in the land”, Slate, 17 June 2014. Retrieved 18 July 2018: http://www.slate.com/articles/news\_and\_politics/politics/2014/06/ the\_maximum\_family\_grant\_and\_family\_caps\_a\_racist\_law\_that\_punishes\_the .html?via=gdpr-consent; N.T. Masters; T.P. Lindhorst; M.K. Meyers (2014) ‘Jezebel at the welfare office: How racialized stereotypes of poor women's reproductive decisions and relationships shape policy implementation’ 18(2) *Journal of Poverty* 109. [↑](#footnote-ref-78)
79. *SC*, 12. [↑](#footnote-ref-79)
80. See, e.g. L. Try ‘Catastrophic caps: An analysis of the impact of the two-child limit and the benefit cap’, *Resolution Foundation*, 31 January 2024. See also “Letter from the Children’s Commissioners to the Secretary of State for Work and Pensions” 21 May 2021, Sally Holland, Comisiynydd Plant Cymru Children’s Commissioner for Wales; Bruce Adamson, Children & Young People’s Commissioner Scotland; Koulla Yiasouma, NI Commissioner for Children and Young People; at Children’s and Young People’s Commissioner Scotland, [https://www.cypcs.org.uk/resources/childrens-commissioners-for-scotland-northern-ireland-and-wales-letter-to-secretary-of-state-for-work-and-pensions/](https://protect.checkpoint.com/v2/r02/___https%3A//www.cypcs.org.uk/resources/childrens-commissioners-for-scotland-northern-ireland-and-wales-letter-to-secretary-of-state-for-work-and-pensions/___.YzJlOnVsc3RlcnVuaXZlcnNpdHk6YzpvOjJlNTE2ZDAxZWMxY2RlN2NhM2FmMmQ0MmYxZDk3NTU2Ojc6ZmM1ZTpiY2FkMjBmODJhYTI2YTBjODcyZWFkNjg2NzYwMThiZTM1N2ZkNzMzNzhmNjIzYjIzNjk2NWE3NzNhZTUxOGZhOnA6VDpO). [↑](#footnote-ref-80)
81. *SC*, 208. [↑](#footnote-ref-81)
82. Article 13 ECHR. [↑](#footnote-ref-82)
83. *R (Carmichael and others) v. Secretary of State for Work and Pensions* [2016] UKSC 58; *Okpisz v. Germany* (2006) 42 EHRR 32. [↑](#footnote-ref-83)
84. *Stec and Others v. the United Kingdom* (2005) 41 EHRR SE18. [↑](#footnote-ref-84)
85. Ibid, 98. [↑](#footnote-ref-85)
86. As it was not in a case also involving the sensitive national prerogative of determining the franchise: *Hirst v United Kingdom (no 2*) (2006) 42 EHRR 41, 82. [↑](#footnote-ref-86)
87. *SC*, 169. [↑](#footnote-ref-87)
88. *SC*,171. [↑](#footnote-ref-88)
89. *SC*, 208. [↑](#footnote-ref-89)
90. “promoting and protecting minorities is an obligation inherent in universal human rights and this is in the interest of society as a whole” - Volker Türk, UN High Commissioner for Human Rights, speech on the 30th anniversary of the UN Declaration on Minority Rights: “We must do more to protect minorities”, 16 December 2022, UN Office of the High Commissioner for Human Rights, [https://www.ohchr.org/en/stories/2022/12/we-must-do-more-protect-minorities](https://protect.checkpoint.com/v2/r02/___https%3A//www.ohchr.org/en/stories/2022/12/we-must-do-more-protect-minorities___.YzJlOnVsc3RlcnVuaXZlcnNpdHk6YzpvOjJlNTE2ZDAxZWMxY2RlN2NhM2FmMmQ0MmYxZDk3NTU2Ojc6YTBkMDo5YWE3ZGJiMDUyM2ExOWUwMTE2Y2UzOTlhNDdjNjY1NDE4ZjA1ZDhiZGMzYmFhYjIxZWU2N2E5ODU0MjUyMjIwOnA6VDpO). On the tension see: R. Ahnen, (2003). ‘Between Tyranny of the Majority and Liberty: The Persistence of Human Rights Violations under Democracy in Brazil’ 22(3) *Bulletin of Latin American Research* 319, drawing the phrase ‘tyranny of the majority’ from Alexis De Tocqueville, *Democracy in America* (New York: Adlard & Saunders, 1838), 252. [↑](#footnote-ref-90)
91. See, in the context of non-nationals: M. Benton (2010) ‘The Tyranny of the Enfranchised Majority? The Accountability of States to their Non-Citizen Population’ 16 *Res Publica* 397. [↑](#footnote-ref-91)
92. UN Committee on the Rights of the Child General Comment No. 5 (2003), *General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6) CRC/GC/2003/5 27 November 2003, 24-5. [↑](#footnote-ref-92)
93. UN Committee on the Rights of the Child General Comment No. 5 (2003), *General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6) CRC/GC/2003/5 27 November 2003, 24-5. [↑](#footnote-ref-93)
94. Ibid, 4. [↑](#footnote-ref-94)
95. Article 3. [↑](#footnote-ref-95)
96. Article 25. [↑](#footnote-ref-96)
97. General Comment 19 (UN Committee on the Rights of the Child, 2016: §31) on public budgeting for the realisation of children’s rights. [↑](#footnote-ref-97)
98. *R (on the application of SG and others (previously JS and others)) (Appellants) v Secretary of State for Work and Pensions (Respondent)* [2015] UKSC 16; *V v United Kingdom* (2000) 30 EHRR 121. [↑](#footnote-ref-98)
99. *SC*, 80. [↑](#footnote-ref-99)
100. *SC*, 79. [↑](#footnote-ref-100)
101. L. Graham (2024) ‘Has the UK Supreme Court Become More Restrained in Public Law Cases?’ *Modern Law Review*; Graham analysed the Supreme Court’s case law and found a ‘more restrained approach to public law’ on some key areas, including in See also C. Gearty, (2022) ‘In the shallow end’ London Review of Books 27 January 2022, https://www.lrb. co.uk/the-paper/v44/n02/conor-gearty/in-the-shallow-end; [↑](#footnote-ref-101)
102. *SG & Ors, R (on the application of) v Secretary of State for Work and Pensions (SSWP)* [2015] UKSC 16. [↑](#footnote-ref-102)
103. *SG*, 77. [↑](#footnote-ref-103)
104. *SG*, 180. [↑](#footnote-ref-104)
105. *SG*,181-2. [↑](#footnote-ref-105)
106. *SG*, 229. [↑](#footnote-ref-106)
107. *UNISON, R (on the application of) v Lord Chancellor* [2017] UKSC 51. [↑](#footnote-ref-107)
108. SI 2013/1893. [↑](#footnote-ref-108)
109. Not under on the HRA, as the appellant not a ‘victim’ within the meaning of that Act; under common law and EU law rights of access to justice (both of which brought Article 6 ECHR into play). [↑](#footnote-ref-109)
110. Tribunals, Courts and Enforcement Act 2007, s. 42 (1). [↑](#footnote-ref-110)
111. On 25 April 2013. [↑](#footnote-ref-111)
112. HC Deb 12 June 2013; Volume 564, c465; HL Deb 8 July 2013, Volume 747, c88. [↑](#footnote-ref-112)
113. HM Courts & Tribunals Service & Department for Business Innovation & Skills, (2011) *Resolving Workplace Disputes: Government response to the consultation,* November 2011, https://assets.publishing.service.gov.uk/media/5a7ca68940f0b65b3de0a48c/11-1365-resolving-workplace-disputes-government-response.pdf. [↑](#footnote-ref-113)
114. Ministry of Justice, Consultation paper CP22/2011, 14 December 2011: [https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/supporting\_documents/chargingfeesinetandeat1.pdf](https://protect.checkpoint.com/v2/r02/___https%3A//consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/supporting_documents/chargingfeesinetandeat1.pdf___.YzJlOnVsc3RlcnVuaXZlcnNpdHk6YzpvOjJlNTE2ZDAxZWMxY2RlN2NhM2FmMmQ0MmYxZDk3NTU2Ojc6NmUzODozNWM5NzJmNWFkMGM4Zjc4MWJkODQzYzI0ODBjM2ZlYmE5ZDUwZGFkNGQ4NWI3MjAwMzA0YmVjNmEyYTJkYWZlOnA6VDpO), page 5. [↑](#footnote-ref-114)
115. House of Commons Hansard “Employment Tribunal Fee”: Volume 599: debated on Tuesday 8 September 2015; Volume 603: debated on Tuesday 1 December 2015; Volume 608: debated on Thursday 14 April 2016; Volume 611: debated on Tuesday 14 June 2016; Volume 618: debated on Thursday 8 December 2016. [↑](#footnote-ref-115)
116. *SC*, 51-2. [↑](#footnote-ref-116)
117. *SC*,53. [↑](#footnote-ref-117)
118. *SC*, 55. [↑](#footnote-ref-118)
119. 108. [↑](#footnote-ref-119)
120. A. Cortina *Aporaphobia: why we reject the poor instead of helping them* (Princeton University Press, English translation, 2022). [↑](#footnote-ref-120)
121. Ibid, 27. [↑](#footnote-ref-121)
122. E.g. Lowe and Rowlands note that societal responses tend not to look at reducing structural inequality or supporting care of the children in response to struggling parents, but more at long acting contraception: P. Lowe & S. Rowlands (2022) ‘Long-acting reversible contraception: Targeting those judged to be unfit for parenthood in the United States and the United Kingdom’ 17(12) *Global Public Health* 3773, 3780. [↑](#footnote-ref-122)
123. Schedule 1, Part 1. [↑](#footnote-ref-123)
124. J. Wilding ‘‘Serious decline’ in legal aid provision reveals extent of post-LASPO crisis’ *The Justice Gap*, 28 June 2023 – the MoJ reported 119 matter starts in the year 1 September 2021 to 31 August 2022 – this is *three orders of magnitude* smaller than in 2011-12 (pre-LASPO) for which the figure was 102, 900: J. Organ & J. Sigafoos (2018) “The impact of LASPO on routes to justice” Equality & Human Rights Commission: Research Report 118, 12. [↑](#footnote-ref-124)
125. P. Townsend *Building Decent Societies. Rethinking the Role of Social Security in Development* (Geneva: Palgrave Macmillan, 2009). [↑](#footnote-ref-125)
126. R. Machin (2020) ‘Regressive and precarious: Analysing the UK social security system in the light of the findings of the UN Special Rapporteur on poverty and human rights’ 21(3) *Social Work & Social Sciences Review* 70, 82. [↑](#footnote-ref-126)
127. R. Patrick & M. Simpson (2020) ‘Conceptualising dignity in the context of social security: Bottom-up and top-down perspectives’ 54(3) *Social Policy & Administration* 475. [↑](#footnote-ref-127)