

**CAROLINE WEATHERILL MEMORIAL LECTURE 2018**  
**HUMAN RIGHTS AND FAMILY LIFE IN THE UNITED KINGDOM**  
**AND ISLANDS**

We are here to celebrate the life of a remarkable woman – lawyer, wife and mother – who died so tragically soon after her twins were born. I very much hope that she would approve of the subject matter of this lecture. It is inspired by the fact that this year we are also celebrating 70 years since the United Nations adopted the Universal Declaration of Human Rights and 65 years since the United Kingdom extended the European Convention on Human Rights to the Isle of Man. Next year we can celebrate 30 years of the United Nations Convention on the Rights of the Child, the most ratified convention of all time. We family lawyers have a lot to thank the European Convention for, so it seems a fitting tribute to spend a little time reflecting on human rights and family life – not just Family Law strictly so called.

Article 1 of the Universal Declaration proudly proclaims that ‘All human beings are born free and equal in dignity and rights’. It wasn’t true then and it isn’t true now, but it voices the great principle of universality. Human rights are there for all of us. Not just for the privileged or the underprivileged few. For the majority as well as the minority. For the popular as well as the unpopular. I had to remind a sceptical taxi driver the other day that it was the UK’s Human Rights Act which

got the ‘black cab’ rapist’s victims their compensation from the police who had negligently failed to protect them, a remedy they would have been denied by the common law – surely some popular beneficiaries. Each of the Crown Dependencies has passed its own Human Rights Act, Jersey and Guernsey in 2000 and the Isle of Man in 2001. All four Acts are very similar, so the odds are that they would produce similar results throughout the United Kingdom and Islands.

Nowhere is the universality of human rights more apparent than in relation to the right to respect for private and family life – protected by article 8 of the European Convention. We all have a private life – it’s a very broad concept protecting our core identities, our dignity and our autonomy. I well remember Mr Friend, one of the very few litigants in person we have had in the House of Lords and Supreme Court, coming along to challenge the Protection of Wild Mammals (Scotland) Act 2002, an Act of the Scottish Parliament banning hunting certain wild animals with hounds, as an interference with one of the core aspects of his identity – his love of hunting. Some of the Law Lords would have agreed with him, had it not been for the very public nature of the activity of hunting. And Mr Friend was assuredly not the sort of person whom the media usually portray as the beneficiaries of human rights. He was an ‘everyman’ figure – in his country suit to symbolise his country life-style and carrying his copy of the Daily Telegraph to symbolise something else. Unfortunately, we could not help him – and neither

could the European Court of Human Rights in Strasbourg (*Friend v United Kingdom* (2010) EHRR SE6) – but we would certainly have liked to.

And the concept of family life has also proved capable of developing to recognise different forms of family in line with developments in society. Sometimes Strasbourg has been ahead of the United Kingdom and sometimes the United Kingdom has been ahead of Strasbourg but so far we have always caught up with one another.

Strasbourg began by holding that article 8 required the recognition of the relationship between unmarried parents and their children. One of earliest and most famous Strasbourg cases was *Marckx v Belgium* (1979-80) 2 EHRR 330, about the right of a child of unmarried parents to be recognised as having a family relationship with her mother and members of her mother's family. The state had to avoid any discrimination grounded on birth. This was in the teeth of a vigorous dissent from the British judge, Sir Gerald Fitzmaurice, who argued that article 8 was all about the 'domiciliary protection of the individual' from the horrors of fascist and communist inquisitorial practices and not about regulating the 'civil status of babies'. He seems to have forgotten that babies grow up to become real people and that England and Wales had already equalised succession rights in the Family Law Reform Act 1969. But *Marckx* led directly to changes in the law in the UK (and perhaps it motivated your own Legitimacy Act 1985?). Indeed, in

the Family Law Reform Act 1987, England and Wales followed the example set by the Scots and abandoned all pejorative adjectives, such as ‘illegitimate’, attaching to the child. If there is a need to differentiate – and there isn’t often – we should differentiate between the *parents* according to whether or not they were married to one another at the relevant time.

*Marckx* was about the relationship between children, their mothers and their mothers’ families. For a while, Strasbourg was prepared to tolerate some different rules for married and unmarried fathers. In *McMichael v United Kingdom* (1995) 20 EHRR 205, it was held justifiable to discriminate between married and unmarried fathers in the acquisition of parental rights and authority – automatic for married fathers but requiring a court order for unmarried. The court said that relationships between unmarried fathers and their children ‘will inevitably vary, from ignorance and indifference at one end of the spectrum to a close stable relationship indistinguishable from the conventional matrimonial-based family unit’ at the other’ (para 98). It may not have occurred to them that the same spectrum can apply to all kinds of parents, mothers or fathers, married or unmarried, especially if they are not living with one another.

But in *Sahin v Germany* [2003] 2 FLR 671 (GC), (2003) 36 EHRR 43 (Ch), the Strasbourg court held that, just as ‘very weighty reasons’ are required to justify a difference in treatment on the ground of birth outside wedlock, ‘the same is true

for a difference in treatment of the father of a child born of a relationship where the parties were living together out of wedlock compared with the father of a marriage-based relationship (para 94). Germany had discriminated against an unmarried father in requiring him to demonstrate that contact with his child was in the child's best interests even though the mother objected, whereas with a married father the presumption would have been the other way around. They didn't explain how and why this situation was different from *McMichael*. However, in *McMichael* there was a procedure whereby the father could acquire equal parental status and he hadn't used it.

In addition to recognising the relationships between children and their parents, Strasbourg has been very concerned to protect the relationship between parents and their children from intrusion by the state. Some very early cases castigated the state of English law before the Children Act 1989 (on which I believe your own Children and Young Persons Act 2001 is modelled), which allowed local authorities to deprive parents of all contact with their children in public care without proper procedural safeguards (*W v United Kingdom* (1988) 10 EHRR 29). On the whole, they were understanding of the immediate need to protect children from harm, but required much more for the total severance of links between children and their families. The spectre of the totalitarian state which tried to separate children from the subversive influence of their families loomed large. The Supreme Court recognised this in *Christian Institute v Lord Advocate* [2016]

UKSC 51, 2017 SC (UKSC) 29, the case which challenged the Scottish ‘named person’ scheme (para 73):

‘There is an inextricable link between the protection of the family and the protection of fundamental freedoms in liberal democracies. The noble concept in Article 1 of the Universal Declaration . . . is premised on difference. If we were all the same, we would not need to guarantee that individual differences should be respected. . . . Individual differences are the product of the interplay between the individual person and his upbringing and environment. Different upbringings produce different people. The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers’ view of the world. Within limits, families must be left to bring up their children in their own way.’

The Grand Chamber summed up the principles in *Neulinger v Switzerland* (2012) 54 EHRR 31 (a case which caused consternation because of what was said about the Hague child abduction convention, but not because of this) (para 136):

‘The child’s interest comprises two limbs. On the one hand, it dictates that the child’s ties with its (sic) family must be maintained,

except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to “rebuild” the family [referring to *Gnahore v France* (2002) 34 EHRR 38, at 59]. On the other hand, it is clearly also in the child’s interest to ensure its development in a sound environment, and a parent cannot be entitled under article 8 to have such measures taken as would harm the child’s health and development [referring, inter alia, to *Elsholz v Germany* (2002) 34 EHRR 58, at 56].’

Laws in Great Britain have tried to reflect this – by requiring more than the simple test of what will be in the best interests of the child in order to separate them permanently from their families.

Scotland has gone further than England and Wales. Our threshold for compulsory adoption is the same as our threshold for compulsory care – that the child is suffering or likely to suffer significant harm attributable to a lack of reasonable parental care, although on top of that there is a rule that the welfare of the child *requires* adoption, which we have interpreted strictly: ‘nothing else will do’. Their threshold for permanence is that, in relation to each parent, the court must be satisfied that the child’s residence with that person would be seriously

detrimental to the child's welfare (Adoption and Children (Scotland) Act 2007, s 84(5)(c)(ii)). Both tests, of course, require predictions and we have held that these must be based on findings of fact rather than mere suspicion or cause for concern (*Re EV (A Child)* [2017] UKSC 15, adopting the approach in *Re J (Children)(Care Proceedings: Threshold Criteria)* [2013] UKSC 9).

This tenderness to the relationship between children and their parents has had consequences for other areas of the law as well – not least in immigration. *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, concerned the planned removal to Tanzania of the mother of two British children who had been born in England and lived there all their lives. There was no-one else to look after them so removing her would inevitably mean that they would have to go too and lose all the benefits of their citizenship. The Supreme Court held that the best interests of the children were a primary consideration in judging whether the interference with the children's right to respect for their private and family life, protected by article 8 of the European Convention, was justified. Following *Neulinger*, we held that article 8 had to be read in the light of other international human rights instruments, including Article 3.1 of the United Nations Convention on the Rights of the Child. This requires that the best interests of the child be a primary consideration in all official actions concerning him. The child's best interests are not paramount, in the sense that they are a 'trump card' overriding everything else. They can be overridden by



other considerations, either separately or cumulatively; but no other consideration is to be taken to be inherently more important than the best interests of the child.

As Lord Kerr put it (para 46):

‘This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.’

Further, the Home Secretary has a statutory duty, under section 55 of the Borders, Citizenship and Immigration Act 2009, to discharge her immigration functions ‘having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom’. A similar duty is imposed upon many public bodies in England, including local authorities, by section 11(2) of the Children Act 2004. The purpose was to implement the obligation in article 3.1 of the Children’s Rights Convention, but it doesn’t actually say that that the best interests of the child are to be a primary consideration. It also does not apply to most of central government, such as the Department of Work and Pensions, and is limited to children in the UK, although the government has said that it will abide by it, and

also apply it to children outside the UK who are the subject of immigration decisions. The *ZH* approach has been applied in many very different contexts since – from planning to policing – but nobody suggests that it is an easy thing to do. Wales has gone much further, in requiring a children’s rights audit of all the Welsh Ministers’ policies (Rights of Children and Young Persons (Wales) Measure 2011).

But while both Strasbourg and the UK have emphasised the importance of the relationship between children and their parents, both married and unmarried, both have been slower to accept that unmarried partners may have the same responsibilities towards one another as they have towards their children. A good example is the recent Supreme Court case of *In re Siobhan McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250. This was about widowed parents allowance – now superseded but at the relevant time a national insurance benefit for a surviving spouse left with dependent children. It was meant to compensate for the loss of a breadwinner. So it depended upon the national insurance contribution record of the deceased. And it was not means-tested so it was particularly valuable if the survivor was in work and not in receipt of means-tested benefits. (My own mother, for example, benefitted from its predecessor, widowed mothers’ allowance, when my father died while my sister and I were children and she went back to work as a teacher. It made a difference to our lives.) But it was limited to married couples.

If it is seen as a benefit for the survivor, then that might be justified. Couples who are married to (or in a civil partnership with) one another have a mutual obligation of support. So it is reasonable for the contributions of one to go to compensate for the loss of support to the other. Couples who are not married or in a civil partnership do not have such an obligation. But if it is seen as a benefit for the children, the position is quite different. Children should not suffer because their parents are not married to one another. Indeed ‘very weighty reasons’ are required for drawing distinctions between them. So where – as in this case – the children involved were the children of the deceased and the survivor, we held that it was not justifiable to distinguish between them. It might be different if the connection between the children and the deceased was more remote but that was not this case. However, as the distinction was in primary legislation, we could only make a declaration of incompatibility.

It was important that children were involved. Strasbourg is clear that states are entitled to have an institution such as marriage bringing with it a special status and entitlements: in *Burden v United Kingdom* [2007] 44 EHRR 51 this was held to justify denying civil partnerships to sisters. Discrimination between married and unmarried couples can be justified when discrimination between their children would not be. But that does not mean that all discrimination between married and unmarried couples can be justified.

Another recent example in our court is *In re Denise Brewster* [2017] UKSC 8, [2018] 1 WLR 519. The rules of the Northern Ireland Local Government Pension Scheme meant that a surviving spouse automatically got a survivor's pension. A surviving unmarried partner could do so but only if she could prove that the relationship between them was genuine and subsisting *and* if she had been nominated by the deceased member of the scheme. This gave the deceased a choice which he did not have if he was married to the survivor. We held that this additional hurdle could not be justified. It added no evidential value to the requirement of a genuine and subsisting relationship. There was no evidence that the rule had been motivated by the sort of socio-economic considerations which might lead the court to respect the choices made by the legislature. As the requirement was in regulations, and not in primary legislation, it could simply be disapplied.

Strasbourg also led way in recognising a change of sex and the right of trans people to be recognised in their reassigned gender and to marry in that gender. In *Goodwin v United Kingdom* (2002) 35 EHRR 447, Strasbourg held that the leeway they had previously given to the UK to change the law had run out and found a violation. One of the very early House of Lords cases under the UK Human Rights Act was *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467. This concerned the validity of a marriage abroad between a trans person and her

husband. The Matrimonial Causes Act 1973 provided that a marriage was void unless the parties were respectively male and female. The House declined to use the interpretative obligation in section 3 of our Human Rights Act (the equivalent of your own section 3) to give the words 'male' and 'female' a compatible meaning, so as to include a post-operative transsexual in her reassigned gender. They took the view that Parliament considered a person's gender at birth to be immutable. That was undoubtedly so when the Matrimonial Causes Act was passed. But did that make it impossible to construe 'female' as including a trans female? However, the House did make a declaration of incompatibility even though steps were already being taken to remedy matters in what was to become the Gender Recognition Act 2004. In a case of such sensitivity, the House should formally record that the present state of the law was incompatible with the Convention.

The recognition of same sex relationships as 'family life' came later. I understand that the right of individual petition from the Isle of Man to the Strasbourg court was allowed to expire in 1976, because of concerns about the compatibility with the Convention of Manx law on judicial corporal punishment and on consensual homosexual activity. In *Dudgeon v United Kingdom* (1981) 4 EHRR 149, Strasbourg recognised the right of homosexuals to respect for their private lives including their sex lives.

But they and we were slower to recognise that same sex couples could enjoy a family life together which was also entitled to respect. The House of Lords case of *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 was about the different treatment of opposite and same sex couples in the calculation of a separated parent's liability for child support – if the parent was in an opposite sex relationship the calculation was more favourable than if the parent was in a same sex relationship. The majority of the House of Lords held that this was too far removed from the 'core values' protected by article 8 to generate an obligation not to discriminate under article 14. Dissenting in the House of Lords, I held that the matter had to do, not with the relationship between the couple, but with the relationship – and thus the family life - between the lesbian mother and her children. Strasbourg agreed with neither of us (*JM v United Kingdom* [2011] 1 FLR 491). They held that there had been a violation of article 14 read with Article 1 of the First Protocol, which protects property rights; so they did not need to consider whether same sex couples had a family life together. But since then Strasbourg has accepted that 'the relationship of a same sex cohabiting couple in a stable relationship falls within the notion of family life just as the relationship of a different sex couple in the same situation would' (see *X v Austria* 920130 57 EHRR 14, para 95).

Great Britain was ahead of them in that, but not the whole UK. In 2002, adoption legislation in England and Wales (in 2007 in Scotland and in 2011 in the Isle of

Man) allowed unmarried couples, of the same or opposite sexes, to adopt. But Northern Ireland did not follow suit. In *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173, the House of Lords held, unsurprisingly, that being unmarried was a status for the purpose of article 14. But we also held, more surprisingly, that the outright ban on an unmarried couple adopting jointly could not be justified. Adoption is meant to serve the best interests of the child. While the fact that a couple have not committed themselves to one another in marriage (or civil partnership) could be relevant to whether allowing them to adopt would be in a child's best interests, it did not follow that it would never be so. As the limitation to married couples was in delegated legislation, the Adoption (Northern Ireland) Order 1987 (SI 1987/2203), it could simply be ignored as incompatible with the Convention Rights.

That case was also an important step in the development of the UK's own human rights jurisprudence. At that date, denying adoption to unmarried couples might still have been within the margin of appreciation which Strasbourg would allow to member states (although this was becoming less likely given their developing attitude to adoption by people who were in a same sex relationship, they had not yet held that the couple must allowed to adopt jointly). The House of Lords pointed out that the fact that Strasbourg would allow the Member States a margin of appreciation said nothing about the respective responsibilities of the national executive, legislature and judiciary in deciding what the content of the

Convention Rights should be in our domestic law. The Human Rights Act did not incorporate the Convention into UK law: it created rights in UK law which were identically worded to the rights in the Convention. The interpretation of those rights depended on the relative competence of the executive, legislature and judiciary in the UK Constitution. Lord Hope was clear that protection against unjustified discrimination, even in an area of social policy such as this, was a matter for the courts. We are the guardians of the rights of minorities and also of disadvantaged or under-represented groups such as women and children of unmarried parents – whether popular or unpopular - against the decisions of the majority or dominant groups.

This is perhaps most significant development UK human rights jurisprudence to date. Another very important development of UK human rights jurisprudence also concerned same sex couples. The issue in *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557, was whether the survivor of a same sex relationship could qualify to succeed to the deceased's Rent Act tenancy as a person who had been living with the deceased 'as husband and wife'. The government argued, and the House of Lords held, that he could. The words 'husband' and 'wife' could be read to include a marriage-like same sex relationship (I still have trouble understanding why, if that was possible, reading 'female' to include a post-operative trans person was not). The case established that the interpretative route in section 3 should wherever possible be preferred to making a declaration of



incompatibility under section 4. What was possible under section 3 went further than either a literal or a purposive interpretation of what Parliament had said. We could draw upon more than 30 years' experience of conforming interpretation under European Union law for the techniques. But we must not adopt an interpretation which went 'against the grain' or contradicted some fundamental principle of the legislation.

Protecting the rights of same sex couples comes up more frequently under the Equality Act rather than under the Human Rights Act. In *Preddy and Hall v Bull* [2013] UKSC 73, [2013] 1 WLR 3741, the Supreme Court held that refusing to provide a double-bedded room to same sex civil partners was unlawful discrimination on the ground of their sexual orientation. We also held that this was not an unjustified interference in the right of Christian hotel keepers to manifest their religion. But in *Lee v Ashers Bakery* [2018] UKSC 49, we held that refusing to supply a cake iced with message supporting gay marriage was not discrimination on grounds of sexual orientation at all – the objection was to the message and not the man. The court recognised that large sections of society support same sex marriage: anyone might have ordered the same cake and would have been refused regardless of their own sexual orientation. Nor was the message only for the benefit of same sex couples. It is for the benefit of their families, their children and wider society that they should be able to recognise their commitment to one another in this way. Ironically, therefore, recognising

the widespread acceptance of gay relationships in society did not help the claimant in that case.

Northern Ireland does not have gay marriage, but it does have civil partnership under the Civil Partnership Act 2004, which introduced this throughout the UK for same sex couples. The Marriage (Same Sex Couples) Act 2013 introduced gay marriage in England and Wales and the Marriage and Civil Partnership (Scotland) Act 2014 did the same in Scotland. This produced the curious situation that same sex couples who want to enter into legal binding commitments to one another have choice between marriage and civil partnership but opposite sex couples do not. Difficult though it is for some of us to understand, there are opposite sex couples who have genuine and deep-seated conscientious objections to marriage – as counsel put in in the Supreme Court, they see it as a ‘patriarchal and hetero-normative’ institution. Many gay couples feel the same and would not want to be associated with it. But others want to feel that they are being treated equally and have equal access to the institution which is available to the straight majority. The Isle of Man is to be congratulated in recognising this long before the larger island did: when you introduced same sex marriage, in the Marriage and Civil Partnership Amendment Act 2016, you also amended the Civil Partnership Act 2011 to include opposite sex couples (incidentally, however, while same sex couples can convert their civil partnership into marriage, opposite

sex couples can't convert their marriage into civil partnership – perhaps an unlikely wish).

In *Steinfeld v Secretary of State for Education*, a straight couple complained that English law was incompatible with their article 14 rights read with article 8. At first, the Government argued that it was not even within the ambit of article 8 – relying on the ‘core values’ argument from *M v Secretary of State for Work and Pensions* (see above). They won at first instance [2016] EWHC 128 (admin) but lost in the Court of Appeal [2017] EWCA Civ 81 and gave up the argument before the Supreme Court: [2018] UKSC 32. But they still argued that this continued less favourable treatment was justified because they were trying to work out what to do about it. Many discrimination cases raise the problem of how to cure the difference in treatment – should there be levelling up or levelling down? Should civil partnerships be opened up to opposite sex couples, or abolished for new entrants, or even abolished for everybody? It would even be theoretically possible to abolish legal marriage for everyone, but somehow I don't think that is going to happen. But the fact that there is a choice of how to put the problem right does not stop its being unjustified discrimination, so we made a declaration of incompatibility. Remarkably, after years of trying to kick the can down the road, the government is now on the case. The Prime Minister announced in October that legislation would be brought forward to remove the discrimination and allow different sex couples to enter civil partnerships. Tim Loughton's bill, the Civil

Partnerships, Marriages and Deaths (Registration etc) Bill has now completed its passage through the House of Commons and moved to the House of Lords. It is envisaged that it might become law in the spring and regulations be in place for the first different sex civil partnerships to be formed in October 2019. Declarations of incompatibility have their uses.

While some families are fighting for legal recognition of their relationships, we should not forget that other families are fighting for enough to live on and to make ends meet. The UK government's austerity policies have undoubtedly made this worse and have posed some uncomfortable problems for the courts. One shortcoming seen by some in the European Convention is that it covers the civil and political rights declared in the Universal Declaration but not the economic and social rights. Strasbourg is quite clear that the protection of the 'home' in article 8 does not require the state to provide housing and the protection of property in article 1 of the first protocol does not require the state to provide welfare benefits. This is a matter of socio-economic policy for the individual member states. But what we do provide must be provided without unjustified discrimination.

The problem that we have in the courts is that it is quite obvious – indeed it is officially conceded – that many of the recent changes to the benefits system impact more harshly on women, children and disabled people than they do on

other groups: for example, the recent report from the Equality and Human Rights Commission, *Is Britain Fairer?*, states that ‘UK wide reforms to social security and taxes since 2010 are having a disproportionate impact on the poorest in society and particularly affecting women, disabled people, ethnic minorities and lone parents’ (p 87). ‘Government policies on social security and taxation have increased pressure on living standards for some groups, particularly disabled people, women and some ethnic minorities’ (p 193).

It was a comparatively small step for Strasbourg to regard contributory social security benefits as a species of property right protected by article 1 of the first protocol. It was a larger step to extend this to means-tested benefits but it happened in *Stec v United Kingdom* (2006) 43 EHRR 47. The case was about a difference in treatment between men and women for the purpose of reduced earnings allowance. This was an earnings-related additional benefit under the statutory occupational accident and disease scheme. It was non-contributory and funded out of general taxation rather than the national insurance fund. Originally it continued into retirement. Changes which limited entitlement to the benefit after retirement age obviously impacted earlier on women than on men because of the earlier state retirement age for women. Was this justifiable? In a famous passage, Strasbourg said this:

‘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 [citing *Van Raalte*, para 37; *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405, para 67]. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy [citing *James v United Kingdom* (1986) 8 EHRR 123, para 46; *National Provincial Building Society v United Kingdom*, para 80]. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation”.’

Differential retirement ages had been justified by the need to correct factual inequalities between men and women in the workplace: Strasbourg is not against positive discrimination to redress factual inequalities. Also, linking Reduced Earnings Allowance to retirement age was justified because it was intended to replace lost earnings. Phasing out of differential treatment for retirement purposes

as the socio-economic condition of women improved depended on local conditions.

The Supreme Court applied the ‘manifestly without reasonable foundation’ test in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545. This concerned the rule that child tax credit should not be split between parents who shared their child’s care but should go to the one with the main responsibility for looking after the child. This indirectly discriminated against fathers, because they were much more likely to be looking after the child for a smaller proportion of the time than mothers. But we pointed out that the complaint would be the same whichever way that went – this was really discrimination between majority and minority care givers – and not related to gender in such way as to show a lack of equal respect (para 21). We also said that the less stringent ‘manifestly without reasonable foundation’ test did not mean that the justifications put forward for the rule should escape careful scrutiny (para 22). This was a case where the government had in fact considered the pros and cons of the no-splitting rule quite carefully.

The test was applied again but more controversially in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449. The benefit cap limits the total sum in benefits which any household can receive even if this takes them below subsistence level as represented by the means-tested benefit rates.

This was admittedly indirectly discriminatory against women because it affected lone parent households more harshly than dual parent or no parent households and lone parents are overwhelmingly women. One question was whether the effects upon the children could be taken into account when considering the justification for the discrimination against women. There was a majority in the Supreme Court for the view that the government had not fulfilled its obligation under article 3.1 of the Children's Rights Convention, to treat the children's best interests as a first priority, when deciding to cap benefits. But there was also a majority for the proposition that the complaint was not of discrimination against the children but against women. The impact upon the children was the same whether the lone parent was a man or a woman (rather as it was in *Humphreys*). So, in the majority view, it was not appropriate to use an unincorporated international treaty like the Children's Rights Convention in this indirect way. We now have before us an attack upon the revised benefit cap, which is even harsher than the original. This time the complaint is not of sex discrimination, but of discrimination against lone parents, particularly lone parents with very young children, and their children. It is easier to see how the best interests of the children ought to be taken into account in this context. But whether they have been is a different question.

An all-out attack on the 'manifestly without reasonable foundation' test was mounted in *R (Carmichael) v Secretary of State for Work and Pensions* [2016]



UKSC 58, [2016] 1 WLR 4550. This was a challenge to the ‘removal of the spare room subsidy’ from disabled people who needed an extra room because of their disability. The Supreme Court held that the balance between entitlement to housing benefit and reliance on discretionary housing payments was one of social policy for the legislature unless it was manifestly without reasonable foundation. But where there was a clear medical need for an extra bedroom – where a married couple could not share because of the disability of one of them or an extra bedroom was needed for an overnight carer – then it could not be justified.

Heard together with *Carmichael* was the case of *A*. This was an attack upon the rule as it affected victims of severe domestic violence who were living in specially adapted safe houses where they needed to stay because of the risk of serious harm from an ex-partner. It wasn’t their fault that the house might have an extra bedroom – it was the one chosen by the authorities to adapt for their protection. Long ago, Strasbourg recognised a positive obligation to protect vulnerable people from serious abuse by other individuals: a mentally disabled person from sexual abuse, in *X and Y v Netherlands* (1985) 8 EHRR 235; children from physical abuse and neglect in their own families in *Z v United Kingdom* (2001) 34 EHRR 3; and women from intimate partner violence in *Opuz v Turkey* (2009) 50 EHRR 28. In *A*, I remarked that ‘Obviously, to deny women protection against gender based violence, such that they cannot lead an equal life with men, is discrimination against them in the enjoyment of their fundamental rights’. This

was what we call *Thlimmenos* discrimination – failing to treat different cases differently – because she had been treated just like any other lone parent with one child when her circumstances required that she be treated differently. But only one of the other Justices agreed with me.

I have focussed on the contribution made by the Human Rights Act in responding to developments in our private and family lives because we all have a private life and almost all of us have some experience of family life. It is an example of one sort of dialogue between the Strasbourg courts and the member states – where at one point in time Strasbourg may be ahead of a member state, as with same sex relationships and the rights of trans people, and at another point we may be ahead of them, as with adoption by unmarried and gay couples and civil partnerships. But that we have each learned from one another is obvious and the Human Rights legislation has enabled us to put that learning into practice in a way which continues to respect the sovereignty of the UK and Island Parliaments. The UK Parliament’s Joint Committee on Human Rights is currently inquiring into the experience of the Act and I think that we can tell them that it has been something of a success for families and for their children.