

## The austerity of lone motherhood

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# *The Austerity of Lone Motherhood: Discrimination Law and Benefit Reform*

Meghan Campbell\*

**Abstract**—The austerity-motivated reforms of the UK benefit system have had a devastating and disproportionate impact on vulnerable groups. Lone mothers are challenging these regulations as discriminatory. Their claims raise an under-theorised question: how should courts adjudicate claims for status equality in the realm of fiscal policy? The courts are adopting a fragmented model of equality that artificially divides status and economic inequalities. This approach fails to fully account for the multiple dimensions of disadvantage at stake in these claims. Using a substantive equality framework, this article uncovers the intertwined status and economic inequalities perpetuated by the benefit reforms. It then proceeds to evaluate how the courts' fragmented approach to equality distorts the justification evaluation. Substantive equality can enrich the justification analysis in a manner that both respects the institutional limits of the court and holds the government to account for discrimination in social benefits.

**Keywords:** social benefit reform, economic equality, status equality, degree of deference, proportionality.

## 1. *Introduction*

The austerity-motivated reforms of the benefit system have had a devastating impact on vulnerable groups across the UK.<sup>1</sup> These reforms have been politically controversial. Under the new system, Universal Credit (UC), the amount of social benefits that claimants can receive is capped.<sup>2</sup> Claimants can escape the cap if they undertake a certain amount of paid work. There have also been restrictions placed on specific types of benefits. The child tax credit, a benefit

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<sup>1</sup> UN Special Rapporteur on extreme poverty and human rights, 'Visit to the United Kingdom of Great Britain and Northern Ireland' (2019) A/HRC/41/39/Add.1.

<sup>2</sup> The benefit cap operates to limit the amount of benefits a claimant would otherwise be entitled to receive. For a lone mother living outside of London, the maximum amount of benefits she can receive is capped at £20,000 per year, 'Benefit Cap' <[www.gov.uk/benefit-cap/benefit-cap-amounts](http://www.gov.uk/benefit-cap/benefit-cap-amounts)> accessed 9 February 2020.

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designed to meet the subsistence needs of children, is no longer available for a woman's third or subsequent children (the 'two-child limit'). Women, particularly lone mothers,<sup>3</sup> are challenging these regulations in court. In a series of cases, lone mothers have unsuccessfully argued that the benefit cap, the work conditionalities and the two-child limit are discriminatory.<sup>4</sup> The claims were brought under the Human Rights Act 1998 (HRA), which domesticates the European Convention on Human Rights (ECHR). Article 14 of the ECHR only guarantees non-discrimination in the enjoyment of Convention rights; it is not an independent right. However, claimants must only demonstrate that the impugned provision falls within the ambit of Convention rights for article 14 to be applicable; there is no requirement to demonstrate an underlying breach of the right.<sup>5</sup> This has widened the scope of article 14 to include fields of life not initially envisioned as falling within the ECHR,<sup>6</sup> and consequently has brought forth under-theorised tensions within anti-discrimination law. How should courts adjudicate claims for status equality in the realm of fiscal policy? This article examines this question through the discrimination jurisprudence on benefit reforms in the context of lone motherhood. The claims of the lone mothers which bring together status and economic inequalities act as a canary in a coal mine and reveal worrying trends in the health of discrimination law in the UK.

Posing this question opens two lines of inquiry. The first explores whether article 14 can fully account for the nature of inequality. Equality has been and continues to be conceptualised in a fragmented manner as between economic equalities (claims for material goods) and status equalities (claims for dignity or respect).<sup>7</sup> The lone mothers' claims strike at the assumptions that equality can be neatly segmented. Their cases bring together intersecting status vulnerabilities (gender and reproductive care) with economic vulnerabilities (poverty) and provide an opportunity to evaluate whether the legal framework can grapple with multifaceted inequalities. It is argued that the UK Supreme Court (UKSC) and Court of Appeal (CA) myopically analyse the claims through the lens of one type of inequality: economic. Because the discriminatory impacts of the reforms are solely reduced to income poverty, the courts regard them as primarily a matter for policymakers, attracting judicial deference and only

<sup>3</sup> Naming the experience of women who bear sole or primary responsibility for caring for their children must not only reflect the diversity of that experience, but also capture the historic, political, economic and social forces that shape the gendered provision of care. This article uses the term 'lone mothers' as it is the prominent in the political, legal and academic discourse, while acknowledging this is a complex identity category; Vanessa May, 'Lone Motherhoods in Context' (2006) ESRC National Centre for Research Methods Working Paper Series 5/06.

<sup>4</sup> *SG and others v Secretary of State for Works and Pensions* [2015] UKSC 16; *SC and others v Secretary of State for Work and Pensions* [2019] EWCA Civ 65; *DA and other v Secretary of State for Work and Pensions* [2019] UKSC 21.

<sup>5</sup> *Belgian Linguistics (No 2)* App no 1474/62 (European Court of Human Rights, ECtHR).

<sup>6</sup> Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the ECHR' (2016) 16 *Human Rights Law Review* 273, 276.

<sup>7</sup> Nancy Fraser and Alex Honneth, *Redistribution or Recognition* (Verso 2003).

light-touch review. The courts are inattentive to the intersection of status identity characteristics with poverty. There is no meaningful engagement with women's antecedent disadvantage in unpaid care work or the stigmas against lone mothers in poverty. Nor is any attention paid to the erasure of women in poverty's voices in political discourse, the gendered structures of the labour market or how the benefit reforms continue to devalue care work. The application of article 14 by the UK courts is not accounting for status vulnerabilities when they manifest in economic reforms nor is it adequately capturing the relationship between economic and status inequalities. In part, this is due to the doctrinal developments of article 14 and the failure to fully adopt a substantive concept of equality.<sup>8</sup> This article demonstrates that a substantive equality framework can identify, with a high degree of precision, how economic and status inequalities interact to create and perpetuate disadvantage.

The second line of inquiry investigates how the justification stage of the discrimination analysis under article 14 should be applied in the context of claims for status equality that touch upon economic policy. The inattention to the connection between different forms of inequality has a distortive effect when evaluating whether the benefit reforms are justified. All of the judgments agree that reforms are *prima facie* discriminatory on the basis of poverty. However, while the CA and a majority of the UKSC conclude that the discrimination is justified, the dissenting minority in the UKSC concludes the opposite. It is the legal test for justification which is the source of disagreement. Because they regard the benefit reforms as an issue of economic policy, the majority advocates using a highly deferential test. Only if it is 'manifestly without reasonable foundation' (MWRF) should the justification for the discriminatory benefit reforms be rejected. This is a weak foundation for a light-touch justification analysis as the benefit reforms cannot be exclusively collapsed into income inequality. Furthermore, the additional rationale offered by the UKSC for using MWRF, a test which originated in the European Court of Human Rights (ECtHR), fails to appreciate institutional differences between regional and national courts and now rests on outdated authority from the ECtHR. The dissenting minority, on the other hand, adopts proportionality, the 'tried and tested' tool for justification in the context of anti-discrimination law. A greater appreciation for the entwined gendered status and economic inequalities perpetuated by the reforms, along with recent jurisprudence from the ECtHR, provides greater support for adopting a more searching justification analysis via proportionality. Surprisingly, the relationship between equality and proportionality in article 14 is under-theorised.<sup>9</sup> It is argued here that, with attention to substantive equality in evaluating the justifications offered by the government for burdening vulnerable

<sup>8</sup> Oddný Mjöll Arnardóttir, 'The Difference That Makes a Difference: Recent Developments on Discrimination Grounds and Margin Appreciation under Article 14 of the ECHR' (2014) 14 Human Rights L Rev 647.

<sup>9</sup> Anna Nilsson, 'Same, Same but Different: Proportionality Assessment and Equality Norms' (2020) 7(3) Oslo L Rev 126, 127.

groups through fiscal policies, courts will be in a position to protect the rights to equality of those who are rendered invisible by the current deferent judicial approach.

The article proceeds as follows. Section 2 explores the splintered relationship between status and economic equality, and the scepticism on the role of law in redressing economic inequalities. Section 3 analyses three cases brought by lone mothers and demonstrates that the fulcrum of the court's reasoning rests on a fragmented model of equality centring upon economic inequality, excluding any recognition of status inequality and ignoring the interaction between the two types of inequalities. Using a substantive equality framework enriched with insights from critical feminist studies, section 4 uncovers in greater detail how synergies between status and economic inequalities perpetuated by the benefit reforms impact on the lives of lone mothers. Section 5 critically reflects on the court's justification assessment. By framing the claim as purely economic inequality, it appears illegitimate for the courts to interrogate the allocation of resources. Drawing on the substantive equality approach developed in section 4, the final section marks out how the justification analysis can both respect the institutional limits of the court and hold the government to account for discrimination in social benefits. This article wades into the contentious debate on the role of law in addressing economic inequality. By unearthing the interaction between status and economic inequalities, it offers pertinent insights into human rights-based approaches to poverty and the future evolution of equality in the UK.

## 2. *The 'Inherent Difficulty'*<sup>10</sup> of Equality

The claims of lone mothers bring to the fore multilayered debates on the nature of equality and what it means to protect equality through law. In what spheres of life are individuals meant to be equal? And which institutions should offer redress for inequalities? Before investigating the judgments of the UK courts, using equality theory, this section briefly sketches the complexity raised by these questions so as to give the necessary grounding to the analysis in the remainder of the article.

### A. *Equal in What?*

There are debates about what spheres of life individuals can claim equality. For the purposes of this article, these spheres can be broadly classified into two categories. The first concerns economic equality. Individuals must have access to a certain level of material goods to be equal, and to achieve this type of equality redistribution is required. There are entrenched debates on the

<sup>10</sup> *DA* (n 4) [20].

precise aims, extent and criteria for redistribution.<sup>11</sup> Some, however, question the desirability of achieving economic equality, as any attempts at material redistribution would, they believe, undermine autonomy and individual choice.<sup>12</sup> The second broad category is status equality. Because of status identity characteristics—gender or race—individuals and groups are culturally subordinated, dominated and disrespected.<sup>13</sup> To redress these institutionalised cultural hierarchies, equality should seek to remove the stigma that attaches to identity characteristics and accord everyone equal worth and respect.

The relationship between status and economic equality is contentious. In some ways, these two types of equality have been like ships in the night. Fraser observes that claims for status equality and claims for economic equality are ‘often dissociated from one another—both practically and intellectually’.<sup>14</sup> There is also scepticism that focusing on either status or economic equality is misguided as the other is the primary source of disadvantage. There is currently a resurgence in polarising different types of equality. Recently, the UK Minister for Women and Equalities argued that attention to status equality is hindering the achievement of greater economic equality.<sup>15</sup> All of these proposed framings are premised on the assumption that status and economic equality can be segmented. However, attempts to enforce a watertight division or a zero-sum relationship is artificial. Instead, there are multifaceted interactions between different types of inequalities. Groups that experience status inequalities, such as women or racial minorities, are more likely to live in poverty.<sup>16</sup> Fraser argues that economic and status inequalities, or what she terms ‘maldistribution and misrecognition harms’, are separate sources of disadvantage but invariably entwined.<sup>17</sup> She uses gender as the paradigm example to illustrate her claim. Economic structures have allocated unpaid care work to women which perpetuates economic marginalisation (economic inequality). At the same time, cultural norms have not properly valued the care work women perform in the home (status inequality). The synergy between inequalities comes to the fore when women enter the paid labour market. Gender operates to segregate women into, *inter alia*, the caring sectors of the economy and since women perform this labour for free in the home, in the market it is low status and consequently low paid (economic *and* status inequality).<sup>18</sup> Fraser argues that women’s position and other groups that simultaneously experience maldistribution and misrecognition harms can only be improved by

<sup>11</sup> John Rawls, *A Theory of Justice* (Harvard UP 1971); Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard UP 2000); Amartya Sen, *Inequality Re-examined* (Harvard UP 1992); Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP 2000).

<sup>12</sup> Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974); Friedrich Hayek, *The Constitution of Liberty* (Routledge 1960).

<sup>13</sup> Fraser and Honneth (n 7) 13.

<sup>14</sup> *ibid* 8.

<sup>15</sup> ‘Fight for Fairness: The Minister for Women and Equalities, Liz Truss, Sets Out the Government’s New Approach to Tackling Inequality across the UK’ (17 December 2020) <[www.gov.uk/government/speeches/fight-for-fairness](http://www.gov.uk/government/speeches/fight-for-fairness)> accessed 21 January 2021.

<sup>16</sup> UN Special Rapporteur on extreme poverty and human rights (n 1).

<sup>17</sup> Fraser and Honneth (n 7) 19, 48.

<sup>18</sup> Sandra Fredman, *Women and the Law* (OUP 1997) 241–5.

simultaneously addressing economic and status inequalities. The claims of lone mothers that the benefit reforms are discriminatory on the basis of gender and lone parenting is participating in the ongoing discourse on the interrelationship between economic and status inequalities.

### B. *Differing Accountability Routes*

Despite the synergies, there are diverging accountability routes for redressing different types of inequalities. Economic inequalities are primarily viewed as a political matter best suited for majoritarian politics, whereas status inequalities are a legal matter addressed through the anti-discrimination law.<sup>19</sup> Legal accountability is by-and-large reserved for claims that are based on prejudice and stereotyping. The accountability divide is also premised on the myth that status and economic claims can be fractured. It assumes that every claim for status equality can be adjudicated without touching upon economic inequalities and that all economic claims can be addressed without also considering status inequalities. This is an untenable assumption. The prime example is women's claims for equal pay, which invariably require courts to consider both status and economic inequality.<sup>20</sup>

There is no overarching reason to explain the reluctance of anti-discrimination law to recognise economic inequality; instead, a series of overlapping reasons offers the best explanation. First, the inability to demand that the state redress economic inequalities through well-established legal routes reflects ideological anxieties on the value of achieving economic equality, particularly through the hard edge of law.<sup>21</sup> Secondly, the intellectual history of equality law also plays an explanatory role. Poverty has not consistently been conceptualised as a matter for anti-discrimination law; rather, it was seen as a matter of development or politics.<sup>22</sup> Until quite recently, human rights, including the right to equality, were only conceived as placing negative duties upon the state.<sup>23</sup> Fredman observes that traditionally the right to equality simply operated to restrain prejudicial action.<sup>24</sup> Equality duties, as originally conceived, would have been incapable of redressing economic inequalities, which invariably require positive measures. Third, there are also concerns that the institutional design of courts leaves them ill-suited to adjudicate on claims for economic equality.<sup>25</sup> The argument goes that judges possess neither the

<sup>19</sup> Sandra Fredman, 'Redistribution or Recognition: Reconciling Inequalities' (2007) 23 SAJHR 214.

<sup>20</sup> *Fraser v Canada* (Attorney General) (2020) SCC 28 (Canadian Supreme Court).

<sup>21</sup> Cass Sunstein, 'Against Positive Rights' (1993) 2 EECR 35, 37; Samuel Moyn, *Not Enough* (Harvard UP 2018); Zachary Manfredi, 'Against "Ideological Neutrality": On the Limits of Liberal and Neoliberal Economic and Social Human Rights' (2020) 8 Lon Rev Int Law 287.

<sup>22</sup> Meghan Campbell, *Women, Poverty, Equality: The Role of CEDAW* (Hart Publishing 2018) ch 2.

<sup>23</sup> Sandra Fredman, *Human Rights Transformed* (OUP 2008).

<sup>24</sup> *ibid* 176.

<sup>25</sup> Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) Yale L J 1346; Paul Yowell, *Constitutional Rights and Constitutional Design* (Hart Publishing 2018).

democratic mandate nor the subject matter expertise to adjudicate economic inequality. Although there have been attempts to dismantle this accountability divide,<sup>26</sup> the role of equality law in redressing economic inequalities thus remains contentious.<sup>27</sup> The lone mothers' claims are also challenging the exclusion of economic equalities from legal redress.

### 3. *The Pennies and Pounds of Equality*

The claims of lone mothers that the benefit reforms are discriminatory brings to the fore these background debates on the nature of and accountability for inequality. Although the CA and UKSC ultimately held that the discrimination was justified, they concluded that the income inequality perpetuated by the benefits reforms was discriminatory against women. Lone mothers would not have the resources necessary to meet their basic needs. At first glance, this is a welcoming development, as the courts are framing the legal right to equality in terms of income. This appears to be breaking down accountability silos as courts are using anti-discrimination law to grapple with economic inequalities. However, this is an impoverished approach. The courts fail to grasp how status inequalities can infiltrate benefit reforms or how differing inequalities interact to create disadvantage. While appearing to challenge the assumption that equality can be fractured, in fact the court's analysis continues to segment inequalities.

First, in *SG and other v Secretary of State for Work and Pensions*, the lone mothers argued in the UKSC that the cap on the amount of benefits they are entitled to was indirectly discriminatory against women. On its face, the cap applied equally to women and men. In practice, is operated to reduce the level of benefits for those receiving a high level of support, namely non-working households with children. Most of these households were lone mothers. Thus, due to women's disproportionate role in care, women (60%) were more likely to be affected by the cap than men (3%).<sup>28</sup> The claim was brought under the HRA. The lone mothers argued that the cap interfered with their peaceful enjoyment of their possessions under article 1 of Protocol No 1 (A1P1) to the ECHR in a discriminatory manner contrary to article 14 of the ECHR. The conceptual links between benefits and property rights under A1P1 remains murky.<sup>29</sup> The government conceded the applicability of

<sup>26</sup> Fredman, *Human Rights Transformed* (n 23); UN Special Rapporteur on extreme poverty and human rights, 'Extreme Inequality and Human Rights' (2015) A/HRC/29/31; Shreya Atrey, 'The Intersectional Case of Poverty in Discrimination Law' (2018) 18 *Human Rights Law Review* 411.

<sup>27</sup> The continued resistance to using law in this context is best evidenced by the refusal of the UK government to bring into force s 1 of the Equality Act 2010 in England, which would create a legal duty requiring public authorities to have due regard to reducing inequalities resulting from socio-economic disadvantage.

<sup>28</sup> *SG* (n 4) [26], [61].

<sup>29</sup> This reflects larger concerns, discussed above, on human rights and the redistribution of material resources; Ingrid Leijten, 'The Right to Minimum Subsistence and Property Protection under the ECHR: Never the Twain Shall Meet?' (2019) 21 *European Journal of Social Security* 307.



A1P1.<sup>30</sup> The analytical focus was on whether there had been indirect discrimination in the application of the cap. Indirect discrimination under the ECHR is a ‘difference in treatment [that] may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group’.<sup>31</sup> This required the Court to examine the impact of a neutral law (the cap) on the lives of the protected group (lone mothers). In theory, this evaluation was meant to be highly contextual and take account of a wide range of impacts.<sup>32</sup>

The disproportionate prejudicial effects imposed by the cap, however, were framed purely in economic terms. Lady Hale explained that the ‘effect of the cap is stark as it breaks the link between benefit and need’.<sup>33</sup> Under the cap, lone mothers would struggle to house, feed, clothe and warm themselves and their children.<sup>34</sup> There was no reference to any other type of prejudicial effect. There was no engagement with gendered impacts beyond noting that women will mathematically suffer greater poverty. There was only a nod in the leading majority judgment to identity characteristics, as Lord Reed observed that the cap will disproportionately burden lone parents and ‘the great majority of [lone] parents are women’.<sup>35</sup> On the basis of poverty, the cap was found to be discriminatory, but a majority of the UKSC concluded that such discrimination was justified. The government’s justification was subject to minimal scrutiny because the impact of the reform was only understood in economic terms. The Court failed to grasp how stereotypes on women’s caring roles and the gendered structures of the labour market intensified their economic disadvantage. By seeing the interaction between status and economic inequalities, the Court’s analysis could have revealed discriminatory impacts which go beyond poverty.

Secondly, in *SC and others v Secretary of State for Work and Pensions*, the lone mothers, SC and CB, unsuccessfully challenged the two-child limit in the CA. SC’s fourth and CB’s fifth child were born after 6 April 2017 and, due to the reforms, they were no longer eligible to receive the child tax credit. Under the new regulations, individuals who had a third child after the cut-off date were not able to receive the credit, a means-tested subsistence benefit.<sup>36</sup> Their claim was based on article 14 of the ECHR read in conjunction with A1P1 and article 8 of the ECHR (right to private life). Specifically, that the access criteria to the credit were indirectly discriminatory against women. This should have prompted the CA to investigate the impact of the reform on the lives of lone mothers. However, similar to *SG*, the CA framed the impact of

<sup>30</sup> *SG* (n 4) [60].

<sup>31</sup> *DH v Czech Republic* (2008) 47 EHHR 3 [184] (ECtHR).

<sup>32</sup> For a comparative summary of the latest theory and doctrine of indirect discrimination, see *Fraser* (n 20).

<sup>33</sup> *SG* (n 4) [180].

<sup>34</sup> *ibid.* Lone mothers would be forced to live below the ‘median after-tax earnings of working households’.

<sup>35</sup> *ibid.* [61].

<sup>36</sup> Tax Credits Act 2002, s 9(3A) and (3B); Child Tax Credit (Amendment) Regulations 2017/387.

the two-child limit only in terms of economic inequality. Justice Leggatt accepted that there was indirect discrimination against women, as women were more likely to be lone parents and the limitation had a more severe effect on women's finances.<sup>37</sup> There was no engagement with any prejudicial attitudes on women, poverty and reproduction that underpin the two-child limit. Using the highly deferential MWRP test, the CA concluded that the income inequalities inherent in the two-child limit were not 'too high a price to pay' to achieve the government's aim of reducing welfare expenditure.<sup>38</sup>

Thirdly, lone parents can escape the pecuniary effects of the benefit cap if they obtain at least 16 hours of work per week.<sup>39</sup> In *DA and DS v Secretary of State for Work and Pensions*, the claimants argued in the UKSC that the work conditionality was discriminatory against lone parents with young children contrary to article 14 read together with article 8 of the ECHR. The work conditionality was designed to move individuals into work or to force them to economise within the household. The UKSC accepted that 'whatever the individual effects' of the work conditionality, it 'will strike at family life', and the claim fell within the ambit of article 8.<sup>40</sup> The core claim was that the application of the work conditions was indirectly discriminatory in the enjoyment of private life as the law fails to account for the caring obligations of lone parents. Unlike *SG* and *SC*, the role of gender was invisibilised as the claim was based not on gender, but on lone parenting. Although the Court acknowledged that 92% of lone parents were women and 65% of individuals affected by the benefit cap were lone mothers, there was no gendered analysis of the impact of the working conditionality.<sup>41</sup> To reflect the reality of the claimants' identity and the overwhelming fact that most lone parents are women, this article will refer to the claimants in *DA* as lone mothers. Under the impact analysis required for indirect discrimination, the Court again assessed the effect of the work conditionality in purely material terms. Lone mothers must either find work and childcare or must adjust their budget to live within the cap, which was acknowledged to push families below the poverty line.<sup>42</sup> Lord Wilson starkly explained the negative impacts of trying to live within the cap: move to cheaper accommodation, risk rent arrears, eviction, debt, going without food or heat.<sup>43</sup> But, again, the effects were framed exclusively as poverty. In *DA*, the majority of the Court also reverted back to the much-maligned conception of formal equality and implicitly rejected the lone mothers' claim of indirect discrimination. Formal equality seeks identical treatment between

<sup>37</sup> *SC* (n 4) [126]–[127].

<sup>38</sup> *ibid* [130].

<sup>39</sup> Regulation 4(1) of the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002/2005. Dual parents were required to work 24 hours to escape the cap.

<sup>40</sup> *DA* (n 4) [37].

<sup>41</sup> *ibid* [22(d)].

<sup>42</sup> *ibid* [37].

<sup>43</sup> *ibid*.

similarly situated individuals. The majority of the Court applied the lens of formal equality to the economic inequality imposed by the work conditions. Lone mothers were not being treated economically differently to any other person subject to the cap. Lone mothers and all persons whose benefits were capped equally experienced economic hardships, and the caring obligations of lone mothers was not a relevant factor that would justify treating them differently from everyone else.

#### 4. *Building a Bridge between Status and Economic Equality*

The courts were acutely aware that the benefit reforms push lone mothers into poverty, but only taking account of the economic impacts perpetuates a fragmented and impoverished vision of equality.<sup>44</sup> The judgments did not engage with how status inequalities shape the lives of lone mothers, nor with how the interaction of status and economic inequalities can create disadvantage, stigma and structural barriers, and marginalise voice. In part, this blindness is a symptom of the doctrinal developments of article 14 of the ECHR, where the bulk of the discrimination analysis is shifted to justification.<sup>45</sup> The ECtHR has been criticized for failing to articulate a model of equality that could grapple with the complexities raised in these cases.<sup>46</sup>

What is needed is a model that not only is sensitive to status inequalities, but, drawing on the insights of Fraser, can attend to both status and economic inequalities and the synergies between them. Substantive equality, particularly Fredman's four-dimensional model, gives the tools to unravel the nuanced interactions between differing types of inequalities. This article uses the four-dimensional model of substantive equality enriched with critical feminist insights on social benefits to re-examine the discrimination claims of lone mothers.<sup>47</sup> Although this model has not been officially adopted, it has been influential in the development of the Equality Act 2010 and accepted in international human rights law.<sup>48</sup> It is a high-precision analytical tool and can take account of the multifaceted ways inequalities manifest. The first dimension, redressing disadvantage, recognises that equality cannot be achieved solely through identical treatment, but disadvantage must be fully accounted for, and differential treatment may be required. It seeks to break cycles of disadvantage that cluster on groups that have historically been marginalised. As

<sup>44</sup> Collapsing the discriminatory impact into economic inequality is consistent with a line of reasoning in the UKSC. In *Re McLaughlin (Northern Ireland)* [2018] UKSC 48 [22], Lady Hale explained that 'there is no need for any adverse impact other than the denial of the benefit question'.

<sup>45</sup> *Thilimmenos v Greece* (2000) 31 EHRR 12 (ECtHR).

<sup>46</sup> Mjöll Arnardóttir, 'The Difference That Makes a Difference' (n 8).

<sup>47</sup> Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 ICON 712.

<sup>48</sup> Department of Communities and Local Government, 'A Framework for Fairness' (2007) [5.28]–[5.29] <<https://webarchive.nationalarchives.gov.uk/20120919212654/http://www.communities.gov.uk/documents/corporate/pdf/325332.pdf>> accessed 12 August 2020; UN Committee on Convention on the Rights of Persons With Disabilities, 'General Comment No 6: Equality and Non-discrimination' (2018) CRPD/C/GC/6.

Fredman observes, this dimension ‘is primarily aimed at socio-economic disadvantage’ of marginalised groups, which tracks closely with economic inequalities, but disadvantage can be more broadly drawn to ‘take on board the constraints which power structures impose on individuals’ because of their membership in marginalised groups.<sup>49</sup> The second dimension, tackling misrecognition, seeks to eliminate stereotyping and prejudice and promote the worth of all individuals. This maps with the status equalities, as it holds that ‘individuals should not be humiliated or degraded through ... status-based prejudice’.<sup>50</sup> The third dimension, enhancing inclusion and voice, seeks to amplify marginalised voices in all decision making. This reflects on Fraser’s theory of justice, which holds that both status and economic inequalities must be remedied to ensure parity in participation.<sup>51</sup> And the fourth dimension, accommodating difference and structural change, seeks to dismantle structures that have been constructed on dominant norms and transform institutions so that difference is not only accommodated but valorised. One of the strengths of the four-dimensional approach is that it can ‘address the interaction between different facets of inequality’.<sup>52</sup> It specifically recognises that the dimensions may be in tension, but rather than exclusively pursuing one dimension at the cost of others, the aim is to find a harmonious synthesis. This is of crucial importance in capturing the entwined nature of status and economic inequalities. This model is employed below to argue that the effects of the benefit reforms cannot be exclusively equated to poverty.

### A. *The Disadvantage Dimension*

The great insight from substantive equality is that equality law does not require identical treatment. The first dimension is ‘expressly asymmetric’<sup>53</sup> and recognises that, due to historical, political, economic, legal and cultural forces, disadvantage clusters on specific groups such as women and, even more particularly, lone mothers. The concept of disadvantage is broad and, as Fredman argues, it accounts not only for poverty, but for power imbalances that trap women in poverty.<sup>54</sup> Equality law should not be blind to this antecedent disadvantage but seek to break it. This contextual blindness is pronounced in *DA*. The case is analysed on the basis of lone parenthood. The gender dimensions of having to seek at least 16 hours of work per week to escape the cap is stripped out. This ignores the identity characteristics of the claimants, who are women, lone parents and on benefits. It also renders invisible the larger context that 90% of lone parents are women, and that 65% of

<sup>49</sup> Fredman, ‘Substantive Equality Revisited’ (n 47) 729.

<sup>50</sup> *ibid* 730.

<sup>51</sup> Fraser and Honneth (n 7) 38.

<sup>52</sup> Fredman, ‘Substantive Equality Revisited’ (n 47) 728.

<sup>53</sup> *ibid*.

<sup>54</sup> *ibid* 729.

all capped households are lone mothers.<sup>55</sup> As Atrey argues, this reflects a ‘misconception of the nature of [disadvantage] as unidimensional ... rather than one [that is] composed of several cross-cutting disadvantages at the same time’.<sup>56</sup> The unidimensional focus in *DA* means that the Court does not see any pre-existing disadvantage for lone mothers on benefits. Thus, there is no basis to treat lone mothers differently than all other individuals subject to the cap, and requiring them to seek paid work is not regarded as perpetuating inequality.

The disadvantage dimension, on the other hand, places lone mothers at the centre of the analysis. Lord Kerr, in dissent in *SG*, observes that ‘a mother’s personality, the essence of her parenthood, is defined not simply by her gender but by her role and responsibility as a carer of her children, particularly when she is a lone parent’.<sup>57</sup> Gender and lone parenting are inextricably at stake in the claims of lone mothers experiencing discrimination in the benefit system. The disadvantage dimension points towards accounting for the relationship between poverty and gendered care work when evaluating the impact of the benefit reforms.<sup>58</sup>

Lone mothers in the UK are more likely to live in poverty and to be excluded from the labour market.<sup>59</sup> This, as Lord Reed acknowledges in *SG*, is because lone mothers take greater responsibility for children.<sup>60</sup> A substantive equality approach to social benefits would seek to redistribute this disproportionate burden of care. Instead, the current approach does not alleviate disadvantage but piles burdens on lone mothers in poverty. They must now perform unpaid work within the home *and* paid work outside of the home or face the punitive poverty imposed by the cap. This does little to redistribute care work away from the shoulders of lone mothers. The work conditionalities do not take account of the fact that lone mothers cannot take on paid work in the same way as men, who generally have fewer caring responsibilities.<sup>61</sup> The design of the benefit cap operates to increase, and in essence punish, the existing disadvantages on lone mothers.

In response, the government pointed out that there were a series of entitlements to childcare.<sup>62</sup> The Parliamentary Work and Pensions Committee, however, was critical of the provision of childcare under UC. The system was plagued with administrative difficulties that acted to increase women’s poverty and was not at a sufficient level to match the skyrocketing costs of obtaining

<sup>55</sup> *DA* (n 4) [22(d)].

<sup>56</sup> Atrey (n 26) 415.

<sup>57</sup> *SG* (n 4) [264].

<sup>58</sup> Sandra Fredman, *Discrimination Law* (2nd edn, Clarendon Press 2011) ch 1.

<sup>59</sup> Women’s Budget Group, ‘The Female Face of Poverty’ (2018) <<http://wbg.org.uk/wp-content/uploads/2018/08/FINAL-Female-Face-of-Poverty.pdf>> accessed 8 September 2020.

<sup>60</sup> *SG* (n 4) [14].

<sup>61</sup> Kate Andersen, ‘Universal Credit, Gender and Unpaid Childcare: Mothers’ Account of the New Welfare Conditionality Regime’ (2019) *Critical Social Policy* 1, 13.

<sup>62</sup> *DA* (n 4) [27].

childcare.<sup>63</sup> In January 2021, the High Court ruled that the system for claiming childcare expenses under UC was discriminatory against women because it disproportionately caused women to be financially and psychologically worse off.<sup>64</sup> The report of the Parliamentary Committee and the recent case law demonstrate that the public provision of care is an illusion. In reality, the burdens of care firmly remain with lone mothers, and are now combined with the additional burdens of paid work or greater poverty. Rather than framing the harsh economic impact of the benefit cap as ‘inevitable’, as the Court did in *SG*, it is the result of treating lone mothers as identical to other groups and failing to appreciate antecedent disadvantage.<sup>65</sup> Lone mothers, because of their care responsibilities, will struggle more than other groups to meet the work conditionalities.

## B. Recognition Dimension

The recognition dimension seeks to combat the prejudice and stereotypes that legally attach to identities. The narrow focus on economic inequality in these reforms erases the role of gender and poverty-based stereotypes in legal responses to poverty. There are three overlapping stereotypes at play: (i) poverty as a moral failing; (ii) disciplining the sexuality of women in poverty; and (iii) the devaluation of care work.

### (i) Poverty as a moral failing

Under neoliberalism, poverty is emphasised as a matter of personal responsibility and individualised moral failing.<sup>66</sup> Conditionalities on access to benefits become tools to discipline wayward individuals who do not participate in the paid workforce.<sup>67</sup> The cultural stigmas attached to poverty are further evidence of the intermeshing of status and economic inequalities, and the recognition dimension of substantive equality is well placed to identify these connections. Poverty-based stereotypes also have strong gender and racial dimensions. Women in poverty, especially Black and minority ethnic women, are demonised for their unmarried status, presumed loose morals and laziness.<sup>68</sup> For decades, these stereotypes have shaped legal responses to the poverty of lone mothers.<sup>69</sup>

<sup>63</sup> Work and Pensions Committee, *Universal Credit: Childcare* (HC 2017–19, 1771).

<sup>64</sup> *Salvato v Secretary of State for Work and Pensions* [2021] EWHC 102 [145]–[166].

<sup>65</sup> *SG* (n 4) [61], [76], [91].

<sup>66</sup> Julie Dehm, ‘Highlighting Inequalities in the Histories of Human Rights’ (2018) 31 *LJIL* 871.

<sup>67</sup> Janet Mosher, ‘Intimate Intrusions’ in Shelley Gavigan and Dorthoy Chunn (eds), *The Legal Tender of Gender* (Hart Publishing 2010).

<sup>68</sup> Ann Cammett, ‘Deadbeat Dads and Welfare Queens: How Metaphor Shapes Poverty Law’ (2014) 34 *Boston College Journal of Law and Social Justice* 233, 237.

<sup>69</sup> Bridgette Baldwin, ‘Stratification of the Welfare Poor: Intersections of Gender, Race and ‘Worthiness’ in Poverty Discourse and Policy (2019) 6 *Modern American* 4.

The government's explanation for bringing the cap into force reflect stereotypes of lone mothers as benefit scroungers. The Equality Impact Assessment for the cap explains that it was 'intended to reverse "the disincentive effects and detrimental impacts of benefit dependency"'.<sup>70</sup> Similarly, the government's Spending Review characterises the benefit system as trapping lone mothers into welfare dependency.<sup>71</sup> Lord Hughes explains in *SG* that the cap is meant to discourage benefit dependence.<sup>72</sup> The language of 'dependency' evokes images of indolence or poor work ethic. Fraser and Gordon, in their historical mapping of the use of 'dependency' in welfare discourse, observe that as the value of independence emerged with the rise of industrial capitalism and became equated with waged work, not working and depending on the state became and remains coded as a deviant individual character flaw.<sup>73</sup> Social benefits for non-working dependants then become a form of welfare decadence.<sup>74</sup> In *SG*, Lord Reed repeatedly emphasises that lone mothers will be stigmatised by the community if they receive too much income support.<sup>75</sup> This implicitly acknowledges that the benefit cap is in place in response to perceived stereotypes of lone mothers as 'welfare queens'. Relying on the stereotype that poverty is the result of individual laziness, lone mothers need the 'stick' of the cap. The personal irresponsibility of lone mothers is in fact regarded as so engrained that only severe financial disincentives can motivate them into paid work. This approach to poverty is highly moralistic, paternalistic and ultimately stigmatic.

There are similar stereotypes at play in *SC*. The government argues that it is unfair that lone mothers 'should be able to have as many children as they choose ... without limit' and 'be subsidised out of public expenditure'.<sup>76</sup> Justice Leggatt queries 'how much additional financial support should [lone mothers] receive from other taxpayers?'<sup>77</sup> And later he wonders how fair it is to 'impose' on society the costs that lone mothers on benefits accrue in the care of their children.<sup>78</sup> The unspoken assumption operating behind the fairness rationale for the two-child limit is that lone mothers are benefit-suckers who need to be prevented from living an extravagant lifestyle on public resources.<sup>79</sup> The benefit reforms perpetuate stereotypes rather than modify them.

<sup>70</sup> *SG* (n 4) [26].

<sup>71</sup> *ibid* [20].

<sup>72</sup> *ibid* [137].

<sup>73</sup> Nancy Fraser and Linda Gordon, 'The Genealogy of Dependency: Tracing a Keyword of the US Welfare State' (1994) 19 *Signs* 309.

<sup>74</sup> Charlotte O'Brien, "'Done Because We Are Too Menny": The Two-Child Rule Promotes Poverty, Invokes a Narrative of Welfare Decadence and Abandons Children's Rights' (2018) 26 *International Journal of Children's Rights* 700, 706.

<sup>75</sup> *SG* (n 4) [33], [66].

<sup>76</sup> *SC* (n 4) [24], [27].

<sup>77</sup> *ibid* [140].

<sup>78</sup> *ibid* [156].

<sup>79</sup> This does not match the empirical evidence demonstrating that lone mothers do want to work but are constrained by gender structural barriers; Andersen (n 61); Work and Pensions Committee, *Childcare* (n 63).

They further the myth that the poverty of lone mothers is solely the result of their poor moral character.<sup>80</sup>

There is a further manifestation of poverty as a moral failing in these cases, and this comes through in the government's effort to cushion the economic impact of the cap. In defending the cap, the government explained that the staff at Jobcentre Plus would provide assistance in accessing childcare, 'negotiating rent reductions with private landlords together with advice on housing options and household budgets'.<sup>81</sup> Ultimately, as the government observed, 'working people on low incomes had to cope with difficult circumstances, and they had to live within their means'.<sup>82</sup> The government's attitude and mitigating efforts suggest that lone mothers live in poverty because they are incapable of making good budgetary decisions. This individualises the responsibility for poverty and ignores its structural roots. The Divisional Court, however, acknowledges that the financial impact of the cap means that the 'sums are too great to bring finances under control by prudent housekeeping'.<sup>83</sup> Lady Hale, in dissent in *SG*, comes to a similar conclusion: the impact of the cap cannot be mitigated by individual action.<sup>84</sup> In a similar vein, in *SC*, the government's repeated explanation for the two-child limit is to encourage women 'to reflect carefully on their readiness to support an additional child'.<sup>85</sup> If the law allowed the lone mothers in the case to claim benefits for more than two children, this 'removes the need for [them] to consider whether they can afford to support additional children'.<sup>86</sup> Again, this is based on assumptions that poverty is the result of financial incompetence and that lone mothers do not reflect on crucial life decisions unless financial pressure is brought to bear on them. The courts do not unearth any of these stereotypes. Substantive equality requires that the legal architecture of the benefit system does not blame or shame individuals for poverty or assume it is explained by individualised moral failings.<sup>87</sup>

### (ii) *Disciplining women in poverty's sexuality*

Threaded throughout the government's reforms are stigmas against the sexuality and reproduction of women in poverty. Women in poverty are characterised as sexually promiscuous and/or having too many children, particularly lone mothers. This links to stereotypes on 'benefit broods', where women in

<sup>80</sup> Martha Jackman, 'One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin' (2019) 39 NJCL 85.

<sup>81</sup> *SG* (n 4) [54].

<sup>82</sup> *ibid* [35].

<sup>83</sup> *ibid* [206].

<sup>84</sup> *ibid* [199]–[207].

<sup>85</sup> *SC* (n 4) [23].

<sup>86</sup> *ibid* [17].

<sup>87</sup> Siobhan Harding, 'The Impact of Universal Credit on Women' (Consortium for the Regional Support for Women in Disadvantaged and Rural Areas 2020) <[www.womensregionalconsortiumni.org.uk/sites/default/files/The%20Impact%20of%20Universal%20Credit%20on%20Women%20\(1\).pdf](http://www.womensregionalconsortiumni.org.uk/sites/default/files/The%20Impact%20of%20Universal%20Credit%20on%20Women%20(1).pdf)> accessed 22 September 2020.



poverty have children to ‘secure greater amounts of welfare’.<sup>88</sup> In *SC*, the government denies that the aim of the two-child limit is to control reproduction. However, under the substantive equality evaluation, the government’s aims are not relevant. The analytical focus is on impacts. While there is no evidence on whether the two-child limit is impacting decisions on reproduction,<sup>89</sup> the recognition dimension acknowledges that harms can be expressive. The two-child limit expresses a negative value towards women in poverty reproducing. The strength of the stereotype is evident in that it is relied upon to oppose the two-child limit. One Member of Parliament asked how it would be fair to condemn the third or fourth child to a life of poverty because of a ‘reckless mother who cannot keep her legs crossed’.<sup>90</sup> This is a graphic and highly prejudicial image. It paints women in poverty as sexually promiscuous and immoral, and gives credence to measures that stop them from reproducing through negative financial incentives.<sup>91</sup>

The role of the two-child limit in controlling women’s sexuality is even more apparent when assessing its exceptions. If a woman can prove that the third child is the result of sexual violence, she is entitled to claim the credit (the ‘rape clause’).<sup>92</sup> Only women who are victims of sexual violence are deemed worthy to make claims upon the state to receive the benefit for all of their children. This falls back on tropes of deserving/undeserving poor, and for women their level of worth is connected to their sexuality. This exemption was not directly subject to judicial review, but neither was it used to uncover the sexual myths that permeate the two-child limit. Although the CA attempts to sidestep this issue,<sup>93</sup> the recognition dimension reveals that the two-child limit is based on stereotypes related to the sexuality and reproduction of women who live in poverty. The law concretises these stigmas. It becomes an instrument of discipline by yielding patriarchal controlling force over women’s reproductive choices.

### (iii) *Devaluation of care work*

Lastly, the benefit cap and work conditionalities are based on stereotypes that devalue care work performed for free within the home. The lone mothers in all of these claims have primary responsibility for the care of their children.<sup>94</sup> The provision of unpaid care to their own children does not activate entitlements to support from the state. Only those who are economically productive are deemed worthy. The lone mother’s value is conditional upon performing

<sup>88</sup> Tracey Jensen with Imogen Tyler, *Parenting the Crisis: The Cultural Politics of Parental Blame* (Policy Press 2018).

<sup>89</sup> Work and Pensions Committee, *Two-Child Limit* (HC 2017–19, 1540) [8]–[21].

<sup>90</sup> *SC* (n 4) [154] (emphasis added).

<sup>91</sup> From an intersectional perspective, this is also problematic as family size can have a deeply religious and cultural value for different communities; Work and Pensions Committee, *Two-Child Limit* (n 89) [15].

<sup>92</sup> Child Tax Credit (Amendment) Regulations 2017/387.

<sup>93</sup> *SC* (n 4) [30], [34].

<sup>94</sup> *SG* (n 4) [170], [174]; *DA* (n 4) [10]–[11].

paid work. Lord Reed in *SG* explains ‘long-term unemployment is socially undesirable . . . it is therefore important to make efforts to assist those capable of working to find work: efforts which can include the removal of financial disincentives’.<sup>95</sup> This equates work exclusively with paid work and ignores the labour inherent in unpaid caring work. There is an assumption on the value of employment, discussed further below, and an unspoken contempt for ‘those who care for dependents [sic]’.<sup>96</sup> Fraser and Gordon argue that the stigmatisation of care work is connected to myths on poverty as a moral failing, as welfare policies venerate independence through waged work and vilify of all forms of dependency.<sup>97</sup> Lone mothers on benefits are doubly vilified as they are dependent on the state benefits and provide non-monetised dependent care. Andersen found that mothers living under UC reported that the system does not properly account for the effort, skill and responsibility ‘involved in carrying out unpaid childcare’.<sup>98</sup> The benefit cap and work conditionalities lead to a paradox. Andersen observes that lone mothers caring for their own children attract the punishment of the benefit cap, but lone mothers caring for other people’s children in the market economy are rewarded.<sup>99</sup> The work conditionalities ignore the fact that the lone mothers in these cases are performing socially valuable work in the caring of their own children. Only Lady Hale, in dissent in *DA*, outlines the value of care work.<sup>100</sup> The recognition dimension of substantive equality demands that the social benefits scheme ‘attach the proper value to caring and the unpaid work that it entails’.<sup>101</sup>

### C. Participation and Voice

The participation dimension recognises that ‘given that past discrimination [has] blocked the avenues for political participation . . . equality laws are needed both to compensate for this absence of political voice and to open up channels for greater participation’.<sup>102</sup> The voice of lone mothers in poverty—the group that disproportionately experiences the hardships of the benefit reforms—is absent.<sup>103</sup> The government assessed the potential impacts of the cap on protected groups, including women, in an Equality Impact Assessment (EIA). In the EIA, which is only 14 pages long, there is no evidence of

<sup>95</sup> *SG* (n 4) [65], [135].

<sup>96</sup> Fraser and Gordon (n 73) 326.

<sup>97</sup> *ibid.*

<sup>98</sup> Andersen (n 61).

<sup>99</sup> *ibid.*

<sup>100</sup> *DA* (n 4) [142].

<sup>101</sup> Sandra Fredman, ‘Whistling in the Wind: Gender Equality and Article 14 of the ECHR in the UK Supreme Court’ in Rosemary Hunter and Erika Rackley (eds), *The Jurisprudence of Lady Hale* (CUP forthcoming).

<sup>102</sup> Fredman, ‘Substantive Equality Revisited’ (n 47) 732.

<sup>103</sup> There is a lack of voice in the judgments. The majority judgment in *SG* does not make any reference to the circumstances of the claimants; it is not until paragraph 169, in Lady Hale’s dissent, that there is any explanation of the claimants’ circumstances. In *DA* (n 4) [10], [11], there are two brief paragraphs in the lead judgment that briefly sketch the relationship status of the 16 claimants and the age of their children.

consulting with lone mothers. There is only a vague mention that ‘many people ... suggest that there should be a benefit cap’.<sup>104</sup> Notably, the EIA only frames the gender equality impact in economic terms and does not meaningfully engage with status inequality. When the two-child limit was introduced, the government was criticised for initially failing to conduct an EIA.<sup>105</sup> This EIA is no longer publicly available, but the portions cited in *SC* make no reference to consulting with women.<sup>106</sup>

The exclusion of lone mothers in decision making that directly affects their day-to-day lives is mirrored by extensive elite political consultation. In *SG*, *SC* and *DA*, the courts list in microscopic detail the numerous political debates in Parliament and government reports. The degree of high-level political scrutiny is used by the courts to justify judicial deference, discussed further in section 5.<sup>107</sup> However, the participation of lone mothers—those most affected by the changes—is absent from the elite political participation. Consultation with lone mothers could not only enhance the responsiveness of benefit reforms, but also facilitate agency by designing a social benefit system that supports women’s choices on reproduction and labour force participation. Substantive equality prompts the government to meaningfully consult not only with privileged groups, but also with lone mothers when proposed changes to benefits are going to acutely impact them.

#### D. *Structural Dimension*

The structural dimension of substantive equality requires that ‘existing social structures must be changed to accommodate difference rather than requiring [women] to conform to the dominant [male] norm’.<sup>108</sup> The design of social benefits must respect women’s different life patterns and choices, as well as the structural gendered constraints on women’s choices. The courts are blind to the structural inequalities in the benefit cap and work conditionalities. In part, this links to dominant narratives outlined above that poverty is a personal failing and that economic success is the meritorious reward for hard work.<sup>109</sup> In the EIA, on the benefit cap, the government identified barriers to participation in paid work that are highly individualised: confidence, educational achievement and low skills level. The reality, as Lady Hale in dissent acknowledges, is more complicated.

<sup>104</sup> Department for Work and Pensions, ‘Benefit Cap:Equality Impact Assessment’ (2012) <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/220153/eia-benefit-cap-wr2011.pdf> accessed 10 May 2021.

<sup>105</sup> Steven Kennedy, Alex Bate and Richard Keen, ‘The Two Child Limit in Tax Credits and Universal Credit’ (2017) House of Common Library Briefing Paper No 7935, 10.

<sup>106</sup> *SC* (n 4) [17], [18], [23], [131].

<sup>107</sup> *ibid* [158]; *SG* (n 4) [96], [122]; *DA* (n 4) [88], [95], [120].

<sup>108</sup> Fredman, *Discrimination Law* (n 58) 30.

<sup>109</sup> Jensen with Tyler (n 88).

The benefit cap and work conditionalities fail to account for intersecting structural gender barriers in the labour market. Lone mothers must secure at least 16 hours of work per week to escape the benefit cap. In *SG*, Lady Hale explains that this means that lone mothers must balance work with the daily tasks of delivering and collecting children from schools and day-care placements, coupled with the inevitable challenges that arise from illness, accidents, school closures and arranging care over the holidays.<sup>110</sup> She concludes in *DA* that many lone mothers ‘will face considerable difficulties in finding suitable work that will fit in with her childcare arrangements’.<sup>111</sup> This conclusion is borne out by the empirical evidence: only 48.4% of lone mothers with children under two are employed.<sup>112</sup> Work conditionalities are still built upon a male model of an autonomous individual divorced from caring relationships. The government argues in both *SG* and *DA* that the law does account for women’s different life patterns, as lone mothers are required to work fewer hours per week than dual parents.<sup>113</sup> This is at best a partial acknowledgement of how the male breadwinner model operates to disadvantage women. Lone mothers are at the heart of a web of dependent relationships.<sup>114</sup> The design of benefits must be structured around the reality of care. The House of Lords Economic Affairs Committee came to the same conclusion, holding that the entire system of UC, including the benefit cap and work conditionalities, is ‘designed and implemented . . . around an idealised claimant’.<sup>115</sup>

On top of the logistical battle of balancing work and care, lone mothers must also secure affordable childcare. Due to the constraints on their time and deep-seated prejudices on the competency of working mothers,<sup>116</sup> women, and lone mothers in particular, struggle to access high-paying jobs.<sup>117</sup> Lone mothers are more prevalent in low-skill employment than mothers in a relationship.<sup>118</sup> This is the paradigm example of status and economic inequality operating in tandem to trap women in webs of structural oppression. Mantouvalou demonstrates that the work conditionality regime channels all people into exploitative work.<sup>119</sup> This is particularly pronounced for women, who already cluster into this type of employment. Lone mothers also suffer a greater gender pay gap.<sup>120</sup> These gendered structural barriers mean lone

<sup>110</sup> *SG* (n 4) [182].

<sup>111</sup> *DA* (n 4) [145]; Harding (n 87).

<sup>112</sup> Women’s Budget Group (n 59).

<sup>113</sup> *SG* (n 4) [19], [26]; *DA* (n 4) [86].

<sup>114</sup> *SG* (n 4) [264].

<sup>115</sup> House of Lords Economic Affairs Committee, ‘Universal Credit Isn’t Working: Proposals for Reform’ (HL 2019–21, 105) 3.

<sup>116</sup> Cecilia Ridgeway and Shelley Correll, ‘Motherhood as a Status Characteristic’ (2004) 60 *Journal of Social Issues* 683.

<sup>117</sup> Women’s Budget Group (n 59).

<sup>118</sup> *ibid.*

<sup>119</sup> Virginia Mantouvalou, ‘Welfare-to-Work, Structural Injustice and Human Rights’ (2020) 83 *MLR* 929.

<sup>120</sup> Trade Union Congress, ‘The Motherhood Pay Penalty’ (2016) <[www.tuc.org.uk/sites/default/files/MotherhoodPayPenalty.pdf](http://www.tuc.org.uk/sites/default/files/MotherhoodPayPenalty.pdf)> accessed 22 September 2020.

mothers have significantly less resources needed to obtain childcare. The Parliamentary Committee powerfully illuminates that the low wages and high childcare costs make it mathematically impossible for lone mothers to escape the cap through work in the paid labour force.<sup>121</sup> Only Lady Hale, in *DA*, takes account of these structural barriers, observing that childcare is ‘in short supply and very expensive’.<sup>122</sup> Childcare workers are also invariably poorly paid and predominantly women. Bringing together status and economic inequalities, the care economy perpetuates gender oppression in the labour market.<sup>123</sup> The absence of good-quality jobs and a lack of affordable childcare are insurmountable obstacles to lone mothers accessing the labour force, and if the lone mother can obtain childcare, it may contribute to the oppression of other women. The benefit cap and work conditionalities are designed for lone mothers to fail.

With a richer understanding of the impact on lone mothers, through the prism of Fredman’s four-dimensional model, it becomes clear that the reforms exacerbate the disadvantage shouldered by lone mothers; are based on pernicious stereotypes of lone mothers’ responsibility for their own poverty and the value of care work; continue to render invisible and exclude lone mothers from political and social participation; and are blind to gender structures in the labour market that are oppressive to lone mothers. The income poverty of the benefit reforms is an intertwined helix with gender status harms, as revealed by a robust substantive equality analysis.

### 5. *Using Substantive Equality to Rebalance Justification*

Notwithstanding the fact that it is artificial to divorce economic and status inequalities in the claims raised by lone mothers, the courts all conclude that the poverty of the reforms is *prima facie* discriminatory. Article 14 of the ECHR nevertheless permits discriminatory distinctions to be justified. In these cases, the government argued that the discrimination in the benefit reforms was justified due to the strength of its aims of generating fiscal savings, incentivising paid work and creating a fair benefit system. In *SG*, *SC* and *DA*, the courts accepted the government’s reasoning, although Lady Hale and Lord Kerr in *SG* and *DA* rejected that the discriminatory reforms could be justified. The myopic focus on economic inequality, discussed above in section 3, resulted in a flawed application of the justification analysis. This final section explores how fully accounting for the entwined nature of economic and status inequality through the prism of substantive equality can fruitfully shape the approach to justification. Before embarking on this analysis, as a caveat, this section is not a wholesale critique of the justification evaluation in these cases.

<sup>121</sup> Work and Pensions Committee, *Childcare* (n 63).

<sup>122</sup> *DA* (n 4) [144].

<sup>123</sup> Lydia Hayes, *Stories of Care: A Labour of Law-Gender and Class at Work* (Palgrave 2017).

It narrowly focuses on how a holistic approach to equality can resolve tensions in the case law on calibrating the degree of deference and how it can provide the required contextual backdrop in which to interrogate the proportionality of the benefit reforms.<sup>124</sup>

### A. Degree of Deference

The degree of deference that the courts should employ when reviewing government action is sensitive to the matrix of the case.<sup>125</sup> In determining if the discrimination is justified, the concept of equality should play a pivotal role in calibrating the level of scrutiny. The misunderstanding of the claims as being purely economic inequality thus wrongly calibrates the degree of deference. This subsection marks out the majorities' errors in using a fragmented model of equality to justify an overly deferential standard of review and then demonstrates how greater attention to the specific context of the case, namely the interlocking inequalities perpetuated by the reforms, can assist in pinpointing a higher level of scrutiny.

The degree of deference the government is entitled to when reforming social benefits law is at the heart of the tensions between the majority and minority decisions in *SG* and *DA*. The debate turns on the appropriate test for justification: manifestly without reasonable foundation (MWRF) or proportionality. Under MWRF, used by the majority in the UKSC and CA, the 'court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation"'.<sup>126</sup> In dissent, Lady Hale and Lord Kerr adopt the proportionality test. While the debate continues in administrative law on the use of proportionality,<sup>127</sup> it is well established under the HRA. The dissenting judgments broadly use the proportionality framework structure articulated in *Bank Mellat*.<sup>128</sup> This test evaluates whether:

- (1) the government's objectives are sufficiently important to justify limiting the individual's rights;
- (2) the measure are rationally connected to the government's objectives in bringing in these benefit reforms;
- (3) a less intrusive measure could have been used; and
- (4) having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.<sup>129</sup>

<sup>124</sup> Guy Lurie, 'Proportionality and the Right to Equality' (2020) 21 German Law Journal 174.

<sup>125</sup> Sujit Choudhry, 'So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1' (2006) 34 SCLR (2d) 501.

<sup>126</sup> *Ste v United Kingdom* (2006) 43 EHRR 1017 (ECtHR).

<sup>127</sup> Hanna Wilberg and Mark Elliot (eds), *The Scope and Intensity of Substantive Review* (Hart Publishing 2015).

<sup>128</sup> *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38; this test draws heavily on *R v Oakes* [1986] 1 SCR 103 (Canadian Supreme Court).

<sup>129</sup> *ibid* [20]; *DA* (n 4) [172].

The unarticulated background question that motivates the deference debate revolves back to the fracturing of accountability for economic and status inequalities. Status inequalities have been addressed through discrimination law. Under the ECHR, certain grounds, such as gender, have historically attracted a high degree of scrutiny through a rigorous application of the proportionality test.<sup>130</sup> Economic inequalities, on the other hand, have been primarily addressed through the political process; in adjudicating claims that touch upon economic policy, the courts have adopted a low level of scrutiny. As discussed in section 2, there are overlapping reasons for these diverging accountability paths. The institutional design of courts is particularly relevant as the UKSC and CA rely on these arguments to justify employing a high degree of deference, thus it is worth examining this rationale in more detail. First, the institutional design of the court, these judgments maintain, means that courts does not have the democratic mandate to make binding decisions on fiscal policy.<sup>131</sup> Second, benefit reforms are often made using incomplete and contradictory social science, and courts are poorly equipped to adjudicate upon this type of evidence.<sup>132</sup> Lord Carnwath makes this observation in *DA*.<sup>133</sup> Third, the entire benefit system is connected to a polycentric web of policies and programmes. The narrow frame of adversarial litigation means a decision on one thread can distort and inadvertently do damage to the entire web.<sup>134</sup> Due to the strength of these reasons, it is believed to be inappropriate for the court to rigorously interrogate any allocation of resources, and the government is entitled to a high degree of deference through MWRF.<sup>135</sup> There are persuasive and well-known responses to these critiques.<sup>136</sup> The aim here is not to recanvas these responses, but is much narrower: to demonstrate that the UKSC and CA's invocation of these arguments on the limited role of the court rests on an untenable assumption about the nature of the inequalities perpetuated by the reforms.

By collapsing the prejudicial impact of the benefit reforms exclusively into economic inequality, the majority of the UKSC and CA are highly sceptical of the role of the court and draw on the arguments outlined above to explain that scepticism. In *SG*, Lord Reed holds that 'certain matters are by their nature more suitable for determination by Government or Parliament than by the courts'.<sup>137</sup> Economic policy, he goes on, is 'pre-eminently the function of democratically elected institutions'.<sup>138</sup> The benefit cap is 'a matter of political

<sup>130</sup> *JD and A v UK* (2019) App nos 32949/17 and 34614/17 (ECtHR).

<sup>131</sup> Waldron (n 25).

<sup>132</sup> Yowell (n 25).

<sup>133</sup> *DA* (n 4) [123].

<sup>134</sup> Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv L Rev 353.

<sup>135</sup> Fredman, 'Redistribution or Recognition' (n 19).

<sup>136</sup> John Hart Ely, *Democracy and Distrust* (Harvard UP 1981); Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2012); Fredman, *Human Rights Transformed* (n 23).

<sup>137</sup> *SG* (n 4) [92].

<sup>138</sup> *ibid* [93].

judgment' and 'it is not the function of the courts to determine how much public expenditure should be devoted to welfare benefits'.<sup>139</sup> Unsurprisingly, he concludes that the Court must be highly deferential to the decisions of the democratically elected institutions. There are echoes of this in *DA*. Lord Carnwath explains that the political branches of the 'constitution [must have] an appropriately generous measure of leeway ... concerning economic and social policy'.<sup>140</sup> In applying MWRF, he concludes that the impact of the cap is 'undoubtedly harsh', but that harshness has been 'approved by Parliament'.<sup>141</sup> Restricting access to benefits is a political question and accountability must be in the 'political rather than legal arena'.<sup>142</sup> The CA in *SC* similarly holds that 'courts are not attuned [to] ... where the balance of fairness lies on questions of distributive justice'.<sup>143</sup> It is not for the court to question whether different budgetary choices could have been made; to do otherwise 'would make considerable incursions into the exclusive territory of Parliament'.<sup>144</sup> Consequentially, the majority judgments of the UKSC in *SG* and *DA* and the CA in *SC* at the justification stage employ the light-touch MRWF.

The rationales for using the deferential MRWF, however, rest upon a shaky foundation, as it is based on a flawed understanding of the inequalities perpetuated by the reforms. As argued in section 4, there are multiple inequalities raised by the claims of lone mothers. The reforms perpetuate not only income poverty, but also stereotyping and stigmas. They devalue care work, are inattentive to lone mothers' antecedent disadvantage, marginalise the voice of lone mothers and are blind to gendered structural barriers in the labour market. The watertight division between status and economic inequality employed by the courts masks a different reality. The four-dimensional model of substantive equality reveals a synergistic relationship between differing types of inequality which should point towards a more searching justification standard. The rationale for an overly deferential approach crumbles away when the substantive equality analysis unearths how gendered status inequalities seep into decision making on economic policy. Gender status harms, even in the realm of benefits, are solidly within the purview of legal accountability via discrimination law.

The courts offers two further rationale for using the MRWF test that also do not withstand close scrutiny. First, in *Carson v UK*, the ECtHR held that, in contrast with a regional court, national authorities are better placed to make decisions in economic policy.<sup>145</sup> The ECtHR will respect the national authorities' choice unless it is MWRF. Lord Kerr, in dissent in *DA*, correctly

<sup>139</sup> *SG* (n 4) [69], [72].

<sup>140</sup> *DA* (n 4) [95], [118].

<sup>141</sup> *ibid* [120].

<sup>142</sup> *SG* (n 4) [133].

<sup>143</sup> *SC* (n 4) [158].

<sup>144</sup> *ibid* [128]–[130].

<sup>145</sup> *Carson v UK* (2010) 51 EHRR 369 [61] (ECtHR).



questions whether a standard developed in the context of a regional court, where different institutional concerns arise, should be transplanted wholesale into review by a national court.<sup>146</sup> Unlike the ECtHR, UK courts do have the requisite level of knowledge and constitutional competence as they are part of the fabric of the ‘national traditions and institutional culture’.<sup>147</sup> Secondly, the ECtHR appears to be distancing itself from its ruling in *Carson*. In the recent case of *JD and A v UK*, the ECtHR unequivocally limited the role of MRWF. It is only appropriate to ‘circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality’.<sup>148</sup> This restricts the MRWF test to affirmative action.<sup>149</sup> In this case, the ECtHR required the UK to provide weighty reasons for capping the housing benefit (the ‘bedroom tax’) of women who experienced gender-based violence. The UK government was unable to do so, and the fiscal policy was declared discriminatory against women. The most recent guidance from the ECtHR is that courts should employ a searching standard of review even in the context of economic policy, and weighty reasons are required to justify gender status inequalities in benefit reforms. All the rationales for using the highly deferential MWRWF thus have fallen away.

Identifying the role of gender in the benefit reforms via the four-dimensional substantive equality framework assists in pinpointing the appropriate degree of deference. As per the ECtHR case law, gendered inequalities require a meaningful interrogation of government policy and attract a high degree of judicial scrutiny, even in the realm of social benefits. As Lady Hale in *DA* observes, ‘there are no “no go” areas’.<sup>150</sup> Upon a finding of discrimination, the court must intensely scrutinise the laws and regulations in question using the more rigorous proportionality test.<sup>151</sup> This is particularly crucial in areas that have historically attracted a high degree of judicial scrutiny, such as gender. This makes the UKSC’s inattention in *DA* to the status vulnerabilities of gender and lone parenting even more egregious.<sup>152</sup> The court must assess the social benefit reforms to ensure that they are not infected with gender status inequalities and ‘very weighty reasons have to be put forward’ to justify any gender discrimination in social benefits.<sup>153</sup> Substantive equality, which captures the synergy between status and economic inequalities, tips the degree of deference away from the government and shifts the analytical fulcrum.

<sup>146</sup> *DA* (n 4) [164]–[170]; Jed Meers, ‘Problems with MWRWF Test’ (2020) 27 JSSL 12.

<sup>147</sup> *ibid* [171].

<sup>148</sup> *ibid* [88].

<sup>149</sup> Jena McGill, ‘Section 15(2), Ameliorative Programs and Proportionality Review’ (2013) 63 SCLR 521.

<sup>150</sup> *DA* (n 4) [133].

<sup>151</sup> As Lord Hope explains in *Re G (Adoption Unmarried Couple)* [2008] UKHL 38 [28], ‘it is with [the courts] that the ultimate safeguard against discrimination rests’.

<sup>152</sup> *DA*(n 4) [114].

<sup>153</sup> *JD and A v UK* (n 133) [89].

## B. Proportionality

A substantive equality analysis under an article 14 claim assists in accurately calibrating the scales for the justification. It logically pushes the court away from MWRF and undue deference to government decision making. The more appropriate justification tool is proportionality, which is the long-standing justification test in human rights adjudication. And while it is a structured analysis, it is also highly contextual to the factual–legal matrix of the claim.<sup>154</sup> Substantive equality, which can fully account for status and economic inequalities, has a role to play. The relationship between proportionality and equality in article 14 is under-theorised. The ECtHR will often evaluate the violations and justification of the underlying substantive rights and then simply repeat that the proportionality analysis from that other right also applies to article 14.<sup>155</sup> Moreover, as mentioned above, the ECtHR does not conduct a robust equality analysis, so there is not a strong doctrinal basis to conceptualise on how the right to equality shapes the application of proportionality. In the American context, Jackson observes that the ‘proportionality doctrine can generate insights into the nature and structure of inequality that might otherwise elude judges’.<sup>156</sup> Substantive equality is the wrench that tightens the nuts and bolts of the proportionality analysis. This final subsection takes tentative steps to explore how substantive equality can fruitfully shape the application of proportionality in the context of discrimination claims that are a hybrid of status and economic equality.

First, substantive equality helps assess whether these aims are ‘sufficiently important’. At this first stage, the court is evaluating whether the government’s aims are legitimate. Broadly speaking, courts generally accept the government’s reasoning and do not assess if they are sufficiently important.<sup>157</sup> Routinely glossing over this first step, as the claims of lone mothers reveal, is not warranted, and substantive equality gives a basis to question whether the articulated aims are in fact legitimate. Across all three cases, the government consistently argued that the benefit cap, work conditionalities and two-child limit are designed to achieve three aims:

- (1) to make fiscal savings, particularly in light of the economic recession of 2008, through ‘*incentivising behaviours* that reduce long term dependency on benefits’;<sup>158</sup>
- (2) to *incentivise* individuals into paid work and instil ‘an ethic of work’; and

<sup>154</sup> Choudhry (n 125).

<sup>155</sup> Nilsson (n 9) 127.

<sup>156</sup> Vicki Jackson, ‘Proportionality and Equality’ in Vicki Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017).

<sup>157</sup> Oddný Mjöll Arnardóttir, ‘The “Procedural Turn” under the ECHR and Presumptions of Convention Compliance’ (2017) 15 *ICON* 9, 29–31.

<sup>158</sup> *SG* (n 4) [190] (emphasis added).

- (3) to *improve fairness* of the benefits system and to increase public confidence in its fairness, particularly by *not rewarding* non-working people with benefits that would exceed the income of average working people.<sup>159</sup>

Both the UKSC and the CA, including the dissenting judges, accept these aims as sufficiently important. Paying attention to substantive equality at this first stage of the proportionality analysis reveals invidious motivations based on prejudice and stereotyping. The government's aims to incentivise benefit recipients into paid work, instil an 'ethic of work' and ensure that benefits are not a reward are all based on deeply engrained stereotypes, discussed in section 4, that lone mothers in poverty are work-shy, benefit scroungers who are seeking an economic windfall from the government. In a similar vein, improving the fairness of the benefit system by not rewarding non-working people is conceptualised by the government in a stigmatic manner. Fairness is framed in terms of disciplining lone mothers to participate in paid work. Justice Leggatt, in *SC*, understands fairness in a way that pits lone mothers on benefits against taxpayers. He queries how fair it is for lone mothers to ask for additional financial support from taxpayers and how fair it is for the government to compensate for the lottery of birth that sees some have the advantages of expensive holidays, private schools and inherited wealth.<sup>160</sup> Reforms that are deliberately built upon stigmas about lone mothers who live in poverty cannot be framed as sufficiently important.

Secondly, substantive equality also calls for greater interrogation at the rational connection stage of the proportionality analysis. At this step, the court examines whether the means chosen will achieve the government's aims. The aim of increasing participation in the paid workforce is achieved through the means of negative financial incentives. This is based on demeaning beliefs that only severe forms of poverty can spur lone mothers into paid work. This runs afoul of the recognition dimension of substantive equality. The reforms also ignore the structural dimensions that impact on lone mothers' ability to access paid work, raising concerns about whether there is a rational connection between income poverty and lone mothers' workforce participation. The benefit reforms fail to acknowledge that the gendered structure of the labour market channels lone mothers into low-paid and precarious work, and that this, combined with the severe lack of affordable childcare, means that lone mothers are often excluded from paid work. In *DA*, Lord Kerr pointedly observes that 'one can only incentivise [lone mothers] to obtain work if that is a viable option'.<sup>161</sup> The court should demand and examine the evidence to support the government's claims that using negative financial incentives can modify the

<sup>159</sup> *DA* (n 4) [7] (emphasis added).

<sup>160</sup> *SC* (n 4) [140], [156].

<sup>161</sup> *DA* (n 4) [190].

behaviour of lone mothers. Requiring a *reasonable* factual basis, not necessarily definitive proof, respects the institutional role of the court while at the same time giving due weight to equality rights.<sup>162</sup> In this case, the rational connection evidence is not strong, as the government's own findings from 2014 show that 'only a small proportion (5%) of capped household[s] move into work because of the cap'.<sup>163</sup> Substantive equality raises questions on the government's claims to a rational connection between the means chosen (negative financial incentives that disproportionately burden lone mothers) and the ends (incentivising paid work).

A substantive equality lens can also be applied to the government's means to achieve fairness and public confidence in the benefit system. The court can query whether there is reasonable evidence that public confidence is increased by disadvantaging lone mothers. The structural dimension of substantive equality points towards fairness being increased by a benefit system that is not designed around an idealised claimant, who is implicitly an able-bodied, working-age man without caring responsibilities.<sup>164</sup> A fair benefit system treats all people as equally worthy of protection regardless of circumstances and choices. It also takes seriously the structural constraints on individual choice. Arguably, trust in the system is increased by knowing that the system does not seek to punish people, but is fair to all people, not just one type of idealised person. Substantive equality provides the basis to query whether there is a rational connection between penalising lone mothers and enhancing public confidence in a fair benefit system.

Thirdly, the 'least intrusive measures' step is challenging as the court can be required to consider counterfactuals and assess whether potential alternatives would be less harmful while still achieving the government's aims. The 'least intrusive measures' step can seemingly draw the court into a policy-making role. This is particularly pronounced in the context of claims that touch upon fiscal policy. It is beyond the scope of this article to address these larger concerns on proportionality in the context of human rights adjudication.<sup>165</sup> However, in these three cases, substantive equality can still provide critical insights into whether the measures are least intrusive. In *SG*, some types of benefits were exempt from the cap, such as disability benefits, and there were questions on whether the list of capped benefits was longer than was strictly needed.<sup>166</sup> The government, however, held that any further exemptions to the

<sup>162</sup> Choudhry (n 125).

<sup>163</sup> Work and Pensions Committee, *The Benefit Cap* (HC 2017–19, 1477) 6, citing Department for Work and Pensions, *Benefit Cap: Analysis of Outcomes of Capped Claimants* (2014) DWP Ad Hoc Research Report no 11 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/385970/benefit-cap-analysis-of\\_outcomes-of-capped-claimants.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/385970/benefit-cap-analysis-of_outcomes-of-capped-claimants.pdf)> accessed 12 October 2020.

<sup>164</sup> House of Lords Economic Affairs Committee (n 115).

<sup>165</sup> Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11 *ICON* 466.

<sup>166</sup> *SG* (n 4) [24].

benefit cap ‘would discourage claimants from obtaining work’.<sup>167</sup> This again draws on stereotypes that lone mothers need the threat of income poverty to be motivated to find paid employment. The government also argued that the benefit reforms were the least intrusive way to achieve its goals, as they provided individualised support for economising.<sup>168</sup> These complementary cushioning measures to the reforms are also based on stereotypes that poverty is a personal, individual problem and run afoul of the commitment to substantive equality.

Fourthly, and finally, substantive equality has a crucial role in the balancing stage of the proportionality analysis. This last step is crucial, Jackson argues, for the clarification and transparency of the community values.<sup>169</sup> Is the means (the benefit cap, work conditionalities and two-child limit) used to achieve the ends (fiscal savings, a fair benefit system and incentivising paid work) a fair balance against the detrimental impact of discriminating against lone mothers? In essence, the court must determine: ‘is the discrimination against lone mothers worth it?’ Answering this question requires analysing both the individual rights at stake and the government’s justifications. The substantive equality analysis in section 4 gives the tools to ensure that the individual side of the balancing scales is fully mapped out. This is a further argument for the need for a detailed equality analysis. The balancing stage creates a symbiotic relationship between proportionality and substantive equality. To ensure a proper balancing, there must be clarity on the multiple dimensions of inequality perpetuated by the reforms. In the majority judgments of the UKSC in *SG* and *DA* and the CA in *SC*, the balancing stage is skewed. The courts do not fully interrogate the inequalities raised by the lone mothers. One side of the scales is opaque: the lone mothers who bear the costs and pay the price are in the shadows. On the other side, the courts undertake a detailed assessment of the government’s rationale for limiting women’s equality. Over the course of 32 paragraphs, Lord Reed’s majority judgment in *SG* examines:

- the government’s emergency budget in 2010;
- the Department of Work and Pensions’ consultation documents;
- the Spending Review;
- multiple EIA;
- White Papers;
- Hansard debates in both the House of Commons and the House of Lords;
- the history of amendments;
- the House of Commons Research Papers; and
- the government’s evidence in the Public Bill Committee and Joint Committee on Human Rights.<sup>170</sup>

<sup>167</sup> *ibid* [37].

<sup>168</sup> *ibid* [54], [167].

<sup>169</sup> Jackson (n 156).

<sup>170</sup> *SG* (n 4) [17]–[45].

In contrast, the implementation and differential treatment of the benefit cap is swiftly dealt with in 6 paragraphs.<sup>171</sup> The degree of difference in unpacking both sides of the claim decalibrates the balancing scales. It permits the courts to easily accept that any reduction in income is ‘not too high a price to pay’. Substantive equality acknowledges the human cost of the benefit reforms, which, in turn, permits a more finely tuned balancing analysis. Both sides of the scales have the requisite detail to have a transparent balancing of competing rights and interests. This level of transparency also assists in the real challenges entailed in balancing the discrimination in benefits against the government’s fiscal and social aims. It does so by prompting questions on the level of fiscal savings (which in these cases was quite small) and the administrative costs in implementing the benefit reforms (which were quite high).<sup>172</sup> In undertaking this balancing exercise, the court is not overstepping its role, but asking searching questions to ensure the government upholds its commitment to equality and non-discrimination.

## 6. Conclusion

The jurisprudence reveals that the UK anti-discrimination framework is not being applied in a manner that is sensitive to how different vulnerabilities interact to trap individuals in webs of inequality. The claims of lone mothers that the benefit reforms are discriminatory under article 14 of the ECHR all fail in the courts because the judgments adopt an archaic and fragmented model of equality that artificially divides status and economic inequalities. The impact of the benefit reforms on lone mothers cannot be collapsed into pure economic inequality as it is inherently entwined around gender status inequalities. In failing to capture how lone mothers in poverty can be discriminated against in the receipt of social benefits, the right to equality in the UK is becoming a luxury for the privileged. Substantive equality provides an analytical framework to fully unpack the synergies between status and economic inequalities perpetuated by the benefit cap, the work conditionalities and the two-child limit.

Substantive equality is not only crucial for understanding the reality of how the claimants experience the inequalities of the benefit reforms, but also fruitfully shapes the justification analysis. The fragmented model of equality obfuscates the potential for legal accountability for discrimination in benefits. The more robust substantive equality framework marks out a clear role for discrimination law in the realm of fiscal policy. Substantive equality shifts the analytical fulcrum away from undue deference to government decision making. It

<sup>171</sup> *ibid* [54]–[58], [61]–[62].

<sup>172</sup> *DA* (n 4) [188]; *SG* (n 4) [153]; see also Work and Pensions Committee, *The Benefit Cap* (n 163) 8–9.

also breathes analytical life into the more appropriate and searching proportionality justification assessment and can guide the court to ask questions and demand reasonable evidence to justify discrimination against lone mothers. Attention to these issues is more pertinent than ever. Criteria and access to social benefits are likely to receive renewed attention in light of the devastating health and economic impacts of COVID-19. There are also a series of cases working their way through the courts brought by lone mothers challenging other aspects of UC and, at the time of writing, the UKSC has yet to hand down its judgment in *SC*. The arguments in this article provide a blueprint for future policy making and litigation. They also contribute to ongoing theoretical debates on legal accountability for economic inequalities by using substantive equality to build a bridge over the historic fracturing of status and economic inequality.