## Submission to the United Nations Special Rapporteur on extreme poverty and human rights

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The two child rule: increasing child poverty without any meaningful human rights analysis in the legislative process

1. The two-child rule exacerbates child poverty – it increases the number of people who fall into it, and makes it more acute.
2. *What is the rule?*

The two-child rule limits the amount of eligible children for child tax credit and universal credit to two. It is contained in the Welfare Reform and Work Act 2016 (ss. 13-14). It has been challenged in a judicial review claim (*SC & Ors v SSWP* [2018] EWHC 864 (Admin)). The High Court dismissed most of the claim but for an issue about the way one of the exemptions worked, and the case is now pending before the Court of Appeal.

1. This rules results in a large, identifiable, group of children (third-plus children) whose quantifiable needs will no longer be recognised in the allocation of key subsistence benefits.
2. *Increasing child poverty*
3. The attached article brings together evidence linking the rule to a projected increase in poverty. The IFS predict that this rule alone will be responsible for pushing 200 000 more children into poverty by 2021. Policy in Practice suggest the number will actually be higher – 266 000, or an increase of 10%. By 2025, 900 000 families, or around 3 million children will be affected, according to a coalition of A coalition of End Child Poverty, the Child Poverty Action Group, and the Church of England.

See: IFS. (2016). *Living Standards, Poverty and Inequality in the UK: 2015-16 to 2020-21.* IFS Report R114. (London, IFS);

Ghelani, D. & Tonutti, G. (2017). ‘The impact of the two child limit to tax credits’. *A Briefing Paper by Policy in Practice;*

Resolution Foundation. (2018). *The Living Standards Outlook 2018.* Report.

1. *Effects of increased child poverty*
2. Child poverty can result in food insecurity and attendant health risks, living in poor or precarious housing, an achievement gap in education. It is related to chronic physical health problems, mental health problems, and it affects long-term life outcomes. The effects of income poverty are more acute for some groups, with people with disabilities and lone parent families in poverty more likely to suffer material deprivation.

See: Hills, J. (2011).‘Fuel Poverty: The Problem and Its Measurement.’ *Interim Report of the Fuel Poverty Review*. CASE Report 69;

Royal College of Paediatrics and Child Health & CPAG. (2017). *Poverty and Child Health: Views from the frontline*. (London: RCPCH);

Shelter. (2010). *Briefing: Review of Poverty and Life Chances*;

Ferguson, H.B., Bovaird, M.P.H., & Mueller, M.P. (2007). ‘The impact of poverty on educational outcomes for children’. *Paediar Child Health*, 12(8), 701;

Cardiff Council. (2013). *A Report of the Children & Young People Scrutiny Committee The Impact of Poverty on Educational Attainment In Cardiff*; National Education Union & CPAG. (2018). ‘Child poverty and education: A survey of the experiences of NEU members’;

Cooper, K. & Stewart, K. (2017). ‘Does Money Affect Children’s Outcomes? An update’. CASE paper 203. (London: LSE);

Ayre, D. (2016). Poor mental health: The links between childhood poverty and mental health problems. (London: The Children’s Society);

The Children’s Society. (2013). *A good childhood for every child? Child Poverty in the UK.*

1. The UK Parliament and the UK government should both have scrutinised the rule for compatibility with the UN CRC, particularly Articles 2, 3, 4 and 26.
2. *Applicability of the UN CRC*

The legislature should have been bound by the duties within the UN CRC – triggered by the ECHR.

1. *The ambit of Article 8 ECHR*

The rule must, as a matter of logic, fall within the ambit of Article 8 ECHR, following *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16and *McLaughlin, Re Judicial Review* [2018] UKSC 48(if in *SG*, the matter would have fallen within Article 8, but for the subjects being women rather than children).

1. Article 8 has to step in where the idiosyncrasies of UK welfare law (not paying benefits to children, so side-stepping A1P1) would otherwise deny that children have any social security rights at all. Otherwise Article 26 UN CRC would be infringed; Article 26 UN CRC places duty upon the state to ‘recognise for every child the right to benefit from social security, including social insurance’.
2. *Article 14 ECHR*

Having fallen within the ambit of Art 8, a range of disadvantaged groups in Art 14 are relevant - most broadly children, since it allows children to be demoted to having nugatory status in the calculation of subsistence benefits. More narrowly, families of particular sizes can be 'groups' for the purposes of Art 14; the UN Committee on Economic, Social and Cultural Rights listed a range of groups at risk of disadvantage - 'including women, children, persons with disabilities, low-income families and families with two or more children’. This analysis suggests that **families with three or more children** can thus be described as a cognate group, at risk of marginalisation.

1. *Engaging Article 8 ECHR*
2. The rule engages Article 8: Non-recognition of an individual for specific social security purposes \*engages\* Article 8. In  *Christine Goodwin v UK*(2002) 35 EHRR 447 the ECtHR found that the UK social security system’s refusal to recognise a changed gender identity (which would lead to receipt of an earlier state retirement pension) engaged and infringed Art 8.  A failure to recognise the welfare status of third-plus children for key benefits, for the whole of their childhood, is at least as great an interference with their Article 8 rights as would be according them the wrong status with delayed benefits.
3. *Analysing the legislative process for addressing the Article 3 UN CRC best interests duty*

Article 3.1 of the UN CRC states:

*‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.*

**The best interests of the children concerned were barely a consideration**, and were not a primary consideration, in the legislative process; both the government and parliament neglected their duties under the UN CRC. The attached article contains the results of a detailed content analysis of parliamentary debates and committee hearings, the government’s human rights memorandum and its impact assessment.

1. *The best interests duty – Article 3 UN CRC*

In the General Comment on the UN CRC Article 3 duty, the UN Committee on the Rights of the Child (2013, §6) underlined that ‘the child’s best interests is a threefold concept’. The three elements of the duty are: (i) a substantive right to have best interests assessed and taken as a primary consideration; (ii) a fundamental interpretative legal principle, so that between competing interpretations, that which best serves the best interests of children should be chosen; and (iii) a rule of procedure.

1. It is not enough to have internally taken objections based on the child’s best interests on board – **there must be evidence of an explicit evaluation**. Parliament is not the only actor - the government also has to comply with the best interests duty, as the actor preparing the legislation, and responsible for the impact assessment and human rights memorandum.
2. The content analysis looks for evidence *either* that the measure serves the best interests of the child, *or* that those interests have been considered and outweighed – both would be positions in favour of the measure. The analysis divides up considerations identified into three groups: (i) rationale of the rule; (ii) mitigation of its effects and (iii) reasons for opposing amendments.
3. *Rationale of the rule*

There were 21 considerations in the ‘rationale’ group. The best interests of the child was not one of them. The considerations that received the most mentions across all materials analysed were were saving money (30 mentions); making benefit recipients face the same choice/take the same responsibilities for their choice to have children (also 30 mentions); and striking a fairer balance between taxpayers and benefit recipients (23 mentions).

1. *Mitigation of the rule’s effects*

There was no discussion of the children’s best interests in the context of mitigation. There was a strong emphasis on the continued existence of other benefits, and no discussion of the impact of an overall loss. The foremost consideration was the fact that the measure did not affect existing claimants, whose children had been born before April 2017.

1. *Responding to exceptions*
2. The best interests of the child were not discussed during debates on proposed exceptions.
3. *Failure to take representations on children’s best interests into account*

The government **refused to take account of relevant representations on the best interests of children** - including those made by the Equality and Human Rights Commission. In its consultation it confined examination of the responses to exceptions only and stated ‘comments in consultation responses addressing only the overall policy itself are not reflected in this document’.

1. *Failure of the procedural duty*
2. The government made some suggestions in the impact assessment that the rule might actually be beneficial to children; that the measure ‘will increase financial resilience’, so supporting ‘improved life chances for children’ (DWP et al, 2015, §33); that it ‘could have a positive effect on overall family stability’ (p1). These suggestions were not backed up with any evidence.
3. In failing to decide whether to argue the rule **is or is not** in the best interests of children (making the hopeless case in the impact assessment that children will somehow benefit), the government has **by default failed in the procedural component of the best interests duty**.
4. *Failure to show the best interests of children have been outweighed*

If the government accepts that, contrary to the assertions in the impact assessment, the rule is not in the best interests of the children concerned, but suggests those interests are outweighed by other considerations, then those other considerations must \*at least\* not be manifestly without reasonable foundation - and arguably ought to be held to the higher standard of striking a reasonable balance, since Art 8 rights are engaged.

1. The two main other interests put forward during the legislative process, apart from saving money, are (i) that families on benefits should make 'the same choice' as those not, and (ii) that the system should create more fairness for taxpayers. Both are manifestly without reasonable foundation.
2. *The ‘same choice’ consideration*
3. People above UC entitlement are not making the ‘same choice’ as people below it. Those above the entitlement line have a relatively high income. Under the ‘old’ regime, the income level at which a claimant with three children, working at least 30 hours per week, would no longer be entitled to tax credits (and so not see their income go up ‘automatically’) is £39 725 – and that is assuming no childcare costs or disability elements. With childcare costs, that level goes up to £66 359. For a lone parent to have earned this much, and so be considered able to ‘afford’ her three children she would have to have been in the top six percentile points of earners in the UK, based on HMRC 2015/16 figures. That is, she would have to have been earning more than 94% of the population (HMRC, 2018).
4. Benefit entitlement helped to slightly equalise that choice. Withdrawing the benefit for third-plus children makes their positions more divergent.
5. ‘Same choice’ is doubly a misnomer – the positions are not the ‘same’ – and for many it is not a ‘choice’ to have a child that brings them below the poverty line. Firstly, because contraception, even sterilisation, fails. Secondly, because the ‘choice’ may have been made while the parents were able to afford to support another child. **Their circumstances may since have changed due to redundancy, the death of a spouse, or separation following domestic abuse**.
6. The only way for a family to have a third child and guarantee that their means would not fall below those needed to meet the basic needs of all the children, is for that family to not only have a high income, but also to have substantial assets or capital.
7. *The fairness for taxpayers consideration*

This al so an irrational consideration, as it creates a false bifurcation between recipients and taxpayers, given the majority of those affected are working families. The vast majority – 66% - of families with three or more children who were on tax credits in 2015-16 were in-work families (HMRC, 2017, 18).

1. *A sole objective of saving money infringes Article 4 UN CRC*

The consideration of saving money cannot simply trump children's best interests, as such a decision would infringe Article 4 UN CRC, which states:

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

1. A budgeting decision that in itself infringes Article 4 UN CRC, as a matter of logic and consistency, cannot, without more, be a legitimate justification under Article 3 UN CRC.
2. The two-child rule infringes Article 4, because children are the first, not the last to be affected, and children in vulnerable situations will be affected more acutely. It is discriminatory against children in general, allowing their status to be rendered nugatory for the purpose of subsistence benefits, and against particular groups of children according to family size, religion and ethnicity. And it is not temporary, with no plans to restore the removed benefit. Nor has the government has shown the measure to be necessary, reasonable and proportionate. And there is no evidence that ‘all other options’ have been considered for saving money (or generating revenue) in other ways.
3. Finally, the government’s submissions as to proportionate are fundamentally misguided. Lord Freud, then Minister of State for Welfare Reform, reported to the House of Lords that the ‘average number of dependent children in families in the UK in 2012 was 1.7, so the Government feel that it is fair and proportionate to limit additional support provided by the taxpayer through child tax credit and the child element of universal credit to two children.’
4. Discrimination is not proportionate because it is ‘only’ a minority who are targeted – **that’s how discrimination usually works**. Proportionality is about minimising the harm to individuals, and ensuring it is not more acute than that warranted by a legitimate aim.
5. The study of the two-child rule highlights a dearth of meaningful, methodical, coherent engagement with human rights analysis, and specifically children’s rights analysis in the legislative process. It also provides a clear example of the damage that can result from this procedural flaw.