High-Level Conference on the European Social Charter (July 2024)
Written submission for planning

Dr Mark Simpson (Senior Lecturer in Law, Ulster University – m.simpson@ulster.ac.uk)
Professor Gráinne McKeever (Professor of Law and Social Justice, Ulster University)
Dr Ciara Fitzpatrick (Lecturer in Law, Ulster University)

Thank you for the invitation to make written submissions in advance of the forthcoming High-Level Conference on the European Social Charter. We are pleased to offer the following documents for your consideration, consisting of three peer-reviewed academic publications from leading legal journals and one previous submission of evidence to a UN Treaty body:

Assessing the Compliance of the United Kingdom's Social Security System with its Obligations under the European Social Charter (Human Rights Law Review, 2018)
This article challenges the Committee's practice of assessing compliance of benefit levels with the right to social assistance (article 13) on the basis of incomes before housing costs. Examples from the UK show that, in some circumstances, some household types could have their income reduced to zero after housing costs, rendering them manifestly unable to meet their basic subsistence needs. Other examples are less extreme but nonetheless show potential for income after housing costs to routinely fall well below 50% of the median for some household types if reliant on social assistance as their main source of income. A change in approach, to focus on income after housing costs, would allow for the emergence of a more realistic view on whether **effective implementation** is being achieved.

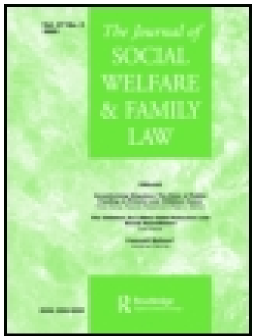
Legal protection against destitution in the UK: the case for a right to a subsistence minimum (Modern Law Review, 2023)
This article examines a key **contemporary challenge with respect to social rights**, namely the persistence of significant levels of destitution in an advanced welfare state. The weakness of protection against destitution in the UK – in law and in practice – can be reconciled with neither the law nor the spirit of the Charter, notably article 13. We have regard to the notional **universality, indivisibility, interdependence and interrelation** of human rights, examining both the threat posed to civil and political rights if basic social rights are neglected, and the (limited) scope for the civil rights protected by the ECHR to form the basis for a legally enforceable social minimum. We conclude that stronger statutory protection against destitution would be desirable, in line with Boyle's model of sectoral incorporation.

Conditionality, discretion and TH Marshall's 'right to welfare' (Journal of Social Welfare and Family Law, 2019)
A companion piece to our article in the Modern Law Review, this article offers a further perspective on destitution as a **contemporary challenge with respect to social rights**. Here, we argue that the rights-based approach to social assistance that crystalised in the 1960s has been eroded, with increasing reliance on discretionary and charitable support. We also revisit the theme of the **interdependence and interrelation** of rights, using empirical data from the landmark *Destitution in the UK* studies to explore how inability to resolve legal problems creates vulnerability to destitution, while destitution increases vulnerability to legal problems. This includes claimants' ability to access justice within the social security system.

United Kingdom's 7th periodic report under the ICESCR: parallel report
As the title indicates, this document focuses on the UK's commitments under the International Covenant on Economic, Social and Cultural Rights. However, many of the points made are equally relevant to the Social Charter. The parallel report summarises many of the issues of adequacy,

discretion, access to justice/enforcement of social rights and interdependence of rights explored by the above publications.

We trust that this information is useful and wish you well in your efforts to streamline, advance implementation of and increase awareness of the Social Charter.



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Conditionality, discretion and TH Marshall's 'right to welfare'

Ciara Fitzpatrick, Gráinne McKeever and Mark Simpson

School of Law, Ulster University, Newtownabbey, UK; Law Centre Northern Ireland, Belfast, UK; School of Law, Ulster University, Derry-Londonderry, UK

ABSTRACT

In an era of increasing interest in and concern about destitution in the UK, the leading studies place social security problems among the principal causes. This suggests that destitution is a failure of social citizenship, with social protection systems unable or unwilling to underwrite the guarantee of a modicum of economic welfare that, according to Marshall, forms the essence of the citizen's social rights. This article documents how the establishment of a comprehensive welfare state in the mid-20th century has been eroded by a series of social security reforms that have turned the focus back on local government and the voluntary sector for the support of the 'undeserving' migrant and unemployed poor. Empirical findings from a major study of destitution in the UK illustrate how the fulfilment of social 'rights' is becoming dependent on knowing where to seek support, having access to the right gatekeeper and enduring social stigma. The authors consider the compatibility of a welfare state characterised by strict conditionality, decision maker discretion and gaps in the safety net with the Marshallian 'right to welfare'.

KEYWORDS
Social rights; citizenship; welfare state; destitution; conditionality; discretion

Introduction

Although organised systems of poverty relief in the UK predate even the earliest Poor Law legislation in 1601, these were neither comprehensive nor rights-based (Marshall 1981a, Charlesworth 1999). The provision of relief, as much a church and charitable function as a state one (Stoker 1994, Shiels 2015), was geographically inconsistent and, for the able-bodied poor, focused as much on deterrence of uptake as facilitating access. A series of reforms between 1906 and 1948 altered this dynamic, with the state focus shifting towards citizen welfare. This ushered in a new understanding of citizenship as conferring rights in the civil, political and social realms (Marshall and Bottomore 1992, Bew 2016). These 20th century reforms have been defined by Marshall, the leading theorist in the area, as creating the social rights of citizenship, which include a 'right to welfare'[1] so that each member of society has at least a right to "a modicum of economic welfare and security," ideally to enjoy "the life of a civilised being according to the standards prevailing." (Marshall and Bottomore 1992, p. 8). Having advanced throughout the greater part of the 20th century, there are signs that this right to welfare is in retreat. Local, discretionary and charitable welfare systems are again playing a significant role in enabling the least well off members of society to meet their essential needs, which means individuals' ability to access services may depend as much on

CONTACT Mark Simpson m.simpson@ulster.ac.uk
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resources and eligibility criteria in a particular geographic area as on need. Dramatic growth in food bank use is the best publicised example of this tendency (Lambie-Mumford 2017), but increased reliance on Discretionary Housing Payments and the fragmentation of other discretionary support systems have also received some attention (Aitcheson, 2018, Meers 2015, 2018, Work and Pensions Committee 2016).

If it has sometimes been imagined that 'real poverty' had been eliminated from advanced capitalist societies (Besharov and Call 2009), any such notion should be dispelled by the finding that up to 1.5 million people in the UK were unable to afford their most basic survival needs at some point during 2017 (Fitzpatrick *et al.* 2018). Destitution tends to flow from the interaction of various legal, social and financial issues (McKeever *et al.* 2018), but social security problems are heavily implicated. This article examines how trajectories in social security policy, particularly the role of conditionality and discretion therein, have contributed to the return of destitution and the erosion of the legal and moral right to welfare in the 21st century. Part 1 outlines the developments between 1906 and 1948 that led Marshall to conclude that citizenship had gained a social element, the more incremental progress thereafter from discretionary systems towards a legal right to a minimum income, and the change in trajectory from the end of the 20th century. Part 2 then looks at how this shift has impacted upon claimants on the ground, drawing on qualitative research with 41 participants identified as currently or recently experiencing destitution. Gaps in coverage, inadequacy of benefit, conditionality, exercise of discretion and difficulty accessing one's entitlements are shown to play a role in reducing individuals to destitution. As outlined in part 3, this results in dependence on local government and charitable services characterised by patchy coverage, inconsistent levels of support, access problems, an even greater role for discretion and high levels of stigma. Part 4 then interrogates the implications for the 'right to welfare', as understood from both a legal and a moral perspective. The authors conclude that Marshall's advocacy of citizenship's social element remains a valuable tool in an era when public policy seeks to diminish the right to welfare.

The empirical findings discussed in this article flow from a wider study of destitution in the UK, conducted at Heriot Watt University (see Fitzpatrick *et al.* 2018). Users of crisis services at 16 locations across the UK first completed a survey exploring incomes, ability to access essential needs and experiences of destitution. Forty-one of the participants in this phase, whose responses identified them as destitute in accordance with the consensual definition previously developed for the Joseph Rowntree Foundation (Fitzpatrick *et al.* 2015), subsequently took part in qualitative interviews. The authors' analysis of this data initially focused on the relationship between destitution, justiciable problems and the use of legal advice. In practice, and in common with previous research on the legal needs of disadvantaged populations (Pleasence *et al.* 2004), it was difficult to disentangle specifically legal issues contributing to or exacerbated by destitution from the cluster of justiciable and non-justiciable problems that individuals experiencing severe poverty tend to experience. Social security emerges as one of the key legal issues facing destitute households (McKeever *et al.* 2018). This, along with the very existence of 1.5 million destitute people, raises the questions this article seeks to address about the adequacy and dependability of the right to welfare in the UK.

The advance and retreat of the right to welfare?

The Marshallian right to welfare emerges alongside social citizenship in the first half of the 20th century. 'The relief of the poor, the care of those who are unable to care for themselves' may always have been 'among the unqualified objects of public duty,' (Abbott 1940, p. 74) but this duty was not previously matched by an unambiguous right to protection from poverty on the part of the citizen. Such relief as was provided for under the Poor Law could be meagre, residual and predicated upon onerous obligations to meet one's own needs if at all possible, and to forfeit one's liberty in return for any support received. By forfeiting their civil rights in this manner, paupers 'ceased to be citizens in any true sense of the word.' (Marshall and Bottomore 1992, p. 15) Only with the extension of the franchise to a majority of adult males in 1884 and to all adult males and most women over 30 in 1918 – adding to the electorate those whose exposure to social risk was greater – would a critical mass of voters exist to demand a comprehensive, rights-based, non-punitive and less stigmatised system of protection against poverty (Marshall and Bottomore 1992: 15, p. 32). The political and policy developments that led to the creation of the welfare state completed the trinity of civil, political and social rights that Marshall conceptualised as civil, political and social citizenship, traced as developments in the UK over the 18th, 19th and 20th centuries. Whether citizenship consists only of these three elements (Turner 2001, Lister 2003) and whether this teleological conception of citizenship applies to societies other than the UK (Mann 1996), even to the UK itself (Dean 2014), or at least to women within the UK (Marshall and Bottomore 1992, Rees 1996), has been questioned, although Marshall is far from the first theorist whose 'ideal citizen' is distinctly male (Lister 2003). Nonetheless, it is true that the first half of the 20th century was the critical period for the development of social rights in the UK.

The process of putting in place a 'guaranteed minimum' of income and services began with the tentative reforms of the post-1906 Liberal governments (Marshall and Bottomore 1992, p. 32). These introduced contributory sickness and unemployment benefits, the former covering most employed wage-earners, the latter specific industries only, and retirement pensions of gradually increasing coverage and generosity. This represented a first step towards a modern welfare state, but with the focus largely on insurance-based benefits those who worked in uninsured industries, had insufficient income to make contributions or were not in paid employment were excluded. The 1930s' depression prompted the introduction of a national, tax-funded, non-contributory Unemployment Assistance benefit, albeit that considerable official discretion remained as to the amount of relief to be awarded.

A *right* to a minimum standard of living began to take shape after World War 2. In arguing that 'a revolutionary moment … is a time for revolutions, not for patching,' Beveridge's (1942: para 7) report on the future of social insurance captured the mood of a public ready for a new conception of citizenship (Bew 2016). This would include a social element encompassing 'the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society.' (Marshall and Bottomore 1992, p. 8) Key features included Family Allowances – a contribution towards the additional costs associated with having children; a more comprehensive system of National Insurance covering all employees except married women; and National Assistance, a system of means tested support for those without insurance cover.

As National Assistance gave way to Supplementary Benefit and later Income Support, the trajectory of social security would be towards forms of poverty relief based more explicitly on a legal right to assistance, although discretion has never been – perhaps can never be – completely eliminated (Meers 2019). Supplementary Benefit decision makers could reduce or withhold payments in undefined 'exceptional circumstances,' while the inadequacy of headline benefit rates promoted reliance on one-off payments, awarded according to a vast, growing and often ignored set of guidance (Smith 1975, Prosser 1977, Donnison 1982, Stewart and Bland 1987). Efforts to increase clarity and consistency in the 1980s also had the effect of restricting eligibility and increasing conditionality (DHSS, 1979, Mesher 1981, Lynes and Drabble 1989). The introduction of Income Support meant more 'clearly defined rights,' more consistently delivered for UK citizens (Walker 1986, p. 93). Conversely, it marked the beginning of non-nationals' exclusion from mainstream social assistance, with affected individuals forced back onto a complex web of residual, often discretionary, support depending on immigration status, age and health. The existence of different schemes for people in subtly different circumstances has too often resulted in the 'lamentable state of affairs' when it is unchallenged that an individual should be supported, but the courts are required to determine which public body should pay (*RW v Sheffield City Council* [2005]: 26; *R (on the application of S) v Lewisham LBC* [2008]; *R (Westminster City Council) v Secretary of State for the Home Department* [2001]).

The limitation of some non-nationals' social rights from the end of the 20th century can be viewed as a rehearsal of the 'benefit tourism' panic that would play a role in critiques of European integration (Larkin 2009, European Council 2016). Lord Hoffmann suggests:

> Voters became concerned that the welfare state should not be a honey pot which attracted the wretched of the earth. They acknowledged a social duty to fellow citizens in need but not … to the world at large.
>
> (*R (Westminster City Council) v Secretary of State for the Home Department* [2002]: 20-21)

This observation echoes sentiments in contemporary political discourses (Billings 2002). However, the extent of the state's duty to support the 'wretched' among its own citizens has seldom been uncontroversial (Golding and Middleton 1982, Somers and Block 2005) and this debate has seen a resurgence in the 21st century (Garthwaite 2011, Wiggan 2012). This has been marked on one hand by the diminution of the support available to working age claimants and more restrictive eligibility criteria for certain benefits, on the other by an increase in the social security authority's ability to impose conditions for the receipt of, make deductions from and suspend payment of benefits. A renaissance of discretion has been driven by changes to Housing Benefit – the reduction of the local housing allowance, social sector size criteria (or 'bedroom tax') and household benefit cap – and increased conditionality. The Department for Work and Pensions (DWP) has argued that claimants whose Housing Benefit no longer covers their rent should take steps to increase earned income, negotiate reduced rent with their landlord, move to cheaper accommodation, reduce non-housing expenditure or seek child maintenance (*SG* [2015]). Given that these steps are likely to be 'simply unrealistic' for many claimants (*SG* [2015] para 202), the fallback option is to apply for Discretionary Housing Payments (DHPs),[2] the 'panacean payments' to which government has looked to fill many of the holes in the safety net created by reform (Meers 2015; *Carmichael v Secretary of State for Work and Pensions* [2016]), or perhaps as one means of 'passing the buck' for social

security cuts. By definition, DHPs are not available as of right, no matter how impossible a claimant might find it to mitigate a shortfall in Housing Benefit. Decisions may take into account numerous indicators of resources or desert, while awards may be subject to various behavioural conditions, are seldom long-term even if the applicant's circumstances are unlikely to change and adverse decisions can be harder to challenge (Meers 2018, 2019). In November 2014, 34% of social tenants affected by the under-occupancy penalty had not even heard of DHPs, only 29% had applied for one and only 36% of applications were successful (Clarke *et al.* 2015).

The conditions for receipt of mainstream benefits – Universal Credit, Jobseeker's Allowance and Employment and Support Allowance – are not, at face value, particularly discretionary. These are defined by the category of claimant – jobseeker, limited capability for work or limited capability for work or work-related activity – and the penalty for non-compliance specified. However, the finer details of the claimant commitment, assessment of whether there was good reason for non-compliance and the award of a hardship payment following a sanction all involve the exercise of discretion on the part of the adviser or decision maker, subject to extensive guidance (DWP 2013/2018).[3] Sanctioned claimants who are refused a hardship payment, individuals who experience delayed payments or difficulties with the application process and those excluded from the system may be forced to rely on local government or voluntary sector welfare services, under which there is often *no* right to assistance. In these circumstances, discretion plays an even greater role and there are glaring geographical inconsistencies in provision (Fitzpatrick *et al.* 2018, McKeever *et al.* 2018). Local authorities can be asked to review decisions on DHP and discretionary assistance awards, but there is no right of appeal to an independent adjudicator (*EA v Southampton CC* [2012]; DWP, 2018, Birmingham City Council Benefit Service undated).

These developments beg the question whether social citizenship is entering a post-Marshallian phase, or returning to a pre-Marshallian form; even whether, as Hoxsey suggests of Canada, citizenship is taking on an individualistic and marketised form shorn of its social element (Hoxsey 2011). Such a conclusion does not inevitably flow from a reduction of generosity, renaissance of discretion or increased conditionality. Marshall's definition of social citizenship is inherently flexible, if not ambiguous. As Dwyer (2010, p. 39) notes, 'there is no overarching universal principle that emphatically defines what citizenship grants.' The social element can consist of anything from a 'modicum of economic welfare' to the resources necessary for full social participation and inclusion. Whether the minimal or maximal option is pursued is, presumably, a political decision, although there must be a point at which resources become so constrained that even a modicum of welfare is unattainable.

Turning to the role of discretion in contemporary social protection, it must be remembered that the conception of a 'right' as implying something laid down in law and judicially enforceable is not the only way of understanding the term. Marshall recognised that the technically discretionary awards from the National Assistance Board were 'not strictly a legal right,' yet felt that the scheme provided sufficiently comprehensive and dependable coverage to conform with 'the idea that the granting of assistance is not an act of grace, but the satisfaction of a right.' (Marshall 1981b, p. 89) The Supplementary Benefits Commission would turn against discretion following publication of 'The right to welfare' because of its inherent complexity, the scope for decision makers' own 'moral judgements' to shape decisions on eligibility and the

attendant threat to claimant confidence in the scheme as a rights-based system (Supplementary Benefits Commission 1975, p. 12, cited by Marshall 1981b). However, Marshall argues that 'the right to have one's claim assessed by the exercise of discretion in accordance with current policy' *is* 'within the category of rights,' the crucial consideration apparently being whether there is an opportunity to appeal the decision (Marshall 1981c, p. 96). Prosser suggests that this emphasis on the moral right to welfare was consistent with a non-legalistic conception of welfare rights that dominated until the 'rediscovery of poverty' in the 1960s (Prosser 1977).

There is also ambiguity around Marshall's stance on conditionality and reciprocity. As reformists accused mid-20th century welfare states of fostering a passive citizenship bereft of responsibility (Dwyer 2004, 2016), so the Marshallian perspective has been cast as a mere 'theory of entitlement' that neglects citizens' responsibilities (Turner and Rojek 2001, p. 202). This conclusion is questionable. Certainly, Marshall and Bottomore (1992, p. 41) write that 'The claim of the individual to welfare is sacred and irrefutable and partakes of the character of a natural right.' Yet a few lines later they expressly recognise the need to 'harmonis[e] individual rights' with duties to 'the common good.' As with the right to welfare, Marshall does not necessarily understand this individual duty to the common good in a legal sense, but he does recognise a moral duty to work as part of a wider 'responsibility towards the welfare of the community.' (Marshall and Bottomore 1992, p. 41) The Marshallian view, then, seems potentially compatible with Plant's (1999, p. 125) construction of social citizenship as 'an achievement rather than a status,' with individuals required to contribute to a society 'through work or other socially valued activities' in order to have a claim on its resources.

Given that most people will ensure their own economic welfare through employment (Marshall 1981b), Watts et al argue that a degree of paternalistic 'coercion into "positive" citizenship' (Larkin 2011, p. 385) may be legitimate if it helps them to do so (Watts *et al.* 2018, Watts and Fitzpatrick 2018). In the context of social security, the question is whether such measures support or undermine the right to welfare. Evidence in the next two sections suggests that, for the research participants, the contemporary social security system erects barriers for citizens who are seeking to realise their right to economic welfare and to social, political and economic participation in society (Lister 1989, Harris 2000). The safety net has given way to the stick.

Lived experiences of the 'right to welfare' in the 21st century

As noted above, while Marshall emphasises the importance of the social rights of citizenship, his work is not especially prescriptive about what standard of living the state ought to guarantee. The aspiration to a social security system that guarantees all citizens the resources necessary to 'share to the full in the social heritage and to live the life of a civilised being' has always remained just that. The notion that social assistance 'should be sufficient to allow its recipients to participate in the life of the community of which they are part,' based on a relative conception of poverty, has seldom had any real influence on the setting of benefit levels (Walker and Church 1978, Walker 1986, Davis *et al.* 2018). With 1.5 million people in the UK experiencing destitution during 2017 (Fitzpatrick *et al.* 2018), even the more modest ambition that a 'modicum of economic welfare' should be guaranteed is not universally realised. If certain migrant groups have long been faced with 'a law and policy framework that

deliberately engineers poverty and destitution' (Harvey 2015, p. 595), the findings of the *Destitution in the UK* studies underline York's (2017, p. 322) observation that:

> Destitution is no longer confined to migrants (if it ever was). With industrial numbers of claimants refused disability benefits under the fitness to work procedures, and those 'sanctioned' under the benefits system, a similar level of hidden destitution is spreading through the general population, and even becoming normalised.

This and the subsequent section draw on a set of qualitative interviews with 41 individuals, who (on the basis of responses to a survey several months previously) had been identified as destitute in accordance with the consensual definition devised by Fitzpatrick *et al.* (2016). That is, within the month prior to completing the survey they were unable to access two or more of adequate shelter, food, heating, lighting, clothing or toiletries, or had had an income too low to do so without charitable or familial assistance – below £70 per week for a single adult, £100 for a couple and £20 per child (after housing costs). The present authors' analysis of the data formed part of a far-reaching investigation into the links between destitution and administrative, civil and criminal justice problems (McKeever *et al.* 2018). While each individual's story revealed a complex, unique cluster of legal and non-legal problems, for UK citizens in the study, social security problems – flowing from policy or from the administration of the system – frequently tipped households that were already struggling into destitution. Issues included lack of awareness or difficulty in accessing potential entitlements, delayed payments and sanctions. Sometimes these problems appeared to arise from failures of communication or the exercise of decision maker discretion to the detriment of the claimant, in some cases arguably incorrectly. Data from claimants alone cannot demonstrate whether this reflected individual errors or a systematic attempt to 'fob people off from benefits' by creating an 'inhospitable environment' in which the public are ignorant of their rights – an accusation made in the 1980s and echoed in recent media exposés (Loveland 1987, Wintour 2013). In any case, the result was destitute individuals and their families falling back on charitable sources of assistance, where these were available, bringing further problems such as the need for a gatekeeper, rationing of support and stigma.

Interviewees' experiences were not consistent with the Marshallian vision of a 'guaranteed minimum' of income and services (Marshall and Bottomore 1992, p. 32), sufficient to ensure access to essential needs. Benefits were seen as prone to fluctuation, suspension or termination for reasons that were frequently beyond the claimant's comprehension, that could appear arbitrary and that interviewees often felt ill-equipped to challenge. Others – with or without their knowledge – were not receiving benefits to which they appeared to have a potential entitlement. Lack of knowledge of the complex system frequently lay at the heart of inability to access means of subsistence (Harris 2013). Awareness of the support that might be available is the first step to realising one's rights, but various interviewees had little idea of the eligibility criteria for, or even the existence of, benefits of possible relevance to their circumstances. This was particularly true of disability- and incapacity-related benefits. Various interviewees with health problems struggled vainly to comply with the work availability and jobseeking conditions associated with Jobseeker's Allowance, in some cases experiencing multiple sanctions (resulting in further deterioration of their condition) before being told that they might be in a position to apply for Employment and Support Allowance. Others assumed that being 'fit for work' meant disqualification from Personal Independence Payment (single male. 50–59, UK national), when eligibility is not affected by one's relationship with the labour market. The

quote below illustrates how a little guidance can transform an individual's circumstances – helping the interviewee access emergency help, break a cycle of sanctions by getting onto a more appropriate benefit and ultimately increase his income and escape the benefit cap by applying for a disability benefit.

> One of the guys at the Jobcentre said, 'You keep getting sanctioned. I know that you've got health problems and stuff like that. Maybe you should apply for ESA.' When I called up over the phone, another gentleman suggested to me, 'Apply for a PIP to get help out of the situation' … I worked up quite a good relationship with a guy at my local Jobcentre … he told me what was available to me … he went out of his way to help me to make sure I got the help that I needed … a lot of other people were dismissive and left me to rot in the situation.
>
> (single male, 30-39, UK national)

If awareness of a benefit and one's possible entitlement is the first step towards making a claim, then in the event that the application is unsuccessful, or a benefit is reduced or stopped, it is crucial to understand why this happened so that, if appropriate, the decision may be challenged. When adverse decisions are appealed, success rates can be extremely high (80% of all Universal Credit sanctions to reach tribunal to October 2017) (MOJ, 2017, Webster 2018), but the number of appeals reaching tribunals is low (0.3% of all Universal Credit sanctions – Webster 2018). Many interviewees appeared ill-equipped to challenge the refusal, reduction or suspension of a benefit because their assessment of the reasons was mere speculation. Sanctions, having had something of a media profile, were reached for by some as the standard explanation for *any* reduction of benefit income, however caused. While at least six interviewees had been sanctioned, and several others threatened with sanctions, some described as 'sanctions' issues ranging from a request for more information before eligibility for Child Tax Credits could be confirmed (female lone parent, 40–49, UK national), to reduced Housing Benefit or being found ineligible for Employment and Support Allowance (single male, 50–59, UK national) (see also Dwyer 2018). This could be linked to difficulty understanding benefit-related communications, sometimes because of the complex language used. This could lead to the headline decision being taken at face value or left uncontested because the process seemed daunting.

> I got that letter from Tax Credit saying that they gave me a big reason why they are still making me [repay an overpayment] and said that – oh, something about I couldn't appeal for another 90 days, but the case would only be open for another 30 or something. I just put it in the drawer. It's all really confusing. The way they word their letters and everything, it's so confusing.
>
> (female lone parent, 30-39, UK national)

In other cases, appeals were not pursued because of the perceived futility of doing so. An unsuccessful request for mandatory reconsideration – the requirement that a claimant who is dissatisfied with a decision seek an internal review by the decision making authority before he or she can appeal to an independent adjudicator (SSAC, 2016, Thomas and Tomlinson 2017) – sometimes appeared to have contributed to this perception. In other cases it simply seemed to contribute to fatigue, with potential appellants unable to sustain enthusiasm for a protracted battle (see Wright and Stewart 2016). This is in keeping with concerns that the process acts as a barrier to justice, deterring applicants from pursuing their challenge to tribunal, where success rates are markedly higher (NAWRA, 2016, SSAC 2016).

> Participant: I keep saying to the DWP, that I should be on ESA but they won't listen, they wouldn't listen to the appeal or anything. I done that mandatory thing, mandatory reconsideration it's called. I tried that but they didn't want to know.
>
> Interviewer: Did you take it any further than that, have you taken it to a tribunal?
>
> Participant: No, I don't think it's worth it because I won't get anywhere.
>
> (coupled male, 40–49, UK national)

When sanctions were experienced, the suspension of the benefit payment almost invariably resulted from one or more missed appointments at the Jobcentre. While the circumstances were not always described in detail, in two instances notification of the meeting had not been received by the claimant, having been posted to the wrong address or too late to have any prospect of being delivered ahead of the appointment. A further two interviewees appeared to have grounds to argue that they had good reason for non-attendance, which should result in the sanction being set aside (DWP 2013/2018: Chapter K2: good cause). One had been left with no money for travel following a previous sanction, the other had experienced domestic abuse, mental health problems and financial hardship. The latter also appeared to have strong grounds for a hardship payment: since her rent exceeded her Housing Benefit by £100 per month, the sanction in principle left her with a *negative* income after housing costs, with no realistic possibility of meeting her own needs for shelter, heat, food, hygiene and clothing. This should bring her within the scope of a hardship payment (DWP 2013/2018: Chapter L1: hardship). However, none was received and the claimant did not believe she was eligible, although it was unclear whether she had reached this conclusion independently or following an enquiry. One ironic, although not unanticipated (Wright and Stewart 2016, Patrick 2017, Dwyer 2018), consequence of sanctioning was to increase distance from the labour market, as existing health problems were exacerbated and the struggle for survival took priority over jobseeking.

Coping strategies

Faced with the inadequacy, reduction or loss of benefits, interviewees employed various coping strategies. Some sought to access residual public welfare systems – Discretionary Housing Payments and local authority discretionary assistance – with mixed results. Assistance from charitable sources, relatives and the individual's wider social network was widely used. None of these sources of support is rights-based or offers a dependable source of protection from destitution; none of the empirical evidence explored below suggests that participants had access to the social citizenship standard of a modicum of economic welfare and security.

With rent in excess of Housing Benefit a widespread problem, various interviewees reported applications for DHPs. Success was far from guaranteed. One woman was unable to receive a DHP while living on her own, but was awarded one after her grandchildren moved in. The award was on a short-term basis even though the grandchildren looked set to stay for the long term, but the interviewee could expect to see her Housing Benefit increase once a tricky application for Child Benefit and Child Tax Credits had been resolved, providing evidence that her home was no longer under-occupied. An award seemed less likely when children did not live in the house, even when the applicant's children stayed there some of the time, and awards could be derisory – in one case £1.40 per

week compared to a £60 per month Housing Benefit shortfall. Various interviewees had used or investigated other forms of discretionary assistance, but could be vague about its source, so that it was impossible to say whether it came from the Social Fund, successor local government schemes, a budgeting loan or elsewhere. Cash advances, white goods or help with energy bills were typical examples. Such schemes were normally a last resort – only contemplated when 'I'd probably been without food for three days' (single male, 50–59, UK national). Nonetheless, applicants could struggle to convince the decision maker of the urgency of their circumstances – one was advised to 'cut out some of our outgoings' rather than claim discretionary assistance when already using a food bank (female coupled parent, 30–39, UK national). Other reasons for refusal included not having a keypad meter, or the sudden closure of a scheme. Support was rationed so that, despite being a public service, discretionary schemes could appear little more reliable than charity.

Most interviewees had received charitable assistance, normally food parcels, sometimes small amounts of money from a church, mosque or temple fund, occasionally larger or regular payments. As with social security, accessing charitable support depends on being aware that the service exists, meeting the criteria and knowing how to access it. Those seeking assistance might also have to demonstrate that they are deserving recipients. Some sources of help were only available to certain classes of people, for instance asylum seekers, ex-service personnel and their families or members of a church. A church 'poor fund' used by one participant was reported to have asked her not to reveal that she was receiving support (single female, 60–69, non-EEA national), raising questions about how widespread knowledge of its existence might be even among the limited pool of potential beneficiaries. Awareness of food banks was high, but some interviewees were not clear how to access the services, notably about the requirement for a referral. This was a potential hurdle even for those who were aware of it: the journey to the food bank could involve trips to a social security office, then an advice service for a referral form and finally to the food bank itself. If these were far apart, transport costs could be a problem. While walking *to* the food bank might be possible for some, 'five miles coming back carrying 20 kilos of food isn't fun' (single male, 50–59, UK national). Opening hours could be limited: having been told the wrong times by the referring organisation, another interviewee had to wait two days to receive a food parcel, while soup kitchens were so far away that 'by the time I walk there and then have some food and then walk back I'm going to be hungry again' (single male, age not stated, UK national).

Even when there appeared to be no practical barrier to accessing charitable assistance, interviewees could be reluctant to do so. In two cases this was due to awareness that food aid was a scarce resource and the perception that 'there's people worse off than me' (single female, 60–69, UK national; female lone parent, age not stated, UK national). More often reluctance was caused by the stigma of dependence on charity, whether this emanated from the person him- or herself, wider society or even those providing the service. Interviewees routinely described feeling embarrassment, like they were 'almost begging,' on their first visit to a food bank (male coupled parent, 30–39, UK national). Ultimately, most experiences of charitable support were more positive than initially anticipated, with volunteers described as 'really nice' (female lone parent, 20–29, UK national), 'very generous' (female lone parent, 20–29, non-EEA national) and 'diamond' (single female, age not stated, UK national). One reluctant user was reassured to be told: 'You're not scrounging, you're out of work, you haven't got no money, we're just offering you some

food' (coupled male, 40–49, UK national). Undoubtedly these near-universal expressions of gratitude were sincerely felt, but it did seem that receipt of charitable assistance carried an unspoken obligation to be grateful in a way that rights-based systems such as social security may not. One interviewee observed that 'they were really, really lovely, but you feel like bad, like … the little minions of society' and felt there was 'no way' a food bank user had a right to negotiate over the contents of a food parcel, even if it included things she did not lack or lacked things she needed (female lone parent, 40–49, UK national).

Some experiences were less positive. One interviewee had felt unable to return to a food bank after an ugly exchange with a volunteer and the manager, prompted by her arrival without a referral. Individuals with specific dietary needs, even when they felt able to raise them, could find that these were not reflected in the contents of their food parcel. Volunteers' strategies for reassuring reluctant users could involve stigmatising others:

> Like some lady said there, 'You'd be quite surprised how many people come in here, and they will just take anything and everything that they can get their hands on.' I said, 'I only want what the children need. I'm not coming in here taking more than I actually need.' She said, 'No, no. I see that, yes.'
>
> (female lone parent, age not stated, UK national)

This kind of differentiation between self and other users was displayed by other interviewees, one of whom reported using soup kitchens 'seven days a week' but spoke condescendingly about 'the type of clientele that go there' (single male, 50–59, UK national). In other cases the stigma came from society as a whole: 'I've heard people talking about, "I would never use a food bank; that's for beggars" kind of attitude' (single male, 50–59, UK national).

In addition to problems of access and stigma, charitable assistance could suffer from a lack of adequacy. Provision is often rationed, with food banks limiting the amount supplied, the frequency of visits and the number of visits per referral. Interviewees reported that three food parcels in a six-month period was a common limit, but these were often used within three months. This was unproblematic if the individual's finances had improved – for example, the delayed commencement of a benefit payment – but has potential to result in considerable hardship. Sometimes interviewees did not know how long they would have to wait to become eligible again and (unsurprisingly given the embarrassment described) some were reluctant to ask. The contents of food parcels could be inconsistent and, for those with no other resources, insufficient to see them through to the next visit: 'the food is supposed to last you for two weeks but you're not allowed to have more than one voucher a month' (single male, 50–59, UK national). Non-food items were even less reliable. Basic toiletries and sanitary products were sometimes included and sometimes absent, while limited availability of clothing, in this case at a soup kitchen, could lead to 'squabble[s]' over its distribution (single male, 50–59, UK national).

Similar barriers existed to accessing informal support from family and friends. While some interviewees were heavily reliant on this kind of help, others were reluctant to request it or could not have accessed it even if they had wanted to. Relatives' finances could be as precarious as the interviewee's own, or borrowing money from one's social network might be regarded as 'a good way to lose friends' (single female, 60–69, non-EEA national). Assistance in kind, like second-hand clothing, was more readily accepted and there were fewer qualms about seeking help on behalf of children rather than the interviewee personally. Assistance from family and friends tended to be even less structured than that from

charitable sources – small amounts of money on an ad hoc basis, a cooked meal or some groceries from time to time, some second hand clothing or furniture, even a lift to an appointment. A similar sense of stigma to that associated with food bank use could be felt: it might be 'embarrassing at 60 … asking your parents for money' (male lone parent, 50–59, UK national) or a shock to the system to go from being 'the strong one' in the family to needing support oneself (female coupled parent, 30–39, UK national). Again, while this stigma was usually internal, this was not always the case, with those providing financial assistance making it clear that they 'weren't happy' about doing so (coupled male, 40–49, UK national). Acceptance of informal support could place recipients in a vulnerable position, with several performing unpaid work – normally childcare, but sometimes cleaning – in return for credit or shelter.

The current state of the right to welfare

It bears stressing that the people whose experiences are documented are among the most impoverished two per cent of UK society. Their experiences are unlikely to be representative of the many claimants for whom social assistance, however ungenerous, does enable access to basic needs. Nor does the article seek to valorise an imagined 'golden age' of the welfare state – the question of whether one existed is beyond its scope. Nonetheless, if the right to welfare is to mean anything, it must mean even those at the bottom of the income distribution should be able to afford adequate housing and other survival needs.

As noted, there are different interpretations of what constitutes a 'right'. Marshall holds the view that if the moral right to welfare is fulfilled, it does not necessarily matter if a legal right is absent. As legal scholars, the authors would argue that rights laid down in statute are more secure, at least until Parliament changes its mind – one recommendation flowing from the research is the creation of a statutory duty to protect against destitution. Yet the interviewees' experiences demonstrate that a formal right on paper is not necessarily a substantive right enjoyed (Lister 2003). Up to 28% of those eligible for Supplementary Benefit and up to 44% of those eligible for income-based Jobseeker's Allowance failed to claim the benefit (Fry and Stark 1987, DWP, 2017); Spicker identifies complexity, adequacy and stigma as deterrents to take-up (Spicker 1986). For Marshall – like others in previous eras (Lister 2013) – the question is not what is set down in statute, but whether in practice people can be confident of enjoying a modicum of economic welfare and security. Dependable, consistently applied discretionary provision with a mechanism for independent review of decisions is capable of fulfilling the moral right to welfare, while a statutory entitlement might fail to do so if inaccessible in practice. The problem today is that neither statutory protection nor discretionary provision guarantees the social security that citizenship requires.

The period since 2010 has seen a diminution of the legal right to welfare. There has been 'a marked and unprecedented reduction in the real value' of working-age benefits (Stephens 2015, p. 5), access to certain benefits has become more restrictive, awareness and application can be problematic and conditionality has escalated. The empirical findings do not implicate 'welfare reform' as the sole cause of destitution among UK citizens, but it is clear that failures of both policy and administrative justice within the system are important contributors. Discretionary awards provide a lifeline for many, but are not enjoyed as of right, cannot be depended on in the long term, sometimes have to be repaid and in some

cases are tightly rationed. This has left many reliant for their survival needs on the goodwill of others, whether on an organised scale through charities or in the form of ad hoc assistance from family, friends and strangers.

Concerns about decision makers' moral judgements undermining citizens' welfare rights remain in 21st century welfare states (Altreiter and Leibetseder 2015, Blomberg *et al.* 2018).The risk, though, multiplies in charitable schemes without statutory eligibility criteria or the equality and human rights obligations applicable to public authorities. For Marshall, the absence of a right of appeal in itself means charity cannot fulfil the right to welfare. The experiences of the research participants reinforce this conclusion. Charitable assistance cannot be dependable if its geographical distribution is based on the distribution of goodwill rather than need. It is unlikely to be adequate if limits are placed on what aid can be accessed or duration of eligibility. Administrative consistency is impossible when delivery is by different organisations with different priorities, target beneficiaries and levels of organisation and resources. Local government discretionary assistance in England is similarly hamstrung by budget limits, thanks to the 'cut and devolve' fashion in which this function has been transferred from DWP post-2012, and the lack of any obligation to provide a scheme (Meers 2019, p. 41). The use of discretion within the mainstream social security system, where there is extensive guidance on its exercise and a right to request mandatory reconsideration – whose flaws have been noted – or appeal, may be more in keeping with a right to welfare. However, when the exercise of this discretion forms part of a policy environment that engineers 'destitution by design,' as has been claimed of the sanctions regime in particular (Simpson 2015, Goulden 2018), or there are barriers to the realisation of one's rights or the meaningful exercise of the right of appeal (Adler 2016, Thomas and Tomlinson 2017), this conclusion becomes more questionable.

There is a need, therefore, to assert the rights of all citizens to a modicum of economic welfare and security. The failure of the state to ensure protection of this right needs to be addressed, and the authors have recommended a statutory duty on Ministers to promote and facilitate the take-up of social security entitlements and to establish statutory minimum standards for discretionary assistance. Both recommendations are achievable and, notably, are being implemented in a devolved social security system in Scotland which seeks to prioritise the dignity of claimants, recognising their status as citizens in a way that stigmatised legal and discretionary benefits have failed to do (Simpson *et al.* 2019).[4] Aligned with this, the authors recommend a review of the parsimonious nature of working-age benefits and establishing a set limit below which household income should not be reduced, either by sanctions or other deductions, because the moral hazard argument about encouraging dependency has been demonstrably outweighed by the lived experiences of destitution. And drawing on Marshall's construction of the role of independent appeal to distinguish a moral right to welfare from mere charitable giving, the authors recommend improvements to the process of appealing adverse decisions to encourage statutory decision makers to make better decisions that do not rely on claimants having to forge through additional processes to engage their rights.

Conclusion

A social security system that provides an income for working age claimants well below both the minimum income standard and the relative low income threshold – alternative

benchmarks for the income required to enjoy a normal standard of living – hardly guarantees the ability to 'live the life of a civilised being.' One that fails to prevent 1.5 million people falling into destitution fails even to ensure a 'modicum of economic welfare and security' for all. Marshall seemed relatively relaxed about the existence of discretionary systems and gaps in the framework of legal entitlements as long as the moral right to welfare was upheld, but this is not happening at present. Interviewees' accounts illustrate the shortcomings of the discretionary safety net and are suggestive of discretionary decision making at odds with the official guidance in mainstream social assistance. Problems particularly arose with the conditionality regime. The right of appeal was undermined by lack of comprehension of both the process and the reasons for adverse decisions and by perceptions of remoteness and futility. Administrative justice is a crucial element in delivering full legal entitlements to claimants and the authors have identified the need to remove barriers to the appeal process and improve the feedback loop from tribunals to decision makers so that more decisions are got right first time (McKeever *et al.* 2018).

Work-focused conditionality is not inherently incompatible with a right to welfare – given the central role of the paid labour market in supporting economic welfare, constructive conditionality that genuinely supports entry to suitable employment can potentially support it (European Committee of Social Rights 1999-2000). Nor, as discussed, does Marshall deny the existence of a duty to work, although this does not equate to support for the position that the unemployed claimant must be prepared to accept *any* job. While condemning 'utter laziness, a desire literally to do nothing at all,' Marshall also recognises that an 'aversion from work may spring from a desire to be doing something different rather than from an unwillingness to do anything.' (Marshall 1973). This implies greater tolerance of 'choosiness' on the part of jobseekers than advocates of disciplinary forms of activation might allow (Dunn 2013, p. 801). Ultimately, a sanctions regime that can reduce income to zero after housing costs can *only* be put in place if policymakers accept that they are constructing a system of social protection with a built-in risk of destitution.

Informal welfare provision can soften the blow of destitution, and formed a crucial part of interviewees' survival strategies. However, charitable and familial assistance are in no way rights-based. The test for comprehensiveness, consistency and a right of appeal is unquestionably failed and this is compounded by the level of support and surrounding stigma. A civilised being does not have to live in shame. There is a limit to how much reliance can be placed on local and charitable discretionary welfare services before the moral right to welfare is no longer realised – the question is whether the UK welfare state has yet reached this level of reliance.

A final question concerns the contemporary relevance of a theorist who officially retired more than 60 years ago. Clearly, the welfare state, whose emergence 'Citizenship and social class' explains, has evolved since 1949. The foundations of today's less generous, more conditional model had scarcely begun to be laid at Marshall's death in 1981. Yet Marshall was not merely describing – given the flaws in his account, his reputation would hardly have survived if this were the case – but advocating. An empirical discussion of *what citizenship is* cannot be separated from normative arguments around *how citizenship should be* and this is precisely how his work should be understood (Lister 2005). These normative arguments retain force today. Different governments, different states, different eras have different levels of ambition regarding the minimum standard of living the state should

support and different methods of doing so. Marshall's vision of social citizenship allows for this, and recognises that rights come with responsibilities. But the bottom line that every citizen should enjoy a modicum of economic welfare remains a useful benchmark that should not be lightly discarded, particularly by a state that has overseen 1.5 million of its residents become destitute.

Notes

1. The term 'welfare' refers to the individual's ability to attain a minimum standard of living. Means tested benefits for the relief of poverty (sometimes described as 'welfare') are referred to by name or collectively as 'social assistance'.
2. Discretionary Financial Assistance Regulations 2001 no 1167.
3. There are 257 pages of guidance on Universal Credit sanctions, including 93 on the interpretation of 'good reason'.
4. Social Security (Scotland) Act 2018 asp 9 s1.

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ORCID

Gráinne McKeever http://orcid.org/0000-0002-5137-1835
Mark Simpson http://orcid.org/0000-0002-5497-1617

References

Bibliography

Abbott, E., 1940. *Public assistance*. Chicago: University of Chicago Press. Cited in Marshall, T.H. (1981). The right to welfare. *The right to welfare and other essays*. New York: Free Press.

Adler, M., 2016. A new leviathan: benefit sanctions in the twenty-first century. *Journal of law and society*, 43 (2), 195.

Aitcheson, G., 2018. *Compassion in crisis: how do people stay afloat in times of emergency?* Salford: Church Action on Poverty.
Altreiter, C. and Leibetseder, B., 2015. Constructing inequality: deserving and undeserving clients in Austrian social assistance offices. *Journal of social policy*, 44 (1), 127.
Besharov, D.J. and Call, D.M., 2009. Income transfers alone won't eradicate poverty. *Policy studies journal*, 37 (4), 599.
Beveridge, W., 1942. *Social insurance and allied services (Cmd 6404)*. London: HMSO.
Bew, J., 2016. *Citizen Clem: a biography of Attlee*. London: Riverrun.
Billings, B., 2002. Alienating asylum seekers: welfare support in the Immigration and Asylum Act 1999. *Journal of Social Security Law*, 9 (3), 115.
Birmingham City Council Benefit Service, undated. *Local welfare provision policy*. Birmingham: Birmingham CC.
Blomberg, H., Kroll, C., and Kallio, J., 2018. On the changing frontline of welfare delivery: views on social assistance recipients among Finnish frontline workers. *Journal of poverty and social justice*, 26 (2), 263.
Charlesworth, L., 1999. The poor law: a modern legal analysis. *Journal of social security law*, 6 (2), 79.
Clarke, A., *et al*. 2015. *Evaluation of removal of the spare room subsidy: final report* (RR913). London: DWP.
Davis, A., *et al*., 2018. *A minimum income standard for the UK 2008-2018: continuity and change*. York: Joseph Rowntree Foundation.
Dean, H., 2014. A post-Marshallian conception of global social citizenship. *In*: E. Isin and P. Nyers, eds.. *The routledge handbook of global citizenship studies*. Abingdon: Routledge, 128–138.
Department for Work and Pensions, 2013/2018. *Advice for decision makers*. London: DWP.
Department for Work and Pensions, 2017. *Income-related benefits: estimates of take-up in 2015/16*. London: Department for Work and Pensions.
Department for Work and Pensions, 2018. *Discretionary Housing Payments guidance manual*. London: DWP.
Department of Health and Social Security, 1979. *Reform of the supplementary benefits scheme* (Cm 7773). London: HMSO.
Donnison, D., 1982. *The politics of poverty*. Oxford: Martin Robertson.
Dunn, A., 2013. Activation workers' perceptions of their long term unemployed clients' attitudes towards employment. *Journal of social policy*, 42 (4), 799.
Dwyer, P., 2004. Creeping conditionality in the UK: from welfare rights to conditional entitlements? *Canadian journal of sociology*, 29 (2), 265.
Dwyer, P., 2010. *Understanding social citizenship: themes and perspectives for policy and practice*. Bristol: Policy Press.
Dwyer, P., 2016. Citizenship, conduct and conditionality: sanctions and support in the 21st century UK welfare state. *In*: M. Fenger, J. Hudson, and C. Needham, eds. *Social policy review*. Bristol: Policy Press, 28.
Dwyer, P., 2018. Punitive and ineffective: benefit sanctions within social security. *Journal of social security law*, 25 (3), 142.
European Committee of Social Rights, 1999-2000. *Conclusions XVI-1 – United Kingdom – article 1-1*. Strasbourg: Council of Europe.
European Council, 2016. *European Council meeting (18 and 19 February 2016) – conclusions (EUCO 1/16)*. Brussels: European Council.
Fitzpatrick, S., *et al*., 2015. *Destitution in the UK: an interim report*. York: Joseph Rowntree Foundation.
Fitzpatrick, S., *et al*., 2016. *Destitution in the UK*. York: Joseph Rowntree Foundation.
Fitzpatrick, S., *et al*., 2018. *Destitution in the UK 2018*. York: Joseph Rowntree Foundation.
Fry, V. and Stark, G., 1987. The take-up of Supplementary Benefit: gaps in the "safety net"? *Fiscal Studies*, 8 (4), 1.
Garthwaite, K., 2011. "The language of shirkers and scroungers?" Talking about illness, disability and coalition welfare reform. *Disaility and Society*, 26 (3), 369.

Golding, P. and Middleton, S., 1982. *Images of welfare: press and public attitudes to poverty*. Oxford: Martin Robertson.
Goulden, C., 2018. *Summary: destitution in the UK 2018*. York: Joseph Rowntree Foundation.
Harris, N., 2000. *Social security law in context*. Oxford: Oxford University Press.
Harris, N., 2013. *Law in a complex state: complexity in the law and structure of welfare*. Oxford: Hart.
Harvey, C., 2015. Refugees and human rights: the future of international protection in the United Kingdom. *European human rights law review*, 595.
Hoxsey, D., 2011. Debating the ghost of Marshall: a critique of citizenship. *Citizenship studies*, 15 (6–7),915.
Lambie-Mumford, H., 2017. *Hungry Britain: the rise of food charity*. Bristol: Policy Press.
Larkin, P., 2009. A policy of inconsistency and hypocrisy: United Kingdom social security policy and European citizenship. *Journal of social welfare and family law*, 31 (1), 33.
Larkin, P.M., 2011. Incapacity, the labour market and social security: coercion into "positive" citizenship. *Modern law review*, 74 (3), 385.
Lister, M., 2005. "Marshall-ing" social and political citizenship: towards a unified conception of citizenship. *Government and Opposition*, 40 (4), 471.
Lister, R., 1989. Social security. *In*: M. McCarthy, ed.. *The new politics of welfare*. London: Macmillan, 104–131.
Lister, R., 2003. *Citizenship: feminist perspectives*. Basingstoke: Palgrave.
Lister, R., 2013. "Power not pity": poverty and human rights. *Ethics and social welfare*, 7 (2), 109.
Loveland, I., 1987. Welfare benefits, administrative discretion and the politics of the new urban left. *Journal of law and society*, 14 (4), 474.
Lynes, T. and Drabble, R., 1989. The social fund – discretion or control? *Public law*, 297.
Mann, M., 1996. Ruling class strategies and citizenship. *In*: M. Bulmer and A.M. Rees, eds.. *Citizenship today: the contemporary relevance of TH Marshall*. London: UCL Press, 125–144.
Marshall, T.H., 1973. Work and wealth. *In*: *Class, citizenship and social development*. Westport: Greenwood, 209–225.
Marshall, T.H., 1981a. Changing ideas about poverty. *In*: *The right to welfare and other essays*. New York: Free Press, 29–49.
Marshall, T.H., 1981b. The right to welfare. *In*: *The right to welfare and other essays*. New York: Free Press, 83–94.
Marshall, T.H., 1981c. *Afterthought on "The right to welfare". The right to welfare and other essays*. New York: Free Press, 95–103.
Marshall, T.H. and Bottomore, T., 1992. *Citizenship and social class*. London: Pluto.
McKeever, G., Simpson, M., and Fitzpatrick, C., 2018. *Destitution and paths to justice*. London: Legal Education Foundation/York: Joseph Rowntree Foundation.
Meers, J., 2015. Panacean payments: the role of discretionary housing payments in the welfare reform agenda. *Journal of social security law*, 22 (3), 115.
Meers, J., 2018. Awarding discretionary housing payments: constraints of time, conditionality and the assessment of income/expenditure. *Journal of social security law*, 25 (2), 102.
Meers, J., 2019. Discretion as blame avoidance: passing the buck to local authorities in 'welfare reform'. *Journal of Poverty and Social Justice*, 27 (1), 41.
Mesher, J., 1981. The 1980 social security legislation: the great welfare chainsaw massacre. *British journal of law and society*, 8 (1), 119.
Ministry of Justice, 2017. *Tribunals and gender recognition statistics quarterly, July to September 2017* (provisional). London: MOJ.
National Association of Welfare Rights Advisers, 2016. *Social security advisory committee consultation review into decision making and mandatory reconsideration*. London: NAWRA.
Patrick, R., 2017. *For whose benefit? The everyday realities of welfare reform*. Bristol: Policy Press.
Plant, R., 1999. Supply side citizenship?. *Journal of social security law*, 6 (3), 124.
Pleasence, P., *et al.*, 2004. Multiple judicial problems: common clusters, problem order and social and demographic indicators. *Journal of empirical legal studies*, 1 (2), 301.
Prosser, D.T., 1977. Poverty, ideology and legality: supplementary benefit appeals tribunals and their predecessors. *British journal of law and society*, 4, 39.

Rees, A.M., 1996. T.H. Marshall and the progress of citizenship. *In*: M. Bulmer and A.M. Rees, eds.. *Citizenship today: the contemporary relevance of TH Marshall*. London: Routledge, 1–24.
Shiels, R.S., 2015. the tay bridge disaster and the major personal injury claim. *Reparation bulletin*, 122 (Feb), 4.
Simpson, M., 2015. "Designed to reduce people … to complete destitution": human dignity in the active welfare state. *European human rights law review*, 66.
Simpson, M., McKeever, G., and Gray, A.M., 2019. From principles to practice: social security in the Scottish laboratory of democracy. *Journal of Social Security Law*, 26 (1), 13.
Smith, C., 1975. Judicial attitudes to social security. *British journal of law and society*, 2, 217.
Social Security Advisory Committee, 2016. *Decision making and mandatory reconsideration (OP18)*. London: SSAC.
Somers, M.R. and Block, F., 2005. From poverty to perversity: ideas, markets and institutions over 200 years of welfare debate. *American sociological review*, 70, 260.
Spicker, P., 1986. The case for supplementary benefit. *Fiscal studies*, 7 (4), 28.
Stephens, T., 2015. *Income-replacement benefits, child benefit and inflation, 1992-2015*. London: Child Poverty Action Group.
Stewart, H.R. and Bland, R.E., 1987. Appeals tribunals on supplementary benefits. *Social policy and administration*, 21 (1), 58.
Stoker, M., 1994. Bentham's proposals for reform of the poor law. *UCL jurisprudence review*, 173.
Supplementary Benefits Commission. 1975. *Annual report*. London: SBC. Cited in Marshall, T.H. (1981). Changing ideas about poverty. *The right to welfare and other essays* New York: Free Press.
Thomas, R. and Tomlinson, J., 2017. *Work and pensions select committee inquiry on PIP and ESA assessments: written evidence submission*. London: UKAJI.
Turner, B.S., 2001. The erosion of citizenship. *British journal of sociology*, 52 (2), 189.
Turner, B.S. and Rojek, C., 2001. *Society and culture: principles of scarcity and solidarity*. London: Sage.
Walker, C., 1986. Reforming supplementary benefit: the impact on claimants. *Social policy and administration*, 20 (2), 91.
Walker, C.L. and Church, M., 1978. Poverty by administration: a review of supplementary benefits, nutrition and scale rates. *Journal of human nutrition*, 32 (1), 5.
Watts, B. and Fitzpatrick, S., 2018. *Welfare conditionality*. Abingdon: Routledge.
Watts, B., Fitzpatrick, S., and Johnsen, S., 2018. Controlling homeless people? Power, intervention and legitimacy. *Journal of social policy*, 47 (2), 235.
Webster, D., 2018. *Benefit sanctions statistics: universal Credit, JSA, ESA and Income Support – february 2018*. Glasgow: University of Glasgow.
Wiggan, J., 2012. Telling stories of 21st century welfare: the UK coalition government and the neo-liberal discourse of worklessness and dependency. *Critical Social Policy*, 32 (3), 383.
Wintour, P. 2013. Jobcentre was set targets for benefit sanctions. *Guardian*, 21 March. Available from: <http://www.theguardian.com/society/2013/mar/21/jobcentre-set-targets-benefit-sanctions>
Work and Pensions Committee, 2016. *The local welfare safety net. HC 373*. London: House of Commons.
Wright, S. and Stewart, A.B.R., 2016. *First wave findings: jobseekers*. York: Welfare Conditionality.
York, S., 2017. "The law of common humanity": revisiting *Limbuela* in the "hostile environment. *Immigration, asylum and nationality law*, 31 (4), 308.

Case law

RW v Sheffield City Council [2005] EWHC 720 (Admin)
R (Westminster City Council) v Secretary of State for the Home Department [2001] EWCA Civ 512
R (on the application of S) v Lewisham LBC [2008] EWHC 1290 (Admin);
EA v Southampton CC [2012] UKUT 381 (AAC)
R on the application of SG v Secretary of State for Work and Pensions [2015] UKSC 16
R on the application of Carmichael v Secretary of State for Work and Pensions [2016] UKSC 58

United Kingdom's 7th periodic report under the ICESCR

Parallel report by: Dr Ciara Fitzpatrick (Lecturer in Law, Ulster University); Prof Gráinne McKeever (Professor of Law and Social Justice, Ulster University); Dr Jed Meers (Lecturer in Law, York University); Dr Mark Simpson (Senior Lecturer in Law, Ulster University)
Correspondence: m.simpson@ulster.ac.uk

About the authors

We are socio-legal researchers whose work largely focuses on the relationship between the law and poverty. The law can protect against or ameliorate negative effects of poverty, but can also produce vulnerability to, exacerbate or entrench poverty. At the same time, poverty can increase exposure to legal problems or make them harder to resolve. Our published output encompasses social security, dignity, human rights, citizenship, multi-level governance and access to justice. McKeever co-edits the Journal of Social Security Law, while Meers and Simpson are members of the editorial board. McKeever and Simpson provide independent advice and scrutiny of social security law, policy and practice to government as members, respectively, of the Social Security Advisory Committee and Scottish Commission on Social Security. Fitzpatrick is academic adviser to the Cliff Edge Coalition, which campaigns on social security-related issues in Northern Ireland. Contributors recently served on independent reviews of social security in Northern Ireland – the review of discretionary support (McKeever as chair, Fitzpatrick and Simpson) and the review of welfare mitigations (Simpson).

The parallel report

This report focuses mainly article 9 (the right to social security) and article 11 (the right to an adequate standard of living). Other articles will at times be relevant. We will rebut certain points in the UK's state party report and offer further observations drawing on our own research on destitution, dignity and discretionary elements of social security. Our submission is arranged into three sections, headed 'Access to justice', 'Destitution' and 'Social security'. Views expressed are the authors' own and do not represent the agreed position of any of the bodies mentioned above.

Access to justice

In its state party report, the UK states without elaboration that it is 'confident… that there are effective remedies for any breaches' of its obligations under the ICESCR (paragraph 2). It is true that mechanisms exist that may be used by individuals to challenge the state's determination of their social entitlements under UK law, but these are not without shortcomings. Nor is this the same as providing remedies for, or even an opportunity to challenge, claimed breaches of the Covenant. The 2020s have seen a reversal of the progress made on this front during the previous decade.

Within the social security system, a notable trend has been the increased prevalence of mandatory reconsideration (or redetermination in the devolved Scottish system) when an individual seeks to challenge an adverse decision. This is an internal review process that must be completed before the individual can appeal to a tribunal. The use of internal reviews is not inherently problematic and has potential to make challenging a decision more straightforward, faster and less stressful. However, this will only happen if a genuinely fresh look is taken at applications, with a real prospect of a different decision being arrived at. Research and inquiries to date suggest that this is not always the case.[1] In practice the process sometimes represents nothing more than an additional hurdle before

[1] Work and Pensions Committee, *Decision making and appeals in the benefits system* (HC313, London: House of Commons, 2010); Social Security Advisory Committee, *Decision making and mandatory reconsideration*

the 'real' appeal can commence.[2] Despite social security tribunals in principle providing a less formal, less 'legal' arena than the courts for contesting a decision of a public authority, claimants can be ill-equipped to challenge, or even understand the reasons for, an adverse decision and may almost automatically regard appeals as futile.[3] Expert advice can be critical to receiving one's entitlements, but in England and Wales this has been subject to severe funding cuts since 2012.[4] This has not applied to the same extent in Scotland and Northern Ireland, with the NI Executive providing dedicated funding in support of an anticipated increase in demand due to post-2012 reforms.[5]

Moving from disputes under domestic law to the individual's ability to uphold rights within the Covenant, it is well recognised that there is very limited scope to judicially enforce economic, social and cultural rights in the UK.[6] In the dualist legal system, only those international agreements that have been specifically incorporated into domestic law become actionable before the courts – ratification alone is not enough. In general this only applies to the European Convention on Human Rights (ECHR).[7] This is problematic in light of the statement in general comment 9 that 'it will be difficult [for state parties] to show' that domestic judicial remedies for violation of the ICESCR rights are 'unnecessary' under article 2(1).[8] In the 2010s, the UK Supreme Court showed willingness to test the limits of this restriction. Majorities were prepared to rule that social security Regulations made by the Executive were incompatible with the UNCRC, because there was a failure to treat the best interests of affected children as a primary consideration, even if only one Justice was willing to consider the constitutionally innovative possibility that this incompatibility might render the Regulations unlawful.[9] The ICESCR has never received equivalent judicial consideration, but for a time these UNCRC judgments held out some prospect of this happening.

Progress on this front has come to a grinding halt with the unanimous Supreme Court decision, in a more recent social security case, that the UK courts 'cannot determine whether this country has violated its obligations under unincorporated international treaties' and 'cannot entertain'

(OP18, London: SSAC, 2016); D Cowan, A Dymond, S Halliday C and Hunter, 'Reconsidering mandatory reconsideration' (April 2017) Public Law 215

[2] R Thomas and J Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' (2019) Public Law 537

[3] C Fitzpatrick, G McKeever and M Simpson, 'Conditionality, discretion and TH Marshall's "right to welfare"' (2019) 41(4) Journal of Social Welfare and Family Law 445 (open access version here); G McKeever, 'A ladder of legal participation for tribunal users' (2013) Public Law 575 (open access version here)

[4] See G McKeever, M Simpson and C Fitzpatrick, *Destitution and paths to justice* (London: Legal Education Foundation/York: Joseph Rowntree Foundation, 2018) (open access)

[5] In line with the recommendation in Welfare Reform Mitigations Working Group, *Welfare Reform Mitigations Working Group report* (Belfast: OFMDFM, 2016); see also the current recommendation in Independent Advisory Panel, *Welfare mitigations review* (Belfast: Department for Communities, 2022) (open access)

[6] K Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Abingdon: Routledge, 2020)

[7] Incorporation of non-ECHR human rights treaties is currently proposed in Scotland, in line with the recommendations in National Taskforce for Human Rights Leadership, *National Taskforce for Human Rights Leadership report* (Edinburgh: Scottish Government, 2021)

[8] Committee on Economic, Social and Cultural Rights, 'General comment no 9: the domestic application of the Covenant' (E/C.12/1998/24, Geneva: United Nations, 1998) para 3; article 2(1) requires state parties to use 'all appropriate means' in pursuit of the progressive realisation of the ICESCR rights

[9] Notably, *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; for commentary, see M Simpson, 'Social Rights, Child Rights, Discrimination and Devolution: Untangling the Web' (2018) 40 Journal of Social Welfare and Family Law 3 (open access version here) and G McKeever, 'Scrutinising social security law and protecting social rights: Lord Kerr and the benefit cap' in B Dickson and C McCormick (eds), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Oxford: Hart , 2022)

arguments concerning whether it has.[10] The inescapable conclusion is that the Supreme Court justices have adopted the position that UK courts should not 'take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant,' identified as a requirement in general comment 9.[11] Now, more than ever, litigants seeking to challenge retrogression in social rights on human rights grounds must shoehorn their claims into the provisions of the ECHR, whose primary purpose is the protection of civil and political rights. Although the Supreme Court has stated that the door remains open for the best interests of the child to be taken into account when considering compliance or discriminatory interference with the right to respect for family life (article 8 ECHR),[12] the courts must struggle to do so if they cannot decide, or even hear arguments on, whether the best interests of affected children have been properly considered.[13]

Litigants bringing social security-related judicial reviews under the ECHR typically rely on article 8 (the right to respect for family life) or protocol 1, article 1 (the right to peaceful enjoyment of one's possessions), normally in conjunction with article 14 (prohibition of discrimination in the enjoyment of the ECHR rights). To be successful, the court must be persuaded that unequal treatment within the social security system is manifestly without reasonable foundation. The test is a high – and in the vast majority of cases, insurmountable – bar for claimants to pass.[14] The trend in judicial interpretation of the test has led 'deference to predominate to an increasingly extreme degree',[15] reflected in the UKSC's dismissal of an Article 14 challenge (taken with Article 8) to sex discrimination in the two-child limit for Child Tax Credit/Universal Credit, in part as sex discrimination 'is inherent in any general measure which limits expenditure on child- related benefits' as 'more women than men are bringing up children'.[16]

Destitution

Destitution is by definition a failure of social rights protection. The most prominent definition of destitution in UK law states that an individual is destitute if he or she does not have 'adequate accommodation' and has no means of obtaining adequate accommodation, or is unable to meet his or her other 'essential living needs'.[17] In the leading social sciences definition, developed for the Joseph Rowntree Foundation (JRF), the destitute individual 'suffer[s] an enforced lack of the following minimum material necessities: shelter, food, heating, lighting, clothing and basic toiletries or [has] an income level so low that they are unable to provide these minimum material necessities for themselves'.[18] The latter definition overlaps to a considerable extent with the minimum core

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[10] *R (on the application of SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 at [84] and [207] (Lord Reed)

[11] Committee on Economic, Social and Cultural Rights, 'General comment no 9: the domestic application of the Covenant' (E/C.12/1998/24, Geneva: United Nations, 1998) para 14

[12] A future Supreme Court President argued in 2015 that this was a well-established approach at Strasbourg and not unheard of in the UK legal system – *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 at [211 – 224] (Lady Hale)

[13] See M Simpson, *Social citizenship in an age of welfare regionalism: the state of the social union* (Oxford: Hart, 2022)

[14] Jed Meers, 'Problems with the "manifestly without reasonable foundation" test' (2020) 27(1) *Journal of Social Security Law* 12 (open access version here)

[15] Tim Sayer, 'Manifest Unreasonableness in the UK Supreme Court: A Doctrine Working Itself Pure' (2022) 33(1) *Kings Law Journal* 122-145.

[16] *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 [197]-[199] (per Lord Reed).

[17] Immigration and Asylum Act 1999 c33 s95(3)

[18] S Fitzpatrick, G Bramley, J Blenkinsopp, S Johnsen, M Littlewood, G Netto, F Sosenko and B Watts, *Destitution in the UK: an interim report* (York: Joseph Rowntree Foundation, 2015) 5

obligations under article 9 ICESCR. These are that people are able to access their subsistence needs, specifically 'essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.'[19] Anyone who is destitute according to the JRF definition, and probably the legal definition, is not enjoying even the bare minimum of rights conferred by article 9, still less those conferred by article 11. If the state fails to offer legal protection against destitution to those lawfully within its territory, it is unlikely to comply with its obligations under article 9.[20]

The UK falls short on both of these measures. The most recent empirical findings on destitution from JRF show that 2.4 million people were destitute and in contact with crisis services at some point during 2019 – others may have been destitute but not in contact with any crisis service.[21] At least 2.4 million people, therefore, were not enjoying the standard of living that articles 9 and 11 are supposed to guarantee. Legal analysis reveals that, while a range of relevant sectoral legislation exists and establishes services (social security, asylum support and local government welfare functions) that can, and to a large extent do, protect against destitution, there is probably no overarching, enforceable legal duty on the state to do so. Consequently, there is little obstacle to a Government with a parliamentary majority cutting or withdrawing forms of support, excluding categories of people from support or imposing conditions that inevitably render some destitute.[22]

In the most extreme cases, article 3 ECHR (the prohibition of inhuman or degrading treatment, article 8 ECHR (the right to respect for private and family life and the home) and the common law of humanity can offer a measure of protection against street homelessness and starvation. However, the standard of living they guarantee remains lower than the destitution threshold and their scope in this context is not necessarily universal. For example, destitution is only one of three components of the test by which the courts determine whether extreme poverty results in breach of article 3 ECHR.[23] The three tests are:

- The individual must be unable to access 'the most basic needs of a human being', by essentially any lawful means
- These basic needs must be denied 'to a seriously detrimental extent', so that the individual experiences degradation or humiliation
- This deprivation must result from treatment by the state, not from the individual's own action, inaction or misfortune.

This appears to imply that there is no positive obligation under article 3 to support an individual who could access charitable support, who does not experience degradation (which the courts do not accept is an inevitable consequence of destitution, even of street homelessness) or who is in any way responsible for his or her own plight, for example because of failure to seek or obtain employment or promptly register an asylum claim.[24] There are hints in the case law that the courts

[19] Committee on Economic, Social and Cultural Rights, 'General Comment no 19: the Right to Social Security (art 9)' (39th session, 2007) (Geneva: United Nations, 2007)
[20] M Simpson, G McKeever and C Fitzpatrick, 'Legal protection against destitution in the UK: the case for a right to a subsistence minimum' (2022) Modern Law Review – EarlyView article (open access)
[21] S Fitzpatrick, G Bramley, J Blenkinsopp, J Wood, F Sosenko, M Littlewood, S Johnsen, B Watts, M Treanor and J McIntyre, *Destitution in the UK 2020* (York: Joseph Rowntree Foundation, 2020)
[22] M Simpson, G McKeever and C Fitzpatrick, 'Legal protection against destitution in the UK: the case for a right to a subsistence minimum' (2022) Modern Law Review – EarlyView article
[23] The test was established in *R (On the Application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66 at [7] (Lord Bingham)
[24] Findings and inferences from a review of case law for M Simpson, G McKeever and C Fitzpatrick, 'Legal protection against destitution in the UK: the case for a right to a subsistence minimum' (2022) Modern Law Review – EarlyView article

are toying with acceptance that state-enforced destitution always equates to inhuman or degrading treatment, but this has yet to be endorsed by the Supreme Court.[25] If this were to happen, it would clearly represent a step forward in the extent of legal protection against destitution, but would not necessarily mean the minimum core obligations of article 9 were sufficiently guaranteed. The High Court case which may lead to change concerned the position of certain non-UK nationals with leave to remain but no recourse to public funds (NRPF) and its practical implications are potentially limited to requiring the lifting of NRPF status when an affected individual faces imminent destitution, as opposed to when an individual *becomes* destitute in line with the previous practice.

Article 8 ECHR does not often impose a positive obligation to provide material support, but can do so when necessary to enable family life to continue and secure the welfare of children.[26] This duty, though, can be a very limited one in practice. The courts have found that the state had discharged its obligation to ensure the necessary respect for family life even in circumstances that unequivocally fall short of the standards of article 11 ICESCR, the right to an adequate standard of living, and probably fail to meet even the minimum core requirements of article 9. Considering the case of a destitute family housed by a local authority in an overcrowded and rodent-infested property, without support for pregnancy-related needs, toiletries, snacks or children's travel costs during school holidays, the High Court found that the support provided was 'regrettable' but not unlawful.[27]

UK courts have at times acknowledged the existence of a common law of humanity that offers a degree of protection against the most extreme forms of poverty. Lord Ellenborough proposed in 1803 that 'the law of humanity, which is anterior to all positive laws, obliges us to afford [people] relief, to save them from starving.'[28] This principle has been invoked on a number of occasions from 1997 onward, usually in judgments that the state had acted unlawfully in withholding any financial support from certain non-nationals.[29] However, it is not clear that the protection provided is any greater than that under article 3 ECHR and, like any common law rule, the law of humanity can be overridden by an Act of Parliament that imposes destitution on a particular group.[30]

Social security

The decade from 2010 to 2020 was a period of unprecedented retrenchment for working age social security in the UK. In part this was because of the identification of social security as a prime area for spending cuts by governments seeking to reduce the public deficit, but an ideological preference for individual self-reliance and the pursuit of (a highly political interpretation of) 'fairness' in the system were equally important drivers. Examples include a lower ceiling on housing benefit awards to private tenants, to cover at most the cheapest 30% of properties in an area, the reduction of housing benefit awards to under-occupying social tenants, introduction of a cap on household benefit entitlement, initially set with reference to average earnings and subsequently lowered, freezing of a

[25] *R (on the application of W) v Secretary of State for the Home Department)* [2020] EWHC 1299 (admin)
[26] *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406
[27] *R on the application of C, T, M, U v Southwark LBC* [2014] EWHC 3983 (Admin); upheld by the Court of Appeal in *R (C and Others) v Southwark LBC* [2016] EWCA Civ 707
[28] *R v Inhabitants of Eastbourne* (1803) 4 East 103
[29] *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275; *R on the Application of Othman v Secretary of State for Work and Pensions* [2001] EWHC Admin 1022; *R (on the application of W) v Secretary of State for the Home Department* [2020] EWHC 1299 (admin)
[30] M Simpson, G McKeever and C Fitzpatrick, 'Legal protection against destitution in the UK: the case for a right to a subsistence minimum' (2022) Modern Law Review – EarlyView article

range of social assistance awards for four years from 2016 and phased limitation of child-related awards to two children per household.[31]

There can be no doubt that retrogression in the right to social security occurred, including in Northern Ireland and Scotland despite devolved administrations' introduction of additional payments to shield claimants from certain cuts or in pursuit of Scotland's statutory targets for child poverty reduction.[32] In considering the UK's compliance with its obligations under the ICESCR, the key question is whether this retrogression was 'fully justified' in the context of continued deployment of the maximum available resources in pursuit of the realisation of the 'totality' of the rights conferred.[33] Defending judicial reviews of various social security reforms in this period, the UK Government has typically argued that its policy choices have been justified on four grounds. We now consider these in turn, followed by recent developments including the 'cost of living' payments made in response to inflationary pressures on low-income households' budgets.

Deficit reduction

Others have noted that the existence of a degree of political consensus around the need to reduce the public deficit after 2010 does not change the fact that a preference for spending cuts over tax increases, and for social security cuts over cuts to other areas of public spending, was an ideological choice and not an inevitable consequence of the 2007-08 financial crisis.[34] The UK courts have repeatedly acknowledged that social security reforms have resulted in greater financial losses to women and men.[35] Although they have normally accepted that the unequal treatment was justified for the purposes of article 14 ECHR, this effect of reform should be taken into account when considering compliance with articles 2(2) and 3 ICESCR.

Incentivisation of paid employment

Successive UK Governments have identified 'work' (by which they mean paid employment) as the 'best route out of poverty'. It is not disputed that entry into and progression in paid work is likely to increase income compared to reliance on social security as one's main source of income. In part the mantra that work is the best route out of poverty is a self-fulfilling prophecy when benefit rates are low. To this extent, measures to promote employment can make a positive contribution to the realisation of the right to an adequate standard of living. However, the specific measures adopted to this end in the UK also have the effect of undermining individuals' rights under articles 9 and 11 ICESCR, without always having the intended effect on employment outcomes or poverty rates. Despite the consistent political emphasis on employment as the solution to poverty, during the New Labour era (1997 to 2010) 'the years in which [social security] entitlements … rose relative to the poverty line coincide almost perfectly with the years in which child poverty fell.'[36]

Promoting employment is often cited as a general justification for various curbs to the adequacy of social security since 2010. Additional measures have been adopted with the sole purpose of

[31] Rent Officers (Housing Benefit Functions) Amendment Order 2010 SI No 2836; Welfare Reform Act 2012; Welfare Reform and Work Act 2016

[32] See M Simpson, *Social citizenship in an age of welfare regionalism: the state of the social union* (Oxford: Hart, 2022)

[33] Committee on Economic, Social and Cultural Rights, 'General comment no 3: the nature of states parties' obligations' (E/1991/23, annex III, New York: United Nations, 1991) para 9

[34] See N Ellison, 'The coalition government, public spending and social policy' in H Bochel and M Powell (eds), *The Coalition Government and Social Policy: Restructuring the Welfare State* (Bristol: Policy Press, 2016)

[35] For example, *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 at [229] (Lady Hale)

[36] R Joyce, 'Child poverty in Britain: recent trends and future prospects ' (W15/07, London: IFS, 2014) 10

encouraging or enforcing transitions from out-of-work and low-income social security benefits to employment, and subsequently to better paid employment. Some of these have involved increases to in-work benefits or, as with the introduction of universal credit from 2013 onward, the reduction of the rate at which benefit payments are withdrawn in response to increases in earned income. Others, as paragraph 84 of the state party report notes, have involved increases in the range and intensity of jobseeking or employability-related activities claimants are obliged to undertake, widening of the pool of claimants to which these obligations apply (for example, to include primary carers of children over one year old),[37] further reducing the scope for 'choosiness' in the type of jobs applied for[38] and increasing the severity of financial sanctions for non-compliance.[39] While some measure of coercion is an accepted part of active labour market policies internationally, when jobseeking 'incentives' include sanctions that can reduce a childless claimant's income after housing costs to zero (or even less), for up to 18 months in some scenarios, there is no plausible way of arguing that this conditionality regime complies with the right to social security or to an adequate standard of living, or protects human dignity.[40] Furthermore, there is strong evidence that, in some cases at least, this highly disciplinary approach to claimant activation can be ineffective, as caring responsibilities continue to act as a formidable barrier to employment,[41] or even self-defeating, as the impact of a sanction and the resulting destitution on mental and physical health prevent effective jobseeking.[42]

Increasing 'fairness' in social security

Reductions in benefit levels and increases in conditionality during the 2010s reflected not only an assumption that lack of employment was the dominant cause of material poverty, but a strong narrative that it (often) reflected a moral poverty. Accordingly, 'those who take a full-time job' must be rewarded financially in absolute terms and relative to those who do not, and who the narrative often implies choose not to.[43] The measures described in paragraphs 80 to 81 of the state party report as having been introduced to increase fairness in the social security system all reduce the adequacy of benefit awards. That these are 'fair' is a subjective and political judgement with which we disagree. What can be more objectively stated is that the benefit cap and two-child limit (measures highlighted in paragraphs 80 and 81) break the longstanding, Beveridgean link between benefit awards and need, measured according to family size and housing costs,[44] in favour of a reassertion of the Poor Law principle of 'less eligibility' for those dependent on state support.

The courts have been extremely deferential to the Executive when faced with the question of whether this approach is 'fair' and whether the policies adopted in the name of 'fairness' are likely to achieve their stated aims. Lady Hale's dissenting judgment on the lawfulness of the household benefit cap provides a rare example of an alternative approach – not disputing that 'fairness' is a

[37] Welfare Reform and Work Act 2016 c7 s17

[38] Universal Credit and Jobseeker's Allowance (Work Search and Work Availability Requirements - limitations) (Amendment) Regulations 2022 SI No 108

[39] Universal Credit Regulations 2013 SI No 376 regs 101 – 105.

[40] M Simpson, '"Designed to reduce people… to complete destitution": human dignity in the active welfare state' (2015) 1 European Human Rights Law Review 66 (open access version here); see also the judgment of the German constitutional court in BVerfG 1 BvL 7/16, Judgment of 5 November 2019.

[41] *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 at [229] (Lady Hale)

[42] G McKeever, M Simpson and C Fitzpatrick, *Destitution and paths to justice* (London: Legal Education Foundation/York: Joseph Rowntree Foundation, 2018)

[43] See HM Government, *A New Approach to Child Poverty: Tackling the Causes of Disadvantage and Transforming Families' Lives* (Cm 8061, London: DWP, 2011) 3 and commentary in M Simpson, *Social citizenship in an age of welfare regionalism: the state of the social union* (Oxford: Hart, 2022)

[44] See W Beveridge, *Social insurance and allied services* (Cmd 6404, London: HMSO, 1942)

political construct, but observing that 'families in work are already better off than those on benefits and so the cap is not necessary in order to achieve fairness between them.'[45] Whereas the ECHR provides little in the way of minimum standards for social protection (beyond that necessary to avoid inhuman or degrading treatment) and factors in a wide margin of appreciation to national executives and legislatures on matters of social and economic policy, a more interrogative approach is appropriate when assessing compliance with the ICESCR. The onus here is on the state to demonstrate that any retrogression is justified – assertions of fairness should not simply be taken at face value – and that in any event the minimum core obligations are being respected.

Discretionary payments protect the most vulnerable

Paragraph 82 of the state party report notes the availability of additional financial support for those unable to meet a shortfall between benefit entitlement and rent through the Discretionary Housing Payment Scheme (DHPs). The report refers to over £1billion of DHP funds since 2011. The availability of DHPs has been cited in defence of various cuts to housing-related benefits.[46] However, DHPs are unable to adequately mitigate the cuts to housing benefit provision because:

- Available DHP funds **pale in comparison to total deductions**. Even at its peak, these only accounted for 6% of total cuts to housing support.[47] The Government cut DHP funding in 2022-23 by 29% compared to 2021-22: a £40 million reduction in England and Wales.
- There is **significant variation between Local Authorities** in how the scheme is administered. Application processes – such as the assessment of income/expenditure and the imposition of conditionality – and the amount of money allocated for additional support varies both by the political make-up and funding constraints faced by individual authorities.[48]
- DHPs **are not a permanent solution** to insufficient housing support. Particularly for disabled people affected by benefit reforms, DHPs are an insecure means of addressing a long-term problem. As the Work & Pensions Committee noted, reliance on DHPs to mitigate the benefit cap means that "many families are not getting the consistent support they need".[49]

Discretionary payments providing support in a crisis have become the safety net of last resort for citizens who do not merely face poverty, but whose ability to meet the basic material requirements of a life in dignity is in question. The UK-wide system of discretionary support under the statutory Social Fund has been replaced since 2012 with a mixture of local and national schemes. In England, discretionary support has been devolved to local authorities with little consistency between different schemes and even less protection for the funds. Scotland, Wales and Northern Ireland each provide distinct schemes of support on a more centralised but still limited discretionary basis.

Coverage ranges from adequate to hopeless. The absence of any schemes in many parts of England, and the susceptibility of existing schemes to budgetary constraints, offers little in the way of dignity

[45] *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 at [229] (Lady Hale)
[46] J Meers, 'Panacean payments: the role of discretionary housing payments in the welfare reform agenda', (2015) 22(3) Journal of Social Security Law 115 (open access version here)
[47] National Audit Office, 'Managing the impact of Housing Benefit reform' (2012) Available at: https://www.nao.org.uk/reports/managing-the-impact-of-housing-benefit-reform/
[48] See R Hick, 'Austerity, Localism, and the Possibility of Politics: Explaining Variation in Three Local Social Security Schemes Between Elected Councils in England' (2022) 27(2) *Sociological Research Online* 251–272 and J Meers, 'Awarding Discretionary Housing Payments: Constraints of time, conditionality and the assessment of income/expenditure' (2018) 25(2) *Journal of Social Security Law* 102 (open access version here)
[49] Work and Pensions Committee, 'The benefit cap - Twenty-Fourth Report of Session 2017–19' (2019) Available at: https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/1477/1477.pdf

for those in need.[50] The lottery of access, the intrusive nature of some schemes, forced reliance on charity even for those able to access support and the lack of user insight into how schemes could be improved fails to meet basic principles of dignity. The nationalised approach of the Welsh scheme provides consistency, but a lack of current data on its effectiveness means few firm conclusions can be drawn about its ability to meet income shortfalls.[51] The Scottish scheme is embedded within a statutory commitment to dignity and respect, an important, albeit symbolic framework where the reality may not necessarily meet the aspiration.[52] The Scottish Parliament's Social Security Committee cautions against replacing rights with discretionary payments.[53] Northern Ireland offers supplementary social security payments to mitigate against some of the impacts of UK-wide policy, but the recent independent review is clear that essential needs still remain unmet.[54]

Recent developments

The era of continual social security cuts from 2010 to 2020 has come to an end. While this is welcome, it must be stressed that the uprating highlighted in paragraph 78 of the state party report (and the uprating of 10.1% planned for April 2023) only means working age social protection is being maintained at the greatly diminished level of adequacy it had reached by the late 2010s. Benefits are not being restored to a level that even pre-2010 the European Committee of Social Rights deemed 'manifestly inadequate' to comply with the right to social security.[55]

Current benefit levels can be considered at an 'all time low' since their introduction in the National Assistance Act 1948. Then, unemployment benefit was equivalent to 20% of average weekly earnings; today's equivalent (universal credit standard allowance) has fallen to 12.5%.[56] When real-terms increases in adequacy have occurred, these have been temporary uplifts, such as the £20 per week increase to the universal credit standard allowance during the COVID-19 pandemic (with no equivalent support for claimants on the 'legacy' social assistance benefits).[57] Although the uplift was widely regarded as an acknowledgement that the level of social assistance was inadequate, it was withdrawn in October 2021, with the only compensatory measure falling outside the mainstream social security system, in the form of the (England-only) household support fund mentioned in paragraph 83 of the state party report. While the latter is welcome, the fund suffers from similar limitations to DHPs. The £500million allocated to it falls well short of mitigating the removal of the £20 per week uplift to Universal Credit and has been calculated to be insufficient to meet the needs of the 1.7 million households with severe food insecurity.[58] This trend of providing support outside the social security system, through a series of one-off payments in receipt to claimants of social assistance benefits, rather than increasing headline benefit rates continued as inflation rose rapidly

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[50] Resolution Foundation, *Sticking Plasters: An assessment of discretionary welfare support* (2022)
[51] Welsh Government, *Evaluation of the Discretionary Assistance Fund* (2015)
[52] See Scottish Government, *Experiences of the Scottish Welfare Fund* (2019)
[53] Social Security Committee, *The Social Security Response to Covid-19* (2021) SP Paper 992
[54] G McKeever, J Currie, C Fitzpatrick, K Higgins, G McConville, U O'Hare, M Simpson, 'Independent Review of Discretionary Support' (Belfast: Department for Communities, 2022) (open access)
[55] See M Simpson, 'Assessing the compliance of the UK social security system with the state's obligations under the European Social Charter' (2018) 18(4) Human Rights Law Review 745 (open access version here)
[56] C McNeil, D Hochlaf, H Quilter-Pinner, *Social (in)security: Reforming the UK's social safety net* (IPPR, 2019) 2
[57] For a recent challenge to this decision – currently under appeal – see *R (on the application of T) v Secretary of State for Work And Pensions* [2022] EWHC 351 (Admin). For a critique, see J Meers, 'Legacy benefits' and the Universal Credit uplift: justified discrimination in the COVID-19 social security response' (2022) 44(2) Journal of Social Welfare & Family Law 245 (open access)
[58] B Geiger, D Edmiston, L Scullion, K Summers, R de Vries, J Ingold, D Robertshaw and D Young, 'Hunger and the welfare state: Food insecurity among benefit claimants in the UK' (2021) Available at: https://kar.kent.ac.uk/91624/1/FoodInsecurityReport.pdf

in 2022. These payments have provided some relief from immediate pressures but provide no long term protection against poverty. Individuals who do not receive the passporting benefit on the stipulated qualifying date do not receive additional support, tenants who use a pre-pay meter that is not registered in their name risk missing out and there have been problems with extending the payments to Northern Ireland due to the current absence of functioning devolved institutions.

The questionable adequacy of working age social security creates a built-in vulnerability to destitution. The weekly level of social assistance benefits (excluding housing-related benefits) in 2021, following the ending of the £20 per week uplift to the universal credit standard allowance, surpassed the JRF destitution threshold for 2020 by about five pounds per week for a single adult, £13 for a couple and £35 for a lone parent with one child. Particularly for childless claimants, almost any delay in receiving payment, debt-related deduction, sanction, or shortfall between a housing costs award and actual rent would inevitably result in destitution.[59] Single claimants under 25 are entitled to a lower standard allowance and will be destitute even if they get the full rate of benefit.

Conclusion

TH Marshall observed that the individual's 'right to welfare' has both legal and moral dimensions.[60] The 2010s saw a clear diminution of UK nationals' legal right to welfare (foreign nationals' social rights having been greatly eroded before then), with rights-based social protection for working age households becoming less adequate and more conditional. Reliance on discretionary and charitable provision to fill the gap might in some circumstances enable fulfilment of the moral right to welfare, but only if these services can offer consistent protection against poverty. Our research shows that the reality is that growing gaps in the mainstream safety net are not reliably filled by the patchwork of discretionary welfare services (whether provided by the state or the voluntary sector), characterised by inconsistency, underfunding, rationing, an absence of meaningful appeal rights and, often, high levels of stigma or judgements about deservingness.

Judicial deference to the Executive in the determination of what is 'fair' or economically necessary means these developments have, when challenged, largely been found compatible with the ECHR. The standards of ICESCR must be higher. The non-retrogression principle must place the onus on the state to show that the diminution of rights in the last decade was justified, rather than requiring those arguing to the contrary to prove that it was manifestly without reasonable foundation. We argue that the minimum core requirements of article 9 can only be delivered when all lawful residents have a right to protection against destitution, in contrast to the current position in which continual vulnerability to destitution, reliance on non-rights based discretionary or charitable support and sometimes destitution itself, is the inevitable consequence of how social protection functions in the UK. Explicitly placing such a right on a statutory footing is not the only way of achieving, and indeed would not in itself guarantee, compliance with article 9, but doing so has potential to act as a foundation stone for the improvements to social protection required to deliver the minimum core obligations. This in turn could act as a first step towards the more ambitious goal of full realisation of the right to an adequate standard of living.

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[59] See C Fitzpatrick, G McKeever and M Simpson, 'Conditionality, discretion and TH Marshall's "right to welfare"' (2019) 41(4) Journal of Social Welfare and Family Law 445; G McKeever, M Simpson and C Fitzpatrick, *Destitution and paths to justice* (London: Legal Education Foundation/York: Joseph Rowntree Foundation, 2018)

[60] TH Marshall, 'The right to welfare' in *The Right to Welfare and Other Essays* (London: Heinemann, 1981); C Fitzpatrick, G McKeever and M Simpson, 'Conditionality, discretion and TH Marshall's "right to welfare"' (2019) 41(4) Journal of Social Welfare and Family Law 445

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Legal protection against destitution in the UK: the case for a right to a subsistence minimum

Mark Simpson,* Gráinne McKeever† and Ciara Fitzpatrick‡

In a 2003 Supreme Court judgment, Lord Hoffmann argued that in the absence of a guaranteed minimum standard of living, many other rights are reduced to 'a mockery'. Given research findings that 2.4 million UK residents experienced destitution in 2019, this article considers whether a social floor exists in law and the implications of its absence or weakness for the standard of human rights protection in the UK. The common law, social rights treaties and the European Convention on Human Rights can each play a role in identifying a minimum standard of living, but with variable precision, generosity and enforceability – and subject to the sovereign legislature setting its own social floor, including one that may render people destitute. With an analysis of the case law revealing clear weaknesses in protection against destitution, the authors argue that a specific statutory duty is required to address this failure of rights protection.

INTRODUCTION

Research published by the Joseph Rowntree Foundation (JRF) since 2016 has provided a consensual definition of destitution (that is, one developed with and approved by members of the public),[1] and measured the extent to which destitution, by this definition, exists in the UK.[2] The most recent research found that during 2019 at least 2.4 million UK residents experienced destitution – that is, they were unable to meet their most basic needs for shelter, food, heat, light, clothing and hygiene from their own resources for themselves. This article looks behind this headline to consider the impact of destitution on people's human rights and explores the extent to which the persistence of extreme poverty in a modern welfare state ought to be regarded as a failure of human rights protection. In Lord Hoffman's view: 'Human rights are the rights essential to

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*Senior Lecturer, School of Law, Ulster University.
†Professor of Law and Social Justice, School of Law, Ulster University.
‡Lecturer, School of Law, Ulster University. This article draws on research funded by the Legal Education Foundation and Joseph Rowntree Foundation. The authors would like to thank Michael Adler, David Webster and the MLR's anonymous reviewers for their comments on earlier drafts, which have helped make it a better piece of work.

1 For critical discussion of the consensual method, see the various articles in (1987) 16 *Journal of Social Policy*.
2 Suzanne Fitzpatrick, Glen Bramley, Filip Sosenko, Janice Blenkinsopp, Sarah Johnsen, Mandy Littlewood, Gina Netto and Beth Watts, *Destitution in the UK* (York: Joseph Rowntree Foundation, 2016); Suzanne Fitzpatrick, Glen Bramley, Filip Sosenko, Janice Blenkinsopp, Sarah Johnsen, Mandy Littlewood, Gina Netto and Beth Watts, *Destitution in the UK 2018* (York: Joseph Rowntree Foundation, 2018); Suzanne Fitzpatrick, Glen Bramley, Janice Blenkinsopp, Jenny Wood, Filip Sosenko, Mandy Littlewood, Sarah Johnsen, Beth Watts, Morag Treanor and Jill McIntyre, *Destitution in the UK 2020* (York: Joseph Rowntree Foundation, 2020).

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the life and dignity of the individual in a democratic society … I think it is well arguable that human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery.'[3] It is argued here that the experience of destitution may in itself represent a direct infringement of certain human rights and has potential to fatally undermine the enjoyment of other rights.

It is possible to point to specific rights in international and European treaties that seem to confer protection against destitution: the rights to social security and to an adequate standard of living in Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[4] and the right to social assistance in Article 13 of the European Social Charter (ESC).[5] However, each of these instruments carries limited weight in the UK legal system (see discussion below). Failure to take instruments for the protection of social and economic rights as seriously as those for protecting civil and political rights could itself be termed a weakness of the UK's approach to human rights protection.[6] Accordingly, there is no clearly expressed obligation on the state to ensure an adequate standard of living or otherwise avoid causing destitution. What we might look for, and have on occasion seen, is the interpretation of human rights that have been incorporated into UK law or the application of common law principles in a way that recognises the need to avoid or mitigate against the experience of destitution.[7] Lord Hoffmann's words point to a need to consider whether destitution reflects, or brings about, a failure of the state's human rights regime in its own terms. If destitution is demonstrably a threat to the rights protected by the European Convention on Human Rights (ECHR), then it should not be necessary to rely on the dramatic and (outside Scotland) currently unlikely step of greater social rights protection being incorporated into domestic law to establish that public bodies are subject to a duty to protect against it.[8]

This article aims to develop an understanding of destitution as a socio-legal problem, to which law has potential to form part of the solution. In doing so, it

3 *Matthews* v *Ministry of Defence* [2003] UKHL 4; [2003] 2 WLR 435 at [26] per Lord Hoffmann. This was a supporting judgment to the leading opinion in the case, delivered by Lord Bingham.

4 International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200A (XXI), 16 December 1966).

5 European Social Charter (Turin, 18 October 1961).

6 Keith Ewing, 'The Unbalanced Constitution' in Tom Campbell, Keith Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford: OUP, 2001).

7 See discussion below and the dissenting judgments in *R on the application of SG* v *Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449.

8 The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill was carried unanimously through the Scottish Parliament in March 2021, although the Supreme Court has ruled that this Bill is beyond the legislative competence of the Scottish Parliament, as set out in Scotland Act 1998, ss 29, 30 and 33: *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill; Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self Government (Incorporation) (Scotland) Bill* [2021] UKSC 42; [2021] 1 WLR 5106. However, the devolution of social security competences to Scotland has allowed the embedding of the principles of dignity and respect into the Social Security (Scotland) Act 2018, which defines social security as a human right: see Mark Simpson, Gráinne McKeever and Ann Marie Gray, 'From Principles to Practice: Social Security in the Scottish Laboratory of Democracy' (2019) 26 JSSL 13.

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first outlines the increased academic interest in the impact of austerity measures adopted in the wake of the 2008 economic crisis,[9] epitomised by the landmark destitution studies commissioned and published by the Joseph Rowntree Foundation.[10] It then moves from considering the work of social scientists in understanding destitution to a rigorous examination of law's contribution to defining, preventing or mitigating destitution. Various pieces of legislation exist that in some fashion define destitution (chiefly, the Immigration and Asylum Act 1999 and related secondary legislation), confer powers upon public authorities that could be used to relieve or address the consequences of extreme poverty (including the Children Act 1989) or might form the basis of an obligation on the state to guarantee a social minimum (Human Rights Act 1998). However, these definitions, powers and duties can be very general in nature and it is necessary to turn to case law for a fuller understanding of the extent to which causing or failing to relieve destitution might breach legal standards in the UK.

To that end, the authors conducted a systematic review of UK case law in search of a basis for a legal definition of destitution. The review draws on an original dataset of 595 domestic UK judgments that have included consideration of destitution and related issues of hardship and benefit sanctions. This consists predominantly of immigration and asylum-related cases since 1999 and social security cases since 1996, after which sanctions became an everyday feature of the social security vocabulary. By showing how the courts have applied what can be very general statutory provisions in light of the state's overarching human rights and common law obligations, these cases illuminate the extent to which UK law imposes a duty on public authorities to protect against extreme poverty or its consequences. To a large extent, they reveal the weakness of litigation (and therefore of the statutory and human rights bases on which cases are brought) in shoring up the social and economic rights of individuals facing the most precarious and desperate of circumstances. The review subsequently looked further back in time to consider the extent to which earlier social assistance regimes – national assistance and its successor supplementary benefit, which in turn was replaced by income support and subsequently universal credit – may have provided stronger protection against destitution, whether on paper or in practice.

Overall, the article finds that, as currently applied, common law, social rights treaties (to the limited extent that these are recognised as 'law' in the UK) and the ECHR collectively provide inadequate protection to those in or facing destitution. This paucity of provision forms a barrier to the enjoyment of other rights. The article acknowledges the value and ambition of human rights, but our analysis exposes their limitations in the face of 2.4 million people experiencing destitution, and the need to provide a bridge between ambition and

9 Michael Adler, *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK* (Cham: Palgrave, 2018); Jamie Redman and Del Roy Fletcher, 'Violent Bureaucracy: a Critical Analysis of the British Public Employment Service' (2022) 42 CSP 306.

10 See Fitzpatrick and others (2016), n 2 above; Fitzpatrick and others (2018), n 2 above; Gráinne McKeever, Mark Simpson and Ciara Fitzpatrick, *Destitution and Paths to Justice* (London: Legal Education Foundation/York: Joseph Rowntree Foundation, 2018). See also Welfare Conditionality, *Final Findings Report: Welfare Conditionality Project 2013-18* (York: Welfare Conditionality, 2018).

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protection. Multiple means of bridging this gap could be explored – including (most obviously) by improving the social security system, as the part of the welfare state that bears primary responsibility for protecting UK nationals and permanent residents against severe poverty.[11] The focus here, though, is on the potential for statutory recognition of the importance of protecting people against destitution to provide impetus for the improvement of various welfare systems while simultaneously demonstrating a more expansive understanding of the state's human rights commitments than hitherto shown.

DEFINING, MEASURING AND EXPLAINING DESTITUTION IN AN ADVANCED WELFARE STATE

Concern about the extreme manifestation of poverty in the UK has been a growing feature of academic discourse, prompted by increasing evidence of individuals unable to meet their basic human needs.[12] The first systematic attempt to establish, through a hybrid of expert and consensual means, a definition of destitution and to use this definition to explore the extent, causes and experience of destitution came in 2015.[13] A dual definition was devised.

Box 1: Expert-consensual definition of destitution devised by Fitzpatrick and others[14]

People are destitute if:

a) They have lacked two or more of these six essentials over the past month, because they cannot afford them:

- shelter (have slept rough for one or more nights)
- food (have had fewer than two meals a day for two or more days)
- heating their home (have been unable to do this for five or more days)
- lighting their home (have been unable to do this for five or more days)
- clothing and footwear (appropriate for weather)
- basic toiletries (soap, shampoo, toothpaste, toothbrush).

b) Their income is so extremely low that they are unable to purchase these essentials for themselves, and they lack sufficient savings to make up for the income shortfall:

- £70 per week for a single adult (after housing costs)
- £95 for a lone parent with one child
- £105 for an adult couple
- £145 for a couple with two children

11 Katie Boyle and Aidan Flegg, *The Right to Social Security in the UK – An Explainer* (London: Nuffield Foundation, 2022).

12 To a considerable extent, this growing interest reflects the well-publicised growth in the number of food banks and food bank users, assumed to be a symptom of growing food poverty: see Abhaya Jitendra, Emma Thorogood and Mia Hadfield-Spoor, *Early Warnings: Universal Credit and Foodbanks* (London: Trussell Trust, 2017); Rachel Loopstra and Doireann Lalor, *Financial Insecurity, Food Insecurity, and Disability: the Profile of People Receiving Emergency Food Assistance from the Trussell Trust Foodbank Network in Britain* (London: Trussell Trust, 2017). See also Arnab Bhattacharjee and Elena Lisauskaite, 'COVID-19 Impacts on Destitution in the UK' (2020) 253 NIER R77-R85; Adler, n 9 above, ch 6.

13 Suzanne Fitzpatrick, Glen Bramley, Janice Blenkinsopp, Sarah Johnsen, Mandy Littlewood, Gino Netto, Filip Sosenko and Beth Watts, *Destitution in the UK: an interim report* (York: Joseph Rowntree Foundation, 2015).

14 Methods are described in *ibid*; income thresholds reflect the updated figures in Fitzpatrick and others (2020), n 2 above.

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The most recent *Destitution in the UK* study (the third of its kind) found 2.4 million people were destitute according to this definition and in contact with crisis services at some point during 2019 – others may have been destitute but not in contact with any crisis service. It is worth stressing that these households were not 'merely' poor, but lacked 'the minimum level of material wellbeing required before people are plunged into despair'.[15] Around 57 per cent of the destitute population were deprived of food, 49 per cent of clothing, 47 per cent of toiletries, 40 per cent of heating, 21 per cent of lighting and 21 per cent of shelter to at least the extent set out in the box above. More than 30 per cent reported having no income from any source.[16] Secondary analysis of qualitative data from the second wave study (2017-18) found destitution is often the result of a cluster of legal and non-legal problems, with specific legal issues in the realms of social security, housing and debt typically acting as the last straw that tips a household from severe poverty into destitution.[17] A fourth wave is currently underway, as poorer households in the UK struggle to navigate what has become widely referred to as a 'cost of living crisis'.[18]

While Fitzpatrick and others' research was pioneering in academic terms, it was not the first attempt to define destitution in the UK – indeed other contemporary definitions exist and would presumably produce different conclusions about the number of destitute households. From a social research perspective, Seebohm Rowntree's definition of primary poverty can be seen as an attempt to set a destitution threshold for the early 20th century. For a household to be classed as poor by this measure, 'nothing must be bought but that which is absolutely necessary for the maintenance of physical health.'[19] Logically, an income below the primary poverty line must be insufficient to sustain physical health – not far removed from Fitzpatrick and others' broad definition of destitution as inability to afford 'the absolute essentials that we all need to eat, stay warm and dry, and keep clean.'[20] More recently, the 2010–15 coalition government introduced a measure of 'severe poverty' into the Households Below Average Income survey, referring to households with an income of less than 50 per cent of the median and experiencing material deprivation.[21] However, it is not clear that this is intended to equate to destitution.

15 Jeremy Waldron, 'John Rawls and the Social Minimum' (1986) 3 *Journal of Applied Philosophy* 21, 30.
16 Fitzpatrick and others (2020), n 2 above.
17 McKeever and others, n 10 above.
18 See Peter Hourston, 'Explainer: Cost of Living Crisis' *Institute for Government* last update 4 August 2022 at https://www.instituteforgovernment.org.uk/explainers/cost-living-crisis (last accessed 12 August 2022).
19 Benjamin Seebohm Rowntree, *Poverty A Study of Town Life, Centennial Edition* (Bristol: Policy Press 2000) 133-134.
20 Fitzpatrick and others (2016), n 2 above, 2.
21 HM Government, *A New Approach to Child Poverty: Tackling the Causes of Disadvantage and Transforming Families' Lives* Cm 8061 (2011), 22.

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THE LEGAL BASES OF PROTECTION FROM DESTITUTION IN THE UK

Beyond the social science definition, it is possible to (tentatively) identify legal definitions of destitution. Notably, the Home Secretary is subject to a duty to protect asylum seekers from destitution,[22] which flowed originally from the requirement in EU law that member states 'ensure a standard of living adequate for the health of [asylum] applicants and capable of ensuring their subsistence.'[23] To this end, the asylum support scheme provides accommodation plus a weekly cash or voucher payment – although this is only available if essential needs cannot be met by any other lawful means. Strictly speaking, under the Immigration and Asylum Act 1999 asylum support is a payment to be made to persons who are 'destitute or likely to become destitute' rather than a sum that has been established as the destitution threshold. Destitution itself has the broader definition of lacking 'adequate accommodation or any means of obtaining it' or inability to 'meet … other essential living needs'.[24] Nonetheless, litigation has revealed that the level of support has in principle been established (however implausibly) with reference to a defined, though non-statutory, list of essential non-housing costs a household is expected to incur.[25] This list is more precise in its description of potential beneficiaries' essential needs than that set out above, albeit covering broadly the same categories of basic needs, but at £37.75 per person per week, regardless of age,[26] asylum support is less generous in terms of the income it deems certain households require to meet those needs.[27]

The law (via the Asylum Support Regulations 2000) does recognise destitution as a phenomenon, but this definition only applies in certain specified circumstances.[28] The Court of Appeal does not recognise the standard set by the immigration and asylum legislation as a destitution threshold for the purposes of assessing the adequacy of social security benefits.[29] Social security law (via the Universal Credit Regulations 2013) provides its own concept of 'hardship', which broadly equates to destitution in that it refers to inability to 'meet [one's] immediate and most basic and essential needs',[30] and a further definition of

22 Immigration and Asylum Act 1999, s 95; Asylum Support Regulations 2000 no 704.

23 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31/18, 06.02.2003), art 13; a revised version of the Reception Directive was enacted in 2013, but does not apply to the UK, Ireland or Denmark – Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180/96, 29.6.2013).

24 Immigration and Asylum Act 1999, s 95.

25 *R on the application of Refugee Action* v *Secretary of State for the Home Department* [2014] EWHC 1033 (Admin); [2014] ACD 99 – the list of essential items appears at [50].

26 Asylum Support Regulations 2000 no 704, reg 10, as amended by Asylum Support (Amendment) Regulations 2018 no 30, reg 2.

27 Fitzpatrick and others' destitution threshold for smaller households will be higher than the £37 allocated to an asylum seeker, but this outcome may be flipped for larger households. Asylum support adds £37 for each member of the household. The Fitzpatrick definition adds £20 per child (or £25 in some cases), so as the number of children increases, eventually asylum support becomes more 'generous'.

28 Asylum Support Regulations 2000 no 704, reg 23.

29 *R (on the application of SG)* v *Secretary of State for Work and Pensions* [2014] EWCA Civ 156; [2014] HRLR 10 at [101]-[105] per Lord Dyson MR, Longmore LJ and Lloyd Jones LJ.

30 Universal Credit Regulations 2013 no 376, reg 116.

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destitution (in relation to visa and immigration concessions for victims of domestic violence) exists as having 'no access to funds or [being] reliant on a third party to pay for … essential living costs such as basic accommodation and food'.[31] However, each of these definitions only applies in very specific circumstances – the former to claimants of out-of-work benefits who are subject to a financial sanction and meet other conditions, the latter to non-UK national domestic violence victims who would normally have no recourse to public funds.

It can be argued that destitution has been, at least in part, a legally-created problem in the UK. A dedicated system for providing limited support to asylum seekers only became necessary as a result of the progressive reduction of non-nationals' access to mainstream social assistance following the introduction of income support – from which various categories of 'person from abroad' were excluded – in 1988.[32] Since 2010, growing levels of destitution among UK nationals have been associated with the freezing of already parsimonious benefit rates, increasingly restrictive access to disability and incapacity benefits and an unprecedented spike in financial sanctions for non-compliance with work-related conditions to which social security claimants are subject, as well as additional barriers to appeal rights.[33] The most obvious solution to the problem of destitution would therefore seem to be addressing these structural problems in the social security system. The JRF research shows clearly how social security is implicated in the experience of destitution and it is not difficult to find economic analyses that point to the need to raise benefit levels to prevent more claimants from becoming destitute.[34] Yet even if the social security safety net was improved, it is unlikely to reach a level of repair that would catch all circumstances, and further reinforcements would benefit those who will continue to slip through the net. A central question for this article, then, is the extent to which the law might offer a partial solution in the form of protection against destitution, either as a complement or alternative to other measures. Given the extent to which basic human needs – rights – are impacted by destitution, it is appropriate to consider whether there can be a rights-based solution to miti-

31 UK Visas and Immigration, 'Victims of domestic violence (DDV) concession' (London: UK Visas and Immigration, 2013).

32 Income Support (General) Regulations 1987 no 1967, reg 21; sch 7 para 17; for discussion of the political context see Peter Billings, 'Alienating Asylum Seekers: Welfare Support in the Immigration and Asylum Act 1999' (2002) 9 JSSL 115.

33 Adler, n 9 above; Sheona York, '"The Law of Common Humanity": Revisiting *Limbuela* in the "Hostile Environment"' (2017) 31 JIANL 308; Ciara Fitzpatrick, Gráinne McKeever and Mark Simpson, 'Conditionality, Discretion and T.H. Marshall's "Right to Welfare"' (2019) 41 JSWFL 445 – note that sanctioning trends were generally downward from 2014 for jobseeker's allowance and from 2017 for universal credit, until the suspension of jobseeking conditionality in the early stages of the coronavirus pandemic.

34 Robert Joyce, Heidi Karjalainen, Peter Levell and Tom Waters, 'The Cost of Living Crunch' *Institute for Fiscal Studies* 2022 at https://ifs.org.uk/publications/15905 (last accessed 21 July 2022); Abigail Davis, Donald Hirsch, Matt Padley and Claire Shephard, *A Minimum Income Standard for the United Kingdom in 2021* (York: Joseph Rowntree Foundation, 2021); Torsten Bell, Adam Corlett and Daniel Tomlinson, *To Govern is to Choose* (London: Resolution Foundation, 2021); Mike Brewer, Karl Handscomb, Gavin Kelly, James Smith and Lalitha Try, *Social Insecurity: Assessing Trends in Social Security to Prepare for the Decade of Change Ahead* (London: Resolution Foundation, 2022).

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gate this impact, whether by conferring an individual right to relief or as the foundation for an adequate, (near-) universal social minimum.

Methods

In order to understand the extent to which UK law currently provides rights-based protection against destitution, the authors conducted a systematic review of case law. The judgments emerging from the review provide insight into what legislative provisions, human rights and common law principles have been drawn on by those constructing legal arguments for protection against destitution and how the courts have responded. This initially used the search terms 'destitute OR destitution', which produced over 2,100 hits. The authors added the filter terms 'private and family life', 'health and social security', 'human rights', 'local government' and 'public law', then excluded cases prior to 2000, as neither of the two key pieces of primary legislation – the Human Rights Act 1998 and the Immigration and Asylum Act 1999 – would have been in force. This left 428 cases. The main search brought up few social security cases, despite benefit issues being identified as the most common cause of destitution in the JRF study and the overlap between the definition of destitution in the immigration and asylum legislation and the eligibility criteria for a jobseeker's allowance or (particularly) universal credit hardship payment.[35] A separate search was carried out for 'hardship', applying the filter 'social security'. This produced 149 hits, of which 80 were cases heard after the introduction of jobseeker's allowance in 1996, not appearing among the 428 post-2000 cases in the main search.[36] A final search used the term 'sanction', again applying the filter 'social security'. However, most of the cases retrieved used the word 'sanction' in a context other than a jobseeker's allowance or universal credit sanction and only a further three made any contribution to the analysis. Following the exclusion of cases in which the search terms only appear as one of the parties' names, judgments of the lower courts in Scotland and cases in which the keywords were used in a different context from that with which the investigation was concerned, and the inclusion of a couple of particularly important older cases cited in those retrieved through the review, the following themes were covered in the case law:

- the definition of destitution and/or essential needs (46 cases)
- appeals against removal from the UK on the basis that it would result in destitution (43 cases)
- support sought from a public authority on the basis of destitution (109 cases)
- destitution as a barrier to the enjoyment of the individual's rights (18 cases)

35 Jobseeker's Allowance Regulations 1996 no 207, part ix; Universal Credit Regulations 2013 no 376, part 8 ch 3.

36 The cut-off of 1996 was applied because the introduction of jobseeker's allowance brought sanctions (the temporary suspension of a benefit payment for breach of claimant obligations) into the social security vocabulary.

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- social security or social assistance (29 cases)
- applications to set aside or amend a contract or order if enforcement would result in destitution (six cases)
- the power of the executive or legislature to impose destitution (five cases)
- criminal law (three cases)

These themes span decisions based on common law, social rights treaties and rights under the ECHR. The article also refers to a small number of judgments handed down after the initial review was carried out.

Common law rights

The statutory definition of destitution in the Immigration and Asylum Act 1999 extends to a number of other contexts,[37] but has not gained recognition as a universal destitution threshold,[38] nor does it establish any right to protection against destitution for anyone other than asylum seekers who follow the correct procedure for registering their claim.[39] Ideally, the value of a legal definition of destitution would be in marking out a recognised minimum subsistence standard that the state must guarantee for everyone lawfully present within its territory. Such a social floor is a feature of various national constitutions, whether as an enforceable right or a non-justiciable principle.[40] While the UK lacks a codified constitution, it has been suggested that there is a natural or common law right to protection against starvation at least.[41] If such a right does exist, though, it can be whittled away by statute.

Some measure of common law protection against destitution has been traced back to Magna Carta, which prohibits disproportionate fines and deprivation of the means of livelihood,[42] through settled persons' right to support from the parish under the Poor Law[43] (although whether the Poor Law was in any way

37 Asylum Support Regulations 2000 no 704, reg 23.

38 *R (on the application of SG)* v *Secretary of State for Work and Pensions* n 29 above at [101]–[105] per Lord Dyson MR, Longmore LJ and Lloyd Jones LJ.

39 Asylum seekers who register their claims late are entitled to support only to the extent necessary to avoid breach of ECHR, art 3, which may be at a still lower level – Immigration and Asylum Act 1999, s 4.

40 Katie Boyle, 'Constitutionalising a Social Minimum as a Minimum Core' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds), *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Oxford: Hart, 2019); Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Oxford: Routledge, 2020). See also the German Basic Law, Arts 1 and 20(1), which proclaim the right to a minimum standard of living in accordance with human dignity and the social state principle. The German constitutional court has long recognised that creating the conditions for leading an independent and fulfilling life is part of the state's constitutional responsibilities. See Valery Gantchev 'Judgment of the German Constitutional Court on the (Un)constitutionality of Welfare Sanctions' (2019) 21 EJSS 378.

41 *R* v *Inhabitants of Eastbourne* (1803) 4 East 103; *R* v *Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.

42 Derry Irvine, 'The Spirit of Magna Carta Continues to Resonate in Modern Law' (2003) 119 LQR 227.

43 Lorie Charlesworth, 'The Poor Law: a Modern Legal Analysis' (1999) 6 JSSL 79; Michelle Stoker, 'Bentham's Proposals for Reform of the Poor Law' (1994) 1 UCL Juris Rev 173. See also Webb

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a rights-based system can be questioned),[44] to long-running debates about the enforceability of contracts that would have the effect of leaving a party destitute, or that could only have been agreed to because of destitution.[45] The argument that the common or natural law confers, or ought to confer, protection against destitution continues to be made.[46] The Hobbesian view that starvation excuses essentially any action taken in the interests of survival has not taken root in the UK's criminal law,[47] but academics have argued,[48] and the law in some circumstances accepts,[49] that the need to survive is a legitimate consideration in sentencing decisions. For present purposes, the most important cases concern Lord Ellenborough's proposal that 'the law of humanity, which is anterior to all positive laws, obliges us to afford [people] relief, to save them from starving.'[50] This principle underpinned the Court of Appeal's decision that Secretary of State had acted ultra vires in denying any form of support to failed asylum seekers. However, despite the view of Simon Brown LJ that 'the Regulations necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it',[51] the 'law of humanity' could not override the right of parliament to reinstate the same provisions through primary legislation.[52] Subsequently, the 'law of humanity' was found to place limits on the extent to which public authorities could deprive a family of its means of subsistence in accordance with EU terrorism legislation.[53] More recently, in a judgment

and Webb referencing *R* v *Curtis R v Curtis* [1873] 27 *Law Times Reports* 792 and *Clark* v *Joslin* [1873] 27 *Law Times* 762 as having established that 'Under the poor law it was a misdemeanour for an officer to refuse relief & it was understood that an indictment for manslaughter would lie if the pauper died as a result': Sidney Webb and Beatrice Webb, *English Local Government: English Poor Law History* (London and New York, NY: Longmans, Green and Company, 1927).

44 Robert S. Shiels, 'The Tay Bridge Disaster and the Major Personal Injury Claim' (2015) 122(Feb) Rep B 4; Fitzpatrick and others, n 33 above.

45 John Kruse, 'Enforcement Law Reform and the Common Law' (2008) 27 CJQ 494; *Simpson* v *Hartropp* [1744] Willes 512; *Bissett* v *Caldwell* [1791] Peake 50; J.L. Barton, 'The Enforcement of Hard Bargains' (1987) 103 LQR 118.

46 Danny Friedman, 'A Common Law of Human Rights: History, Humanity and Dignity' (2016) 4 EHRLR 378; David Feldman, 'The Nature and Significance of 'Constitutional' Legislation' (2013) 129 LQR 343.

47 *Re A (Children)* [2001] 2 WLR 480.

48 Susan Easton, 'Dangerous Waters: Taking Account of Impact in Sentencing' (2008) 2 Crim LR 105; Victor Tadros, 'Poverty and Criminal Responsibility' (2009) 43 *Journal of Value Inquiry* 391; Jeffrey Reiman and Paul Leighton, *The Rich get Richer and the Poor get Prison* (Abingdon: Routledge, 2017).

49 Modern Slavery Act 2015, s 45; for discussion, see Susan Edwards, 'Coercion and Compulsion – Re-imagining Crimes and Defences' (2016) 12 Crim LR 876.

50 *R* v *Inhabitants of Eastbourne* n 41 above, 107 per Lord Ellenborough.

51 *R* v *Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* n 41 above, 292–293 per Simon Brown LJ; note that, despite citing verbatim the reference to Lord Ellenborough's judgment that appears in this case, the majority judgment in *R (on the application of O)* v *Secretary of State for the Home Department* [2022] UKSC 3; [2022] 2 WLR 343 at [37]-[39] per Lord Hodge treats that case as turning on the fundamental common law right of access to justice rather than any right to a subsistence standard of living.

52 Asylum and Immigration Act 1996, ss 8-11.

53 *R on the Application of Othman* v *Secretary of State for Work and Pensions* [2001] EWHC Admin 1022; Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000 (OJ L 67/1), art 2.

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handed down in the midst of the global coronavirus pandemic, the 'law of humanity' was at the heart of determining when the imposition of 'no recourse to public funds' (NRPF) could be in breach of Article 3 ECHR, as one of the legal principles that should be applied to the construction of parliamentary intent. The High Court found Home Office guidance to be unlawful since it failed to make clear that the condition of NRPF could be lifted when there was a risk of destitution, rather than only when destitution had manifested itself. The case is notable for asserting that a common law protection from inhuman and degrading treatment by denial of resources would exist 'even in the absence of Article 3'.[54]

The second strand of the debate around a possible common law protection from destitution largely concerns whether it would be unreasonable to uphold a contract or other legal arrangement, to apply a criminal sanction or to deny access to a public service. Legally, a decision to do so would be unreasonable if it were 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'[55] This is a high bar to surmount, and one that changes over time as social attitudes evolve.[56] If public opinion in the UK or democratic societies across the world were overwhelmingly of the view that it was unacceptable for the state to subject people to destitution, then a decision with that effect might be regarded as unreasonable: 'the Courts would intervene in an executive decision, even one with internal logic, if they took the view that it was in outrageous defiance of common law standards of decency.'[57] Simon Brown LJ's view that regulations contemplating 'a life for some so destitute that no civilised nation could tolerate it' must be ultra vires surely follows similar logic;[58] however, this is not the logic that underpins a range of policy decisions and other judgments.

Social rights treaties

If it is possible to debate what rights the common law does or does not confer, there is less ambiguity around the intention of multiple human rights instruments to protect against destitution – particularly those whose focus is on

54 *R (on the application of W)* v *Secretary of State for the Home Department)* [2020] EWHC 1299 (admin); [2020] 1 WLR 4420 (*W*) at [61] per Bean LJ and Chamberlain J.

55 *Council of Civil Service Unions* v *Minister for the Civil Service* [1984] 3 WLR 1174, 1196 per Lord Diplock.

56 *R* v *Ministry of Defence ex p Smith* [1996] 2 WLR 305.

57 Michael Beloff and Helen Mountfield, 'Unconventional Behaviour? Judicial Uses of the European Convention in England and Wales' (1996) 5 EHRLR 467, 479.

58 In South Africa, the constitutional court assesses the conformity of the state with its constitutionally protected social rights through an assessment of the reasonableness of policy and legislation made with a view to their realisation, in a context of limited resources and competing political priorities, albeit that its interpretation of reasonableness is not necessarily identical to the UK courts': See Anashri Pillay, 'Courts, Variable Standards of Review and Resource Allocation: Developing a Model for the Enforcement of Social and Economic Rights' (2007) 6 EHRLR 616.

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social and economic rights.[59] The European Social Charter (ESC) is the sister of the European Convention on Human Rights (ECHR), but unlike the ECHR the Charter has not been incorporated into UK domestic law. The original 1961 Charter (as opposed to the Revised European Social Charter of 1996) has, however, been ratified by the UK. Article 13(1) confers 'an individual right of access to social assistance in circumstances … when no other means of reaching a minimum income level consistent with human dignity are available.'[60] Eligibility may not be time limited and while benefits may be reduced for non-compliance with reasonable work-related conditions, this may not result in 'the loss of basic means of subsistence'.[61] The International Covenant on Economic, Social and Cultural Rights (ICESCR) is another international treaty focused on protecting the enjoyment of social rights, which again has been ratified by the UK but not incorporated. Like the ESC, the first of the minimum core obligations under Article 9 of the ICESCR (the right to social security) requires that people are able to access subsistence needs, here defined as 'essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.'[62] The definition developed by Fitzpatrick and others dovetails with a number of other specific social rights. The housing related requirement, that people should have 'shelter' and should not have to sleep rough, is at face value fairly minimal. When combined with the requirements for heating and lighting, though, it begins to look something more like the right to adequate housing within Article 11 ICESCR, which expects housing not only to be habitable, but to meet current cultural and technological requirements.[63] It arguably falls short of the standards in Article 31 ESC, which encompasses security of tenure, absence of overcrowding and facilities like water, sanitation and waste disposal.[64] Article 31 ESC has been successfully used to challenge the use of destitution as a tool to force Roma migrants to leave France,[65] but as it features in the Revised Charter it does not strictly bind the UK,[66] which has only ratified the original text – Article 16 of which (the right to family protection) may imply a less explicit right to housing. The expectation that people should have at least two meals per day is in keeping with the right to adequate (that is, nutritionally and culturally acceptable) food, also conferred by Article 11 ICESCR, and with Article 11(1) ESC, which requires protection

59 This category is taken here to include instruments with a dual focus on civil/political and social/economic rights, such as the Convention on the Rights of the Child.
60 *European Roma Rights Centre (ERRC)* v *Bulgaria* (complaint 48/2008) [2009] 49 EHRR SE12 at [38].
61 *ibid* at [41].
62 Committee on Economic, Social and Cultural Rights, 'General Comment no 19: the Right to Social Security (art 9)' (39th session, 2007) (Geneva: United Nations, 2007).
63 Committee on Economic, Social and Cultural Rights, 'General Comment no 4: the Right to Adequate Housing (art. 11 (1) of the Covenant)' (sixth session, 1991) (Geneva: United Nations, 1991).
64 European Committee of Social Rights, *Conclusions 2003 – France – Article 31(1)* (Strasbourg: Council of Europe, 2003).
65 *Centre on Housing Rights and Evictions (COHRE)* v *France* (complaint 63/2010) [2012] 54 EHRR SE5.
66 Article 31 is also used as an aid to interpretation of art 16 (the right to family protection), which appears in the 1961 Charter and is accepted by the UK.

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from causes of ill-health. Weather-appropriate clothing and basic toiletries also help protect against causes of ill-health. The problem, from the point of view of using human rights as a tool to address destitution, is that neither the Charter nor ICESCR forms part of UK law, and their requirements are not consistently reflected in relevant fields of domestic law.[67]

The UK, of course, is not alone in having been slower to embrace constitutional protection of social rights. Goldmann observes that the common view in the post-World War 2 period was that 'protecting social rights was a task for national welfare systems … [O]ne needs to understand the Universal Declaration of Human Rights as setting out a program for domestic welfare states, rather than as a compendium of judicially enforceable individual social rights.'[68] While some other states have moved on, the key test for the UK courts remains whether ECHR rights are affected. Edwards and Billings argue that the ECHR 'should be read to give effect to the other international obligations of the UK, particularly those obligations arising under [ICESCR], the Universal Declaration on Human Rights and the European Social Charter' under the broader banner of protecting human dignity.[69] The courts have been slow to adopt this approach, except in their use of the UN Convention on the Rights of the Child (UNCRC) as an aid to interpretation of the right to respect for family life;[70] even on this front, progress has been halted by the Supreme Court's decision in *R (on the application of SC, CB and 8 children)* v *Secretary of State for Work and Pensions and others* that unincorporated conventions do not apply to domestic law.[71] The still more ambitious approach advocated by Lord Kerr, that ratified human rights treaties should have direct effect,[72] seems even further from gaining widespread judicial acceptance.[73] The Scottish Parliament has voted unanimously to incorporate the UNCRC into domestic law thus placing a

67 Mark Simpson, 'Assessing the Compliance of the UK Social Security System with the State's Obligations Under the European Social Charter' (2018) 18 HRLR 745.

68 Matthias Goldmann, 'Contesting Austerity: Genealogies of Human Rights Discourse' MPIL research paper 2020-09 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561660 (last accessed 22 July 2022).

69 Richard Edwards and Peter Billings, 'Safeguarding Asylum Seekers' Dignity: Clarifying the Interface Between Convention Rights and Asylum Law' (2004) 11 JSSL 83, 95.

70 Mark Simpson, 'Social Rights, Child Rights, Discrimination and Devolution: Untangling the Web' (2018) 40 JSWFL 3.

71 *R (on the application of SC, CB and 8 children)* v *Secretary of State for Work and Pensions and others* [2021] UKSC 26; [2021] 3 WLR 428. See Charlotte O'Brien, 'Inevitability as the new Discrimination Defence: UK Supreme Court Mangles Indirect Discrimination Analysis while Finding the Two-child Limit Lawful' *Oxford Human Rights Hub* 26 July 2021 at https://ohrh.law.ox.ac.uk/inevitability-as-the-new-discrimination-defence-uk-supreme-court-mangles-indirect-discrimination-analysis-while-finding-the-two-child-limit-lawful/ (last accessed 22 July 2022).

72 *R on the application of SG* v *Secretary of State for Work and Pensions* n 7 above at [243-257]. See Gráinne McKeever, 'Scrutinising Social Security Law and Protecting Social Rights: Lord Kerr and the Benefit Cap' in Brice Dickson and Conor McCormick (eds), *The Judicial Mind: a Festschrift for Lord Kerr of Tonaghmore* (Oxford: Hart, 2021).

73 There are some, albeit limited, exceptions to judicial reluctance to use unincorporated treaties including *In the matter of NP* [2020] EWCOP 44 where the Court of Protection used CRPD, art 19 (the right to live independently and be included in the community) to inform its decision as to what was in P's best interests, noting that although 'the CRPD has not been incorporated into English and Welsh law, the court should pay it due regard given the UK's ratification'.

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judicially enforceable prohibition on Scottish public authorities (excluding the parliament) acting contrary to the Convention.[74] However, the nature of the devolution settlement limits the extent to which this Bill will serve to protect children from destitution, and not just on the basis of the UK government's successful challenge to the Scottish parliament's competence to enact the Bill.[75] Although the UNCRC includes a right to an adequate standard of living, the limited extent of the Scottish parliament's social security powers may limit the scope for incomes to be topped up at devolved level to the extent necessary to ensure its realisation for all children.

European Convention on Human Rights

The ECHR clearly has domestic force, most of its component rights having been incorporated into UK law through the Human Rights Act 1998. Unlike the social rights treaties mentioned above, however, the ECHR contains no provision that can be interpreted as providing explicit protection against destitution. Collins J, citing Lord Ellenborough's contention that the state is subject to a natural law duty to do just this,[76] argues that 'it would be surprising if the standards of the ECHR were below those believed 200 years ago to be applicable as the law of humanity.'[77] Yet the European Court of Human Rights (ECtHR) has traditionally been reluctant to read specific social entitlements into the Convention rights,[78] despite recognising their close connection to civil and political rights.[79]

In the 21st century, O'Cinneide suggests that some degree of protection for social rights, and protection from destitution, has 'begun to take solid doctrinal shape', driven in large measure by the UK courts.[80] If this were indeed the case, the ECHR would clearly offer a firmer foundation for a social floor of this kind,

74 United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill [as passed] SP Bill 80B, Session 5 (2021); see also Nicola Hogg, '2020 and Beyond: Children's Rights in Scotland' (2020) 65 JLSS 26; The Scottish government plans to incorporate four further human rights treaties in law, including the International Covenant on Economic, Social and Cultural Rights – Scottish Government, 'New Human Rights Bill' News release, 12 March 2021 at https://www.gov.scot/news/new-human-rights-bill/ (last accessed 22 July 2022).

75 *Reference by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill; Reference by the Attorney General and the Advocate General for Scotland - European Charter of Local Self Government (Incorporation) (Scotland) Bill* [2021] UKSC 42; [2021] 1 WLR 5106. See Joshua Rozenberg, 'How Competent is Scotland's Parliament?' *A Lawyer Writes* 14 April 2021 at https://rozenberg.substack.com/p/how-competent-is-scotlands-parliament?utm_campaign=post&utm_medium=web&utm_source=copy (last accessed 22 July 2022).

76 *R* v *Inhabitants of Eastbourne* n 41 above.

77 *R (on the application of Q)* v *Secretary of State for the Home Department* [2003] EWHC 195 Admin at [72] per Collins J.

78 Andrew Williams, 'The European Convention on Human Rights, the EU and the UK: Confronting a Heresy' (2013) 24 EJIL 1157; Dimitrios Kagiaros, 'Vulnerability as a Path to a "Social Minimum"? An analysis of ECtHR jurisprudence' in Kotkas, Leijten and Pennings (eds), n 40 above, 246.

79 *Airey* v *Ireland* (A/32) [1979-80] 2 EHRR 305.

80 Colm O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 EHRLR 583, 584.

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since public authorities in the UK are prohibited from acting contrary to the Convention unless required to do so by primary legislation and the courts are required to interpret all legislation in such a way as to be compatible with the Convention if at all possible.[81] It would also offer a clear means of holding the executive and legislature accountable for such legislation, as the courts can make a declaration of incompatibility[82] – something they have been reluctant to do in respect of other human rights treaties. However, when the case law is examined, it is evident that – while O'Cinneide is correct to observe that genuine doctrinal progress has been made – the ECHR has not been interpreted as requiring protection from destitution in all circumstances, rather that the consequences of destitution can in some circumstances include the violation of certain rights within the ECHR. This means the state can be required to step in and help individuals meet their or their children's subsistence needs, but the demands of the ECHR can often be satisfied while still leaving the household below either of the destitution thresholds set out above. The Joint Committee on Human Rights argues that it is 'difficult to envisage a case where a person could be destitute without there being a threat of a violation of Articles 3 [the prohibition of inhuman or degrading treatment] and/or 8 [the right to respect for private and family life] of the ECHR,'[83] but the courts have repeatedly shown themselves willing to accept that individuals can be destitute without infringement of either article (see discussion below)

Despite its limitations, the ECHR has a role to play, if not in preventing destitution then certainly in requiring minimal protection against its most extreme manifestations. There are clear examples of rights protected by the ECHR whose enjoyment would in practice be curtailed, if not rendered impossible, by the most extreme forms of poverty. Correspondingly, these rights can carry an implicit obligation on the state to protect against, or at least ameliorate, destitution in some circumstances. While a claim against the state for the protection of social rights most obviously arises when a 'degree of degradation … significantly below [the statutory] definition of destitution' brings about a risk of violation of Article 3 (prohibition of torture, inhuman or degrading treatment or punishment),[84] the UK judiciary may be slightly more receptive than their Strasbourg counterparts to the possibility of a positive right to a minimum – or minimal – income under Article 8 (right to respect for private or family life), at least where the welfare of children is at stake. It is also not too great a leap to imagine that breach of Article 6 (the right to a fair trial) could in some circumstances flow from destitution. This potential to use the ECHR to protect against inhuman or degrading treatment, to ensure respect for family life, and the access to justice protection offered by Article 6 ECHR requires some detailed examination, to understand the extent to which the ECHR could thereby protect against destitution.

81 Human Rights Act 1998, ss 3, 6.
82 Human Rights Act 1998, s 4.
83 Cited by Anthony Bradley, 'Judicial Independence Under Attack' (2003) PL 397, 407.
84 *R (on the application of S)* v *Secretary of State for the Home Department* [2003] EWCA Civ 1285; [2003] UKHRR 1321 at [8] per Kennedy LJ.

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Inhuman and Degrading Treatment

The judgment in *W* suggests both the courts and the government now treat it as uncontroversial that inhuman and/or degrading treatment, which is prohibited by Article 3 ECHR, can result from 'lack of resources.'[85] However, the bar for violation of Article 3 is set very high and requires a two-part test. First, destitution would have to result in inhuman and degrading living conditions. This outcome is certainly possible, but not inevitable, and is generally assessed on a case-by-case basis. Second, the inhuman and degrading conditions would have to result from either treatment by the state or the state's failure to discharge a positive obligation to prevent such treatment by someone else. While O'Cinneide suggests the state has a positive obligation to protect from destitution those who are in a position of dependence on it,[86] the Article 3 case law points to a conservative interpretation of what this means practically.

As a headline definition, 'treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being.'[87] Denial of a person's most basic needs appears to be a relatively straightforward test. The judgments in *Limbuela*, concerning the state's breach of Article 3 ECHR for its failure to provide food and accommodation to asylum seekers who had no means of supporting themselves, overlap with the JRF definition of destitution, referring to inability to access shelter, food, warmth, somewhere safe to sleep and hygiene facilities.[88] When this occurs at a level which can be judged 'to a seriously detrimental extent' is less clear, particularly in cases where it cannot be proven that the state has deliberately set out to inflict pain or suffering. Williams's proposition that 'suffering is the unspoken precondition for human rights' is certainly apt.[89] It is suggested that treatment becomes degrading when it 'humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.'[90] The point at which this threshold is passed will vary: some individuals might be able to sleep rough for a period without experiencing degradation, as long as they are in good health and have sufficient food and access to washing facilities,[91] while for others street homelessness would immediately breach Article 3 (typically because of their physical or mental health)[92] and some might suffer degradation before reaching the point of sleeping rough.[93] Hickinbottom J has suggested that 'in the ordinary course the [Article 3] threshold may be crossed if, as a result of a withdrawal of support … a person was obliged to sleep in

85 *R (on the application of W)* v *Secretary of State for the Home Department)* n 54 above at [60] per Bean LJ and Chamberlain J.

86 O'Cinneide, n 80 above.

87 *R (On the Application of Limbuela)* v *Secretary of State for the Home Department* [2005] UKHL 66; [2005] WLR 1014 at [7] (Lord Bingham).

88 *RM* v *Secretary of State for the Home Department* [2017] EWHC 1262 (Admin).

89 A.T. Williams, 'Human Rights and Law: Between Sufferance and Insufferability' (2007) 123 LQR 133, 137.

90 *Pretty* v *UK* [2002] 35 EHRR 1.

91 *R (on the application of Zardasht)* v *Secretary of State for the Home Department* [2004] EWHC 91 (Admin); *R (on the application of S)* v *Secretary of State for the Home Department* n 84 above.

92 *R on the application of GS* v *Camden LBC* [2016] EWHC 1762 (Admin).

93 *R (On the Application of Limbuela)* v *Secretary of State for the Home Department* n 87 above.

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the street, or was seriously hungry, or was unable to meet the most basic requirements of hygiene.'[94] If homelessness were to interfere with the treatment regime for a chronic illness, resulting in pain, this could be further evidence of degrading treatment.[95] The High Court decision in *W* has potential to bring greater clarity and consistency as it hints at the use of 'destitution' (as defined by the 1999 Act) as a more precisely defined proxy for 'inhuman or degrading treatment'.[96] The caveat to this is that the same judgment acknowledges that in *Limbuela* the Supreme Court specifically declines to equate destitution with degrading treatment;[97] a decision of the higher courts will be required to instil confidence that destitution should automatically be regarded as degrading.

Identifying when degradation results from treatment by the state is also complex, particularly when degrading living conditions are more readily attributable to omissions (such as failure to provide financial support) than acts. Fredman asserts that all destitution ultimately results from state action, because it is the state that enforces the property laws that prevent the penniless accessing food and shelter.[98] The courts, though, have not come close to accepting this view – if they did, it would potentially imply a far-reaching positive obligation to protect against destitution. Nonetheless, the decision in *Limbuela* makes clear that failure on the part of the state to provide support to a destitute individual or class of people cannot always be regarded as mere inaction, but constitutes 'treatment' if support would be available to other classes of person in similarly destitute circumstances. The regime for late asylum seekers (people who fail to register their claim for asylum as soon as practically possible upon arrival in the UK), which excludes them from the paid labour market, social security and the support available to other asylum seekers, is recognised to constitute treatment because the state takes a deliberate decision to exclude one group from services and opportunities to access earned income that it provides to others.[99] Or, as Harvey puts it, the state put in place 'a law and policy framework that deliberately engineers poverty and destitution … [D]eprivation of human rights by design.'[100] On the other hand, failure to provide asylum seekers with a guaranteed right to housing does not constitute treatment if no such right is provided to citizens.[101] Meanwhile, an individual who purports to have grounds for asylum, but has not registered a claim, may be unable to argue that non-receipt of support results from any action on the part of the state, when the 'true' cause is his or her own inaction.[102] Failed asylum seekers are even further removed

94 *R on the application of EW* v *Secretary of State for the Home Department* [2009] EWHC 2957 [Admin] at [85] per Hickinbottom J.
95 *R on the Application of N* v *Lambeth LBC* [2006] EWHC 3427 (Admin).
96 *R (on the application of W)* v *Secretary of State for the Home Department)* n 54 above.
97 *ibid* at [42] and [71] per Bean LJ and Chamberlain J.
98 Sandra Fredman, 'Human Rights Transformed: Positive Duties and Positive Rights' (Aut 2006) PL 498.
99 *R (On the Application of Limbuela)* v *Secretary of State for the Home Department* n 87 above at [6] per Lord Bingham; [56] per Lord Hope; see also *R (on the application of Q)* v *Secretary of State for the Home Department* [2003] EWCA Civ 364; [2003] 3 WLR 365 at [57] per Lord Phillips MR.
100 Colin Harvey, 'Refugees and Human Rights: the Future of International Protection in the United Kingdom' (2015) 6 EHRLR 595.
101 *R on the application of EW* v *Secretary of State for the Home Department* n 94 above.
102 *NA (Sudan)* v *Secretary of State for the Home Department* [2016] EWCA Civ 1060; [2017] 3 All ER 885.

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from protection since the High Court determined that the Secretary of State owes no duty under Articles 2, 3 or 8 ECHR to provide accommodation, either on the grounds of protecting a failed, homeless asylum seeker during a global pandemic or as a specific obligation owed to the public at large.[103] Instead, the court recognised the broad discretion the state was to be provided in order to balance difficult policy decisions.

With the case law in this area dominated by immigration and asylum cases, it is unclear whether someone left destitute by, for example, the withdrawal of a social security benefit or the five-week waiting period for a first universal credit payment, would be viewed as the victim of 'treatment' by the state or whether the absence of any legal bar to paid employment would relieve the state of any positive obligation under Article 3. Although the destitute individual will normally be required to attempt to meet his or her essential needs by other means before the state has a responsibility to do so, the state is not necessarily entitled to 'wait and see' whether degradation occurs rather than intervening earlier to prevent it.[104] If an individual has no access to the labour market, no access to social security, no familial support network and it is well known that charitable provision is overstretched, 'case-by case decision-making … cannot reasonably be regarded as a sufficient discharge of the Secretary of State's responsibilities.'[105] Ultimately, Feldman's interpretation of *Limbuela* as a statement that 'Article 3 guarantees … protection against destitution and degradation' still seems over-optimistic.[106] At best, thanks in part to the activism of the UK courts,[107] of which the judgment in *W* can perhaps be viewed as the next, incremental step forward, the article can be used to compel a state to take action against destitution in certain narrow circumstances: where the treatment by the state or its failure to discharge a positive obligation to prevent such treatment by someone else results in inhuman and degrading living conditions which denies the most basic needs of any human being, humiliating them, debasing the or putting their moral or physical resilience in danger.

Respect for Family Life

Article 8 ECHR similarly confers no right to protection from destitution, but destitution can give rise to circumstances that result in breach of the article, particularly the right to respect for family life.[108] When a 'family unit' is affected and particularly when 'the welfare of children is at stake, article 8 may

103 *R (Secretary of State for the Home Department)* v *First-tier Tribunal (Social Entitlement Chamber)* [2021] EWHC 1690 (Admin); [2022] 1 WLR 22.

104 The approach endorsed in *R (on the application of Q)* v *Secretary of State for the Home Department* n 99 above; see also *R (on the application of W)* v *Secretary of State for the Home Department)* n 54 above at [42] per Bean LJ and Chamberlain J.

105 *R (on the application of Limbuela)* v *Secretary of State for the Home Department* [2004] EWCA Civ 540; [2004] 3 WLR 561 at [125] per Carnwath LJ.

106 Feldman, n 46 above, 346.

107 Derry Irvine, 'A British Interpretation of Convention Rights' (Apr 2012) PL 237; Bharat Malkani, 'A Rights-Specific Approach to Section 2 of the Human Rights Act' (2012) 5 EHRLR 516.

108 See O'Cinneide, n 80 above.

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require the provision of welfare support in a manner which enables family life to continue.'[109] Any decision taken without regard for the welfare of affected children would potentially contravene Article 8 ECHR.[110]

This is an example of the Human Rights Act 1998 compelling authorities to exercise powers in a particular way. Local authorities in England are subject to a specific duty to provide accommodation for children in need,[111] and a general duty to safeguard and promote the wellbeing of children in need, including the promotion of their upbringing by their families.[112] In some cases, there may be a choice to make between accommodating the child alone through fostering or promoting his or her wellbeing by supporting the whole family. In 2003, Lord Nicholls was a dissenting voice in the House of Lords in arguing that Article 8 is likely, in many (or most) cases, to require the latter approach on the basis that the child's 'basic need' will usually be for 'accommodation with his parent.'[113] The Court of Appeal would soon adopt Lord Nicholls' approach, concluding that where children are affected the state is subject to an obligation to relieve poverty if 'necessary to allow family life to continue'[114] or if children are at risk of street homelessness.[115] This interpretation appears to be more readily accepted by the courts today,[116] albeit that the minimum level of support required by Article 8, that which is necessary to enable family life to continue, may be less than would be required to prevent destitution.[117] A 'minimum level of humanitarian support'[118] might suffice to uphold the principle that 'if the Council are seeking to keep the family together when that is in the children's interests and to respect their Convention rights, it would make no sense to leave the adults to starve.'[119]

The burden Article 8 places on public authorities in terms of a positive duty to maintain the destitute, then, is potentially very limited. The London Borough of Southwark was found to have discharged its duty to support children in need through the provision of emergency accommodation and assistance with other

109 *Anufrijeva* v *Southwark LBC* [2003] EWCA Civ 1406; [2004] 2 WLR 603 at [43] per Lord Woolf CJ; *R (on the application of JS)* v *Secretary of State for Work and Pensions* [2013] EWHC 3350 (QB); [2014] PTSR 23 at [66] per Elias LJ.

110 Borders, Citizenship and Immigration Act 2009, s 55.

111 Children Act 1989, s 20.

112 Children Act 1989, s 17 – interestingly, this duty was at the heart of the *W* case discussed at n 54 above, but the High Court was not convinced by arguments based on Article 8 (with Article 14), finding for the applicant solely on the basis of Article 3.

113 *R (on the application of G)* v *Barnet LBC* [2003] UKHL 57; [2003] 3 WLR 1194 at [55] per Lord Nicholls.

114 *Anufrijeva* v *Southwark LBC* n 109 above.

115 *R on the Application of N* v *Greenwich LBC* [2016] EWHC 2559 (Admin).

116 *R on the Application of PK* v *Harrow Council* [2014] EWHC 584 (Admin); although it appears to be acceptable to accommodate one parent separately from the other parent and children - *R (MK (Iran))* v *Secretary of State for the Home Department* [2011] EWCA Civ 671; [2012] 1 WLR 765; *R on the Application of MK, TM* v *Secretary of State for the Home Department* [2010] EWHC 1002 (Admin); *R on the Application of Grant* v *Lambeth LBC* [2004] EWHC 1524 (Admin).

117 *R (C and Others)* v *Southwark LBC* [2016] EWCA Civ 707; [2016] HLR 36.

118 *R (Mensah and Bello)* v *Salford County Council* [2014] EWHC 3537 (Admin); [2015] ACD 46 at [53] per Lewis J; *R on the application of C, T, M, U* v *Southwark LBC* [2014] EWHC 3983 (Admin).

119 *R on the Application of: PO, KO, RO* v *Newham LBC* [2014] EWHC 2561 (Admin); [2015] PTSR D1 at [47] per Howell QC.

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essential needs for a Nigerian family evicted from their home, even though the family clearly remained destitute. The council argued that 'although overcrowded … the room [provided] was assessed as providing basic care needs for the family during a period of temporary accommodation.' On the other hand, a doctor considered that the accommodation was having a 'deleterious impact' on the children's health and schooling, while an environmental health inspection found 'the rodent infestation in the property represented a Category 1 hazard under the Housing Health and Safety Rating system.'

The court found the choice of accommodation was 'regrettable' but not unlawful, having enabled family life and education to continue and 'basic needs for shelter and sustenance' to be met.[120] As Edwards and Billings observe, to the very limited extent that Article 8 embodies a right to housing,[121] the right is 'quantitative not qualitative.'[122] The decision that it was not necessary to provide financial support for additional pregnancy-related needs, toiletries, snacks or travel for the children during school holidays was also upheld.

Access to Justice and Other Rights

Prior to and since the enactment of the Human Rights Act, the courts have been alive to the possibility that destitution might act as a barrier to obtaining a fair hearing in the determination of one's rights, protected by Article 6 ECHR. It is for that reason that the Bach Commission recommended a new, legally enforceable right to justice, as part of a 'Right to Justice Act.' The Act would principally create a new right for an individual to 'receive reasonable legal assistance without costs they cannot afford', alongside a new independent body to promote and develop the right.[123] While such legislative provision remains beyond reach, the courts have given consideration to the problem that such legislation would aim to address. In 1997 the Court of Appeal found the Secretary of State could not remove late and failed asylum claimants' eligibility for social assistance through secondary legislation in part because to force them out of the UK by destitution would be to render 'nugatory' their procedural right to claim asylum and to appeal an adverse decision,[124] although primary legislation achieving the same 'sorry state of affairs' was subsequently introduced.[125] Similarly, whereas in *M* the High Court found section 17 of the Children Act 1989 could only be used to provide support for a short period

120 *R on the application of C, T, M, U* v *Southwark LBC* n 118 above at [10], [13], [51], [53] per Cheema QC; see also *R (C and Others)* v *Southwark LBC* n 117 above.

121 Hale suggests the ECtHR is also 'developing a duty not to deprive a person of the home he already has,' but no positive obligation to supply a home to the individual who lacks one – Brenda Hale, 'Common Law and Convention Law: the Limits to Interpretation' (2011) 5 EHRLR 534, 541; see *Connors* v *United Kingdom* [2005] 40 EHRR 9; *McCann* v *United Kingdom* [2008] 47 EHRR 40.

122 Edwards and Billings, n 69 above, 105.

123 Bach Commission, *The Right to Justice* (London: Fabian Society, 2017). See also Boyle (2020), n 40 above, ch 1.

124 *R* v *Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* n 41 above, 289 per Simon Brown LJ.

125 *ibid*, 293 per Simon Brown LJ. Such a sorry state of affairs can also be a policy rather than legislative provision, as was the case in *FB (Afghanistan) and Medical Justice* v *Secretary State for the*

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pending removal once a household had been found to have no right to remain in the UK,[126] the Court of Appeal ruled that support must be available until the conclusion of the applicant's appeal, as it would be treated as abandoned if she left the UK.[127] In particular, if the appeal raises issues under Article 8 and is not clearly futile, then Article 8 includes an implied procedural right that the person concerned should be able to see the appeal through, which may require the provision of accommodation or financial support.[128] However, there is no right to support to enable one to remain in the UK in order to pursue an appeal that is 'clearly specious' or that could be continued from outside the country.[129]

Other ECHR provisions have shown briefer glimpses of potential to offer protection against destitution, in narrow circumstances. The right to life, protected by Article 2 ECHR, has been recognised as a relevant consideration in cases where there is a risk that destitution might lead an HIV positive mother to breastfeed because of inability to afford formula milk.[130] The review did not reveal any cases in which destitution has been found to result in an actual breach of Article 2, but some jurisdictions more readily accept that the right to life may include a right to the necessary resources for a life in dignity.[131] Notably, no attempt was made to advance arguments based on the right to life in a UK case concerning a claimant who starved to death following the automatic termination of a benefit award due to non-attendance at an appointment. Although this was an opportunity to explore the possibility of a positive obligation to relieve destitution in extreme circumstances, ultimately the case turned on technical points about the reasonableness of placing the burden of proof on the claimant to demonstrate good reason for failure to comply with conditions for benefit receipt.[132] This in itself may reflect a lack of confidence on the part of the applicant's legal team that arguments based on any right to protection from or duty to prevent destitution were worth pursuing. Any such lack of confidence would appear well founded given the subsequent decision that Article 2 did not require the coroner to investigate what the High Court judge described as 'shocking' failures on the part of the Department for Work and Pensions in

Home Department [2020] EWCA Civ 1338; [2021] 2 WLR 839, where the Court of Appeal held that the Home Office's Judicial Reviews and Injunctions Policy which gave a 'removal notice window' of between 72 hours and one week before an individual would be removed from the UK was unlawful insofar as it gave rise to a real risk of preventing access to justice.

126 Applying the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 no 3078.

127 *R (on the application of M)* v *Islington LBC* [2004] EWCA Civ 235; [2005] 1 WLR 884.

128 *R (on the application of KA (Nigeria))* v *Essex County Council* [2013] EWHC 43 (Admin); [2013] 1 WLR 1163.

129 *R (on the application of K)* v *Lambeth LBC* [2003] EWCA Civ 1150; [2004] 1 WLR 272 at [50] per Lord Phillips MR.

130 *R (on the application of T)* v *Secretary of State for Health* [2002] EWHC 1887 (Admin).

131 Fredman, n 98 above; Ruvi Ziegler, 'No Asylum for 'Infiltrators': the Legal Predicament of Eritrean and Sudanese Nationals in Israel' (2015) 29 JIANL 172; see *Franic Caralie* v *Union of Territory of Delhi* [1981] 1 SCC 608; LCA 4905/98 *Gamzu* v *Yishaiyahu*, 55(3) PD 360, 375-376 (IsrSC).

132 *R on the application of Turner* v *Secretary of State for Work and Pensions* [2021] EWHC 465 (Admin); [2021] PTSR 1312.

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the period preceding the suicide of a claimant whose employment and support allowance award had been terminated.[133]

The ECtHR has also held that a fee charged to individuals subject to immigration control wishing to marry must be waived on behalf of destitute couples; the UK's failure to do so breached Article 12 (the right to marry) and Article 14 in conjunction with Articles 12 and 9 (freedom of religion).[134] There are also examples from case law of rights derived from EU law indirectly conferring a right to a minimal level of support,[135] but given that free movement and residence rights for EU citizens in the UK who do not have settled status are likely to be eroded in the coming years these now form a poor basis on which to advocate a more general right to freedom from destitution.

PROTECTING AGAINST DESTITUTION?

Ultimately, despite the limitations of the ECHR, it appears that the Human Rights Act 1998 has served to increase the range of scenarios in which a duty to prevent, relieve or mitigate the effects of destitution does apply. Various public authorities hold powers that can be used to this effect. By requiring authorities to act in accordance with the ECHR, unless prohibited from doing so by primary legislation,[136] the Act has been held to convert some of these discretionary powers to provide support into duties to do so where this is necessary to prevent violation of an individual's Convention rights.[137] This has been particularly evident in the field of immigration and asylum, within which the Secretary of State has discretion to support 'able-bodied destitute' asylum seekers whose claim fails and others with no right to remain in the UK.[138] This discretion must be exercised if necessary to avoid a breach of the individual's ECHR rights,[139] but the support is not intended to prevent destitution[140] and does not encompass all essential needs, a deliberate policy decision to 'emphasise the precarious and temporary nature of the failed asylum-seeker's stay in the UK and the imminence of their departure.'[141] Powers to provide for the children of people with no recourse to public funds or for 'infirm destitute'

133 *Dove* v *HM Assistant Coronor for Teesside and Hartlepool* [2021] EWHC 2511 (Admin); [2021] ACD 121 at [34] per Farbey J.

134 *O'Donoghue* v *United Kingdom* [2011] 53 EHRR 1.

135 *Sanneh* v *Secretary of State for Work and Pensions* [2015] EWCA Civ 49; [2015] 3 WLR 1867; *R (on the application of HC)* v *Secretary of State for Work and Pensions* [2017] UKSC 73; [2017] 3 WLR 1486.

136 Human Rights Act 1998, s 6.

137 *R (on the Application of Limbuela)* v *Secretary of State for the Home Department* n 87 above; for discussion, see Keith Puttick, 'Strangers at the Welfare Gate: Asylum Seekers, "Welfare" and Convention Rights after Adam' (2005) 19 IANL 214.

138 Immigration and Asylum Act 1999, s 4.

139 Sheona York and Nancy Fancott, 'Enforced Destitution: Impediments to Return and Access Section 4 "hard cases' support"' (2008) 22 JIANL 5.

140 *R (on the application of C and Others)* v *Southwark LBC* n 117 above; *R (on the application of MK (Iran))* v *Secretary of State for the Home Department* n 116 above; Immigration and Asylum (Provision of Services or Facilities) Regulations 2007 no 3627; *R on the Application of AW (Kenya)* v *Secretary of State for the Home Department* [2006] EWHC 3147 (Admin); [2007] ACD 33.

141 York and Fancott, n 139 above, 20.

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persons subject to immigration control may be similarly converted into duties.[142] All this said, there are hints in the case law that the common law offers comparable protection where there is a threat to family life or a risk of degrading treatment. Perhaps the strongest statement to this effect comes from Collins J, who, having held that the 'law of humanity' prohibited the cutting off of all financial support bar child benefit to a family because of one member's alleged links to terrorism (overriding EU law in the process), stated that it was unnecessary even to consider the effect of the Convention rights.[143] That the law of humanity confers comparable rights to, but stands above, the ECHR has been a recurring theme since the courts belatedly picked up on Lord Ellenborough's proclamation, although in other cases the two have been yoked together.[144]

Where social security payments to people facing extreme hardship are concerned, no evidence was found of the courts drawing on human rights obligations to require the state to cast the safety net of last resort wider, or to make it more generous. Claimants whose income is reduced for non-compliance with benefit conditions (which will normally result in destitution according to the JRF definition) can seek a hardship payment, but these are contingent on compliance with set conditions and inability to access familial support.[145] Meanwhile, discretionary support for individuals facing crises for other reasons is, in England at least, a non-core local government function, typically only available until an annual budget has been exhausted and not offered at all by some local authorities.[146] Mainstream social assistance, too, is implicated in exposing people to destitution as they struggle to navigate a legally and structurally complex landscape of means-tested benefits, including the transition from the 'legacy' system to Universal Credit.[147] Claimants are increasingly expected to access support via a digitalised system, in an environment where face-to-face advice provision and legal assistance has been greatly depleted.[148] This can frustrate efforts to seek poverty relief (for example by the digitally excluded), reinforcing the need to bridge the gap in human rights protections to meet the basic needs of those who are destitute.

142 Children Act 1989, s 17(10); see *R (on the application of W)* v *Lambeth London Borough Council* [2002] EWCA Civ 613; [2002] 2 All ER 901; *R on the Application of PO, KO, RO* v *Newham LBC* n 119 above; National Assistance Act 1948, s 21.

143 *R on the Application of Othman* v *Secretary of State for Work and Pensions* n 53 above at [51], [56] per Collins J – Othman was barred from receiving any public funds as an individual directly connected with Osama Bin Laden or the Taliban, in accordance with Council Regulation (EC) No 467/2001 (as amended by Commission Regulation (EC) No 2062/2001(OJ L 277/25).

144 G. Whyte, 'Lord Ellenborough's Law of Humanity and the Legal Duty to Relieve Destitution' (2018) 60 *Irish Jurist* 1.

145 Universal Credit Regulations 2013 no 376, reg 116; Jobseeker's Allowance Regulations 1996 no 207, reg 140. See Adler, n 9 above, ch 6.

146 Damon Gibbons, *The Decline of Crisis and Community Care Support in England: Why a New Approach is Needed* (London: Centre for Responsible Credit, 2017); National Audit Office, *Local Welfare Provision* (London: NAO, 2016); Iain Porter, *Nowhere to Turn: Strengthening the Safety Net for Children and Families Facing Crisis* (London: Children's Society, 2019); Jed Meers, 'Forms of Fettering: Application Forms and the Exercise of Discretion in the Welfare State' (2019) 42 JSWFL 221.

147 Neville Harris, *Law in a Complex State: Complexity in the Law and Structure of Welfare* (Oxford: Hart, 2013); Sam Royston, *Broken Benefits: What's Gone Wrong with Welfare Reform* (Bristol: Bristol University Press, 2017).

148 McKeever and others, n 10 above.

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TOWARDS A SPECIFIC RIGHT TO PROTECTION AGAINST DESTITUTION

It can certainly be argued that one of the suitable ambitions – if not the key functions – of human rights is to 'protect … the weak, the powerless, the destitute, the undeserving'.[149] The CJEU suggests that 'to have one's most basic needs catered for is … an essential right which cannot depend on the legal status of the person concerned.'[150] McCrudden argues that the protection of human dignity – the 'very essence' of the ECHR[151] – requires protection from inhuman and degrading treatment and the opportunity to satisfy one's essential needs;[152] Feldman that dignity 'may generate duties on public authorities to provide assistance to those who would otherwise be left destitute';[153] and Whyte that dignity overlaps with elements of both the 'law of humanity' and 'Catholic social teaching' that impose upon the state a 'duty to promote the right to avoid destitution.'[154]

However, as the preceding sections highlight, the UK currently recognises no absolute legal obligation to prevent destitution; indeed, Dupre suggests that the limited extent to which the ECHR protects against destitution undermines its potential to uphold human dignity.[155] In particular, there is no right to a home or to financial assistance to achieve a given standard of living and no protection against expulsion to a state where one's standard of living would be lower, as long as means of subsistence are available.[156] Nor, conversely, does a British national who has not been habitually resident in the UK gain access to social assistance simply because he or she is forced to return to the UK by destitution.[157]

Small, though real, doctrinal steps towards the recognition of the ECHR as a vehicle for some degree of social rights protection have not yet been transformed into an effective shield for people who experience destitution. Furthermore, there is a risk that such progress as has been made might grind to

149 Aidan O'Neill, 'Judging Democracy: the Devolutionary Settlement and the Scottish Constitution' (2004) 8 Edin LR 177, 182.

150 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve (CPAS)* v *Abdida* [2015] 1 WLR 3109.

151 *Pretty* v *United Kingdom* n 90 above at [65]; the veracity of this statement is contested in Williams, n 78 above.

152 Christop McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 665.

153 David Feldman, 'Human Dignity as a Legal Value: Part 2' (spr 2000) Public Law 61, 61.

154 Whyte, n 144 above, 28.

155 Catherine Dupre, 'Unlocking Human Dignity: Towards a Theory for the 21st Century' (2009) 2 EHRLR 190. See also the Social Security (Scotland) Act 2018, which embeds the principle of dignity and respect: Simpson and others, n 8 above.

156 *Hussein* v *Netherlands and Italy* [2013] 57 EHRR SE1; *AB (Jamaica)* v *Secretary of State for the Home Department* [2007] EWCA Civ 1302; [2008] 1 WLR 1893; *Januzi* v *Secretary of State for the Home Department* [2006] UKHL 5; [2006] 2 WLR 397; *R on the application of Tabrizagh* v *Secretary of State for the Home Department* [2014] EWHC 1914 (Admin).

157 *R on the application of Couronne* v *Crawley Borough Council* [2007] EWCA Civ 1086; [2008] 1 WLR 2762. The position may be different in other states – Stendahl and Swedrup suggest that Sweden does recognise 'positions of social destitution that in themselves trigger a public responsibility to act,' even if the level of support available to non-nationals can be limited: Sara Stendahl and Otto Swedrup, 'A Social Minimum for Whom? Making a Case for a Normative Pattern of Pragmatic Decency' in Kotkas, Leijten and Pennings (eds), n 40 above, 47.

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a halt. A consultation on the reform of the Human Rights Act 1998 into a 'modern Bill of Rights' envisages measures to simultaneously 'mitigate the incremental expansion of rights driven by [the ECtHR]' and 'address the risk of domestic courts running ahead of the ECtHR jurisprudence,'[158] although plans to legislate are currently on hold.[159] Other rights that might offer more explicit protection carry too little weight in UK law. The general weakness of human rights in our domestic jurisprudence is that it can only enshrine minimal personal entitlements rather than challenge structural causes leading to distributive unfairness or the power disparities that sustain this systemic inequality.[160] Moreover, the minimum entitlement is clearly set at an extremely low level. Commenting on one of a series of ECHR-focused judicial reviews of the household benefit cap, Lammasniemi asks: 'can the state ever justify inflicting extreme poverty and hunger on those who are dependent on it? The Supreme Court disappointingly answers that question in the affirmative.'[161] The review of case law undertaken for this article underlines the need for the UK to afford citizens and other lawful residents a statutory right to protection against destitution.[162] Fitzpatrick and others' finding that 2.4 million people in the UK experienced destitution in 2019 represents a strong basis from which to argue that welfare systems designed to provide a safety net to prevent the worst excesses of poverty have not been effective enough. Given that the UK's existing human rights framework has not prevented this state of affairs, there is a need to consider how that framework might be changed or supplemented to underpin the development of more effective social and legal protection against the worst forms of poverty. This is the gap that a statutory duty to protect against destitution might help fill.

The historic duty and its erosion

There is historical precedent for a form of statutory protection against destitution in the UK. The historic duty to relieve destitution, flowing from the Poor Laws, was enshrined in 'modern' form in the National Assistance Act 1948. This imposed an explicit duty on the state (via the National Assistance Board) 'to assist persons in Great Britain who are without resources to meet their requirements, or whose resources … must be supplemented in order to meet their requirements'. The Ministry of Social Security Act 1966 conferred a 'right to benefit' upon 'every person … whose resources are insufficient to meet his requirements' and gave the Supplementary Benefits Commission (SBC) authority to provide 'benefit … by way of a single payments to meet an exceptional

158 Ministry of Justice, *Human Rights Act Reform: a Modern Bill of Rights* CP 588 (2021) 59

159 Jessica Elgot, 'Liz Truss Halts Dominic Raab's Bill of Rights Plan' *Guardian* 7 September 2022 at https://www.theguardian.com/law/2022/sep/07/liz-truss-halts-dominic-raab-bill-of-rights-plan (last accessed 20 September 2022). The impact of Raab's return to the position of Secretary of State for Justice in October 2022 remains to be seen

160 See Virginia Mantouvalou, 'Welfare-to-Work, Structural Injustice and Human Rights' (2020) 85 MLR 929.

161 Laura Lammasniemi, 'The Benefit Cap and Infliction of Poverty' (2019) 41 JSWFL 368, 370.

162 McKeever and others, n 10 above.

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need'.[163] By the 1960s the principle of 'the positive, personal and beneficent use of discretionary powers' was well established in a context where 'the public, the politicians and the administration fully accept the legitimacy of the claims [for the relief of poverty], take them seriously and give them a high degree of priority.' As a result, the 'less than legal' right to last-resort protection against extreme poverty in practice felt like something that was 'not an act of grace, but the satisfaction of a right, even if not strictly a legal right.'[164]

Case law reinforced the basic principle that the state had a duty to ensure, by some means, that those lawfully resident in the UK could meet their requirements by bridging any gap between the household's available resources and its needs, although it was not necessarily bound to do so through the provision of cash.[165] The statutory duty first began to be eroded through the exclusion of those on strike due to a trade dispute.[166] Regulations made in 1980 largely excluded strikers and their families from supplementary benefit.[167] The SBC's policy had been to only make payments to strikers or their families in very restricted circumstances, but the new Regulations mandated that no payments were to be made to a disqualified claimant, removing the only means by which a single striker could have obtained benefit at a minimal level. Further regulations permitted payments where this was the 'only means' of preventing 'serious damage or serious risk to the health or safety of any member of the assessment unit,[168] drawing the assessment criteria very tightly.[169] In Donnison's analysis this was the point where the government broke with 'a centuries old tradition that those who administer the poor laws must in last resort prevent people from starving, no matter what the cause of their plight.'[170] Further erosion of the scope of protection from severe poverty would follow in subsequent years. A gradually increasing range of non-UK nationals were unable to claim income support, the successor to supplementary benefit, with restrictions on access to paid employment and some other benefits introduced in the same period.[171] The Social Fund, introduced in 1986, provided a discretionary system of loans and payments for one-off expenses, but was abolished in 2012,[172] with powers devolved to local authorities in England and regional legislatures in Scotland,

163 National Assistance Act 1948, s 4; Ministry of Social Security Act 1966, ss 4, 7; Supplementary Benefits Act 1976, ss 1, 3.
164 T.H. Marshall, 'The right to welfare' in *The right to welfare and other essays* (London: Heinemann, 1981) 89.
165 *Supplementary Benefits Commission* v *Jull; Y* v *Supplementary Benefits Commission* [1981] AC 1025, 1031 per Viscount Dilhorne; 1037 per Lord Salmon.
166 Ministry of Social Security Act 1966, s 10.
167 Supplementary Benefit (Trade Disputes and Recovery from Earnings) Regulations 1980, S.I. 1980 No. 1641.
168 Supplementary Benefit (Single Payments) Regulations 1980, S.I. 1980 No. 985, amended by Supplementary Benefit (Miscellaneous Amendments) Regulations 1980 S.I. 1980 No. 1649.
169 Supplementary Benefit (Urgent Cases) Regulations 1980, S.I. 1980 No. 1642.
170 David Donnison, *The Politics of Poverty* (Oxford: Martin Robertson, 1982).
171 Income Support (General) Regulations 1987, S.I. 1987 No. 1967, reg 21; sch 7 para 17; Asylum and Immigration Act 1996, ss 8-11.
172 Social Security Act 1986, part III; Welfare Reform Act 2012, s 70.

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Wales and Northern Ireland – though crucially without any legal duty to replace the abolished national scheme or a ring-fenced budget.[173]

Dimensions of a modern duty

The proposal, then, is at once an appeal for the UK to live up to at least the minimum core obligations of the human rights it has signed up to respect by ratifying the various international instruments, and to reinstate in some form the last-resort protection against destitution formerly provided for in national systems for the relief of poverty. Definitively establishing the parameters of the duty and developing an initial draft Bill will be a significant piece of work in its own right, but some key considerations and an initial appraisal of the likely pros and cons of different approaches can be presented here. In particular, it will be necessary to establish a definitive definition of destitution, identify a duty bearer and decide on the nature of the duty. At face value it seems likely that discretionary support must play some role in protection against destitution, but the extent and nature of this role also demands consideration.

At a conceptual level, the basic choice for a definition of destitution is between income- or deprivation-based models. A deprivation-based definition would imply that it is possible to have no income at all but avoid destitution as long as basic needs for shelter, food, heat, light, clothing and hygiene can be met by some means. This is the approach adopted in the asylum support system and for universal credit hardship payments. While a duty to protect from destitution so defined would not be without value, it legitimises delegation of responsibility from the state to the charitable sector to the extent that it is able to provide such essentials.[174] This would be problematic from a human dignity or social citizenship perspective which encompasses basic rights rather than reliance on ad hoc charitable support.[175] It is also vulnerable to substandard application of emergency relief duties, as the Asylum Support Regulations have demonstrated. An income-based definition, if based on income after housing costs, has the advantage of simplicity but faces the problem that what is sufficient to meet basic needs in one part of the UK might not be elsewhere. Energy costs are higher than average in Northern Ireland and remote parts of Scotland, while living costs are generally higher in greater London. The Minimum Income Standard (MIS) embodies a more ambitious vision for poverty prevention than mere protection against destitution, but in setting a single, UK-wide standard it exemplifies the methodological problem with which a statutory destitution threshold would have to contend. Proposals exist for geographical variations to

173 See Gráinne McKeever, Jonny Currie, Ciara Fitzpatrick, Kevin Higgins, Ursula O'Hare, Gerry McConville and Mark Simpson, *Independent Review of Discretionary Support* (Belfast: Department for Communities, 2022); Porter, n 146 above .

174 *R (on the Application of Limbuela)* v *Secretary of State for the Home Department* n 87 above.

175 Ciara Fitzpatrick, Gráinne McKeever and Mark Simpson, 'Conditionality, Discretion and T.H. Marshall's "right to welfare"' (2019) 41 JSWFL 445; Luke Graham, 'Destitution as a Denial of Economic, Social and Cultural Rights: Addressing Destitution in the UK through a Human Rights Framework' (PhD thesis, Lancaster University, 2021).

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the MIS, for example to reflect the specific circumstances of island communities, and these could be equally relevant to a future destitution duty.[176] Alternatively there might be a more cohort-specific or outcome-based approach which would accommodate the variance in unavoidable expenditure on certain essentials at the household level, including for example the need for higher ambient temperature for people with certain impairments.[177]

A strength of Fitzpatrick and others' definition is that it combines deprivati- and income-based models. A single adult with an income over £70 per week is still destitute if that is insufficient to meet his or her basic needs, as is a household whose basic needs are satisfied but not from its own income or savings. This definition also benefits from the legitimacy of having been developed in partnership with both experts and the general public. It therefore represents a strong candidate for adoption as the legally recognised definition, or at the very least offers a model for a definition that combines income and deprivation factors, even if there is room to debate the final list of essential items or income threshold. In practice, there is considerable overlap between Fitzpatrick and others' list of essential items and the other obvious candidates – the items recognised as essentials for the purpose of the Asylum Support Regulations 2000, social security hardship provisions and especially the minimum essential needs identified by the Committee on Economic, Social and Cultural Rights.[178]

The questions of the nature and location of the duty are linked. Various existing models – a duty to have due regard to the desirability of eliminating destitution,[179] a duty to develop a strategy to address destitution[180] or a duty to reduce the prevalence of destitution to a maximum level[181] – could play a role in mainstreaming the prevention of destitution into policy development and political accountability. However, none of these would offer the destitute individual a route to compel public authorities to provide support in his or her case, and the possibility of this kind of litigation could in itself have a mainstreaming function. Our ultimate aspiration is that the envisaged duty should encompass something resembling an individual right not to suffer destitution, although this does not automatically mean the other models have no role to play. This leaves a basic choice between a negative duty (to avoid taking action that would result in destitution) and a positive duty (to take measures to relieve destitution). A negative duty would risk offering only weak protection against destitution as it might suffer from the same shortcoming as Article 3 ECHR – the difficulty of proving that the state had *caused* destitution through its positive action, as opposed to failing to provide support with destitution resulting from a health condition, labour market exclusion, family breakdown, non-compliance

176 See Scottish Government, *The National Islands Plan: Plana Nàiseanta nan Eilean* (Edinburgh: Scottish Government, 2019).
177 Rachel Statham, Henry Parkes and Russell Gunson, *Securing a Living Income in Scotland: Towards a Minimum Income Guarantee* (Edinburgh: IPPR Scotland, 2021).
178 Committee on Economic, Social and Cultural Rights, n 62 above – some of the essentials identified are provided free at the point of use in the UK while others mirror Fitzpatrick and others' definition.
179 Modelled on Equality Act 2010, s 149.
180 Modelled on Northern Ireland Act 1998, s 28E.
181 Modelled on Child Poverty Act 2010, part 1 (as enacted).

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with benefit conditions or migration decisions. A positive duty would offer stronger protection, but could be problematic if it compelled any and every public authority with a power that could be used to prevent or relieve destitution to do so. The case law review showed that in those cases where Article 8 ECHR results in a positive duty to provide financial support, the vehicle for this is frequently a residual welfare power held by local government under the Children Act 1989 or National Assistance Act 1948, all too often following a 'lamentable' legal battle between authorities, neither disputing the individual's right to support, but each arguing that the other is responsible.[182] Besides being unedifying, the need to await the outcome of such litigation before receiving relief would not be in the interests of a destitute household. It also seems unrealistic to look to local government as the primary duty bearer, given its already-constrained resources[183] and the uneven geographic distribution of destitution.[184] A better option might be to impose a positive duty on selected authorities – the Secretary of State for Work and Pensions and Department of Communities (Northern Ireland) in most cases, as the authorities responsible for social security; the Home Secretary in the case of certain immigrant groups. Other authorities could be subject to a negative duty – important due to the prevalence of public authorities' pursuit of debts as a trigger for destitution.[185]

The nature and location of the duty will also impact on the enforceability of the duty, or perhaps more accurately the different duties. Again, it is not possible to be definitive at this point, but some fundamental features of enforcement can be considered. An individual right to protection against destitution would become another line of argument in social security or immigration appeals and judicial reviews, or in actions to recover public debt, particularly where it takes the form of a negative duty to avoid imposing destitution. A preventative mechanism that duty bearers were obliged to adhere to would create a legal and political accountability framework: legal through judicial scrutiny on whether the duty was properly considered and implemented, and political in requiring scrutiny of government policies and draft legislation to ensure compatibility with the destitution duty. This 'mainstreaming' approach has already been adopted elsewhere (albeit with limited success), including in equality legislation[186] and more recently in the devolved social security principles the Scottish government has committed itself to.[187] The legal enforcement mechanism would be through judicial review, a tried and tested route to accountability, that has the advantage of being able to challenge both individual and systemic problems. Its weakness, however, is that it is costly and time consuming, and while it may have greater structural impact it offers little in the way of immediate relief to those who may be destitute.

182 *RW* v *Sheffield City Council* [2005] EWHC 720 (Admin) at [26] per Gibbs J.
183 Jed Meers, 'Discretion as Blame Avoidance: Passing the Buck to Local Authorities in "Welfare Reform"' (2019) JPSJ 41; Porter, n 146 above.
184 Fitzpatrick and others (2020), n 2 above.
185 McKeever and others, n 10 above.
186 In Britain, through the Equality Act 2010, and in Northern Ireland through the Northern Ireland Act 1998.
187 Social Security (Scotland) Act 2018, asp 9 s1.

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Discretion appears to have an unavoidable role to play in the granting of awards to relieve destitution. First, this is because of the variability of the cost of essential goods at regional and household level. Second, because a sum that allows access to ongoing essential needs and no more will, by definition, not cover a significant one-off (but equally essential) cost like white goods or urgent home repairs. There are advantages of discretionary support schemes in being able to respond to the immediacy of a claimant's need, providing a reliable way of getting cash or in-kind support to people quickly, although the more robust the duty to prevent destitution through a statutory right to income adequacy the less reliance on discretionary support would be needed.[188] There are inevitably disadvantages of discretion – most notably for our purposes in substituting an administrative power for a legal right, and concern that this last resort option would become an inevitable destination. For Titmuss, overreliance on discretion represented the complete destruction of an inherited right to social security,[189] but this perspective was formed long before the Human Rights Act 1998. The review of case law shows that, where mainstream provision is grossly inadequate in its generosity or coverage, a power to provide discretionary support can become a duty to do so if required to prevent degrading treatment. A duty to protect against destitution could serve to raise the baseline at which a 'discretionary' power must be exercised to wherever the destitution threshold is set, regardless of whether there is a risk of degradation. This might well remain an imperfect system of social protection, in need of reform to address the structural causes of severe poverty,[190] but even if reforms are effected a defined social minimum below which the state should not allow residents to fall would remain desirable.

Building a statutory duty would not mean immediate, absolute protection of UK residents from destitution. Such a protection is not constitutionally possible, since parliament – as the sovereign legislature – could always bring in primary legislation with the effect of rendering some people destitute, or indeed to whatever end it chose. Existing primary legislative provisions with this effect would remain in force. The duty would promote the interpretation of legislation in a way that is more favourable to those at risk of destitution, where the wording allows this, and might affect public authorities' use of powers that have potential to cause, prevent or relieve destitution. For example, the duty would not override the benefit sanctions regime set out in the Welfare Reform Act 2012, but could push decision makers to tread more carefully when imposing a sanction or to award hardship payments more liberally. Something resembling such a duty existed in the past; in one sense we are arguing that we should revert to what has been before, tracked from the Poor Law, through the law of humanity, through discretionary powers to the National Assistance Board and the Supplementary Benefit Commission, that allowed Marshall to

188 David Donnison, 'Supplementary Benefits: Dilemmas and Priorities' (1976) 5 JSP 337; David Donnison, 'Against Discretion' (1977) 41 *New Society* 534.

189 Richard Titmuss, 'Welfare "Rights", Law and Discretion' (1971) 42 PQ 113.

190 Luke Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (Oxford: Routledge, 2022).

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conclude that 'the relief of the poor, the care of those who are unable to care for themselves, is among the unqualified objects of public duty'.[191]

A right to be protected from destitution is also a movement towards a system that protects dignity under which the state can no longer justify inflicting extreme poverty and hunger on those who are dependent on it.[192] A statutory duty could add value by: defining and centralising the role of the duty bearer; raising the bar on the expectation of a minimum standard of living; setting a statutory benchmark to expand the legal interpretation of what it is reasonable to expect the state to provide; reinforcing the common law duty of humanity that has been recently resurrected; and generalising protection against destitution to the whole population rather than to a specific set of circumstances.

And while our argument is for primary legislation that protects against destitution, this is merely a means to an end. The investment of energy and intellect should not be in whether social rights are better protected by human rights or in statute – those in destitution will not care and we should not either. The focus should be on the importance of providing protection now. Human rights have not yet delivered that protection but that fight for progress can still continue. Meanwhile we argue for a more direct re-implementation of the state's duty, which might simultaneously serve as a step towards the sectoral incorporation of minimum core international obligations in respect of social rights.[193]

CONCLUSION

The causes of destitution in the UK are many, with the austerity measures introduced after the financial crash of 2008 heavily implicated, particularly in key areas of social security, housing and food security. It seems almost trite to argue that there should not be individuals in the UK who are destitute by any common understanding of that concept and yet that is an argument that we have failed in law to make. Systems of social and legal protection have been weakened by successive governments' prioritisation of personal as opposed to state responsibility, heightened by but not restricted to austerity and post-pandemic provisions that limit the financial and public resources available to those without independent means of survival. The trite argument therefore becomes turned on its head – it is no longer an obvious position that destitution should not exist but rather the obvious statement is that the state has enabled destitution by design.

We have set out the difficulties in identifying a legal definition of destitution, drawing from immigration and social security legislation that gives some specific consideration to the concept. Beyond these statutes, our original dataset of judgments provides rigorous evidence that neither the common law, the human rights framework nor sectoral welfare legislation provides effective protection against destitution and its effects of destitution, except in extreme circumstances.

191 Marshall, n 164 above, 84.
192 Gantchev, n 40 above.
193 See Boyle (2020), n 40 above.

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The high threshold interpretations of ECHR provisions on inhuman and degrading treatment, respect for family life and access to other linked rights means they offer remedies for destitution rarely and to a limited extent. Other rights at face value have greater potential to offer solutions to the social, legal and economic problem of destitution, but for this to happen those rights need to carry more weight in the UK context. We argue that this can be pursued through a statutory duty to protect against destitution. We also recognise, however, that if we could litigate our way out of destitution then we would have done so by now. Given that we cannot do this in the current legal context, providing an individual right to protection against destitution must be a priority.

Any recommendation for a 'right' to protection from destitution will be vulnerable to Moyn's accusation of lacking ambition, ambivalence towards inequality or acting as the 'handmaiden of neoliberalism'.[194] We accept Mantouvalou's argument that legal reform will not root out the deep structural problems that result in destitution,[195] and acknowledge that a bare right to protection from destitution would address the symptoms rather than the 'root causes of social suffering.'[196] But, like Mantouvalou, we see a role for law in remedying the symptoms of structural injustice that law itself has created.[197] More urgently, when those symptoms – inability to afford basic essentials like shelter, food, heat, light and hygiene, utter social exclusion, exposure to myriad legal problems, risk of degrading treatment and denial of any measure of human dignity – are suffered by 2.4 million people, society is faced with an emergency that requires a response, even if at the minimal end of the scale. The riposte to Moyn is straightforward. The argument about legitimate and illegitimate sources of inequality, acceptable and unacceptable degrees of inequality and the role of the state in addressing poverty and inequality can and should continue.[198] The authors agree that greater ambition on that front would be welcome, but the destitute cannot and should not have to wait for that debate to play out before their most basic needs are met. In the present circumstances, to say that the trigger for an absolute right to support should be destitution rather than inhuman or degrading treatment already shows a level of ambition, but this need not shut the door on arguments for the 'perpetual improvement' of living conditions at the bottom of the income distribution.[199]

This article has made clear that the case for human rights as protection against destitution is not open and shut. There has been progress in utilising the poten-

194 Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018). See also Michael Adler, 'The Social Minimum in the Context of Inequality' in Kotkas, Leijten and Pennings (eds), n 40 above, 71; Malcolm Torry, 'An Essential Dimension of the Social Minimum' in Kotkas, Leijten and Pennings (eds), *ibid*; Goldmann, n 68 above.

195 Mantouvalou, n 160 above.

196 Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 *Law and Contemporary Problems* 147, 159.

197 Mantouvalou, n 160 above; V. Mantouvalou, 'In Support of Legalisation' in C. Gearty and V. Mantouvalou, *Debating Social Rights* (Oxford: Hart, 2011).

198 David Bilchitz, 'What is the Relationship between Minimum Thresholds and Distributive Justice?' in Kotkas, Leijten and Pennings (eds), n 40 above.

199 See Luke Graham, 'The Right to Continuous Improvement of Living Conditions as a Response to Poverty', Jessie Hohmann and Beth Goldblatt (eds), *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges* (Oxford: Hart, 2021).

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tial of civil and political rights to protect social rights, yet such progress has been hard won and more limited than is necessary to tackle the problem. These limitations mean other solutions are required, and there is no conflict with human rights working hand in hand with other protections. Transforming the human rights arguments that dignity requires protection from inhuman and degrading treatment, and the opportunity to access one's essential needs, into statutory recognition of what the state considers to be destitution and the necessity of preventing it leads to our proposal for destitution specific legislation. We do not presume this to be the only or definitive solution, or one that is immune from sovereign parliaments removing such protections, but equally a law against destitution is no more vulnerable than any other rights protected under statute, including those protected by the Human Rights Act 1998. What it would provide, however, is a legally enshrined starting point for systemic change, building on the state's human rights commitments to offer meaningful (if still minimal) protection to those who remain most at risk of destitution.

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Assessing the Compliance of the United Kingdom's Social Security System with its Obligations under the European Social Charter

Mark Simpson*

ABSTRACT

The European Social Charter, a relatively neglected human rights instrument in the United Kingdom, academically, judicially and politically, represents a statement of minimum standards in social rights the state has committed to uphold. This article assesses the compliance of the UK's social security system with the Charter following a period of reform that has put in place a less generous, more punitive model of working-age provision. It is argued that social benefit levels and conditions for their receipt are now, at best, of questionable conformity with some of the core requirements of Article 13 (the right to social assistance) and Article 16 (the right to family protection) of the Charter, while the previously identified non-conformity with Article 12 (the right to social security) continues. Consideration is given to the potential potency of the Charter as a means of challenging austerity-driven reforms, alone or in combination with other human rights agreements.

KEYWORDS: social and economic rights, social security, welfare state, austerity, United Kingdom, European Social Charter

1. INTRODUCTION

Academic analysis and popular perceptions of human rights in the United Kingdom (UK) are dominated by a single instrument: the European Convention on Human Rights (ECHR or 'the Convention').[1] On one level, this is inevitable as no other human rights treaty has been incorporated into domestic law. However, the state is a party to various other international agreements, including the European Social Charter (ESC or 'the Charter'),[2] sister treaty to the ECHR. While these non-incorporated instruments are not directly enforceable in the UK courts, they nonetheless represent a set of commitments by which the state has undertaken to abide.

The ECHR does not completely neglect social rights, but its primary focus is firmly on civil and political rights. Various provisions have been used to support challenges

* Lecturer, School of Law, Ulster University (m.simpson@ulster.ac.uk).

1 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 005.

2 European Social Charter 1961, ETS 035.

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to recent reforms of social security law, but nonetheless the Convention underpins a fairly limited set of state obligations in terms of citizens' economic welfare. In a period in which welfare rights are under sustained attack,[3] this article starts from the position that there is value in raising the profile of the minimum standards the UK claims to respect. The repeal of statutory obligations to dramatically reduce the extent of child poverty has removed an important domestic law tool for advocating improvements in (or resisting the diminution of) citizens' social rights.[4] The international standards endorsed offer an alternative means of holding governments to account. This is recognised by the Scottish Government that has given a political commitment to enhance the standing of social rights in the policymaking process (albeit with a primary focus on the United Nations regime rather than the ESC) as it seeks to distinguish itself from the UK administration through a more egalitarian programme.[5]

Articles 12, 13 and 16 of the ESC are respectively associated with minimum standards of social security, social assistance and family benefits. Article 16 is also linked with the right to housing. Article 1, at face value an employment right, has a connection to modern social security due to the increasing importance of compulsory claimant activation schemes, with Articles 11 and 17 also potentially relevant. Reports by the European Committee of Social Rights (ECSR) have consistently found the UK to comply with most of its obligations under Articles 13 and 16 but not those under Article 12. However, the most recent conclusions in respect of Article 13, prior to the preparation of this article, had been published at a time when the welfare state was on the cusp of major change. A series of four Welfare Reform Acts between 2007 and 2016 first increased working age claimants' obligations to take steps to improve their chances of (re)entering paid employment, then reduced the generosity of much of the support provided to them through the social security system and increased the financial penalties associated with non-compliance with the conditions for receipt of some benefits.

Consequently, a reassessment of the UK's compliance with those ESC obligations of relevance to social security was required. The release by the ESCR of a new set of conclusions on the UK's compliance with Articles 11, 12 and 13 between acceptance and publication of this article does not significantly change its findings. Section 1 discusses the status of the Charter in UK law and the current prospects of its enforceability. Section 2 consists of a detailed examination of the state's obligations in respect of social security under the Charter. Section 3 then assesses the compliance of the system with these standards in the wake of the reforms of the early twenty-first century. It is suggested that the ECSR's previous findings that the state largely complies with Article 13 may have to be revised in its next conclusions and that there are also question marks over compliance with Article 16. The article's conclusion highlights that some of the findings point to a need for revision of some recent findings of compliance with Charter requirements and offers closing remarks on the likely political and judicial implications in the UK of such a development.

3 Simpson, 'Renegotiating Social Citizenship in the Age of Devolution' (2017) 44 *Journal of Law and Society* 646.

4 Section Welfare Reform and Work Act 2016 c7; The Child Poverty (Scotland) Act 2017, especially Section 6, reinstates child poverty targets in Scotland only.

5 Sturgeon, SP Deb, 25 May 2016, col 11; Scottish Government, *Fairer Scotland Action Plan* (2016).

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2. THE EUROPEAN SOCIAL CHARTER IN UK LAW

Social rights are not irrelevant to the ECHR, nor is the European Court of Human Rights (ECtHR) unaware of their importance, recognising 'no watertight division' between civil and political rights on one hand and social and economic rights on the other.[6] However, the Convention itself is strongly tilted in favour of the protection of the former, and the set of social rights it confers can appear rudimentary. While social security and social assistance fall within the scope of Article 1 of Protocol 1 to the ECHR (P1-1), which protects the peaceful enjoyment of one's possessions, this sets no minimum standards for the benefits to be provided by the state. The Article does offer some protection against arbitrary reduction or withdrawal of an existing entitlement and against discriminatory eligibility rules. However, in deference to national legislatures in the realm of economic and social policy, such interference or discrimination will normally only be found unlawful if manifestly without reasonable foundation.[7] Some kind of obligation on the state to support a minimum standard of living may also be based on Article 8, which requires respect for private and family life. While some judges claim Article 8 'adds nothing' to the social security rights conferred by P1-1,[8] others suggest it might impose a positive obligation to provide 'welfare support in a manner which [enables] family life to continue' if the welfare of children were in question, or the family were at risk of being split up. Such an obligation, though, might only engage in circumstances sufficiently dire to engage Article 3, which prohibits inhuman or degrading treatment.[9] Nor does the right to respect for the home in Article 8 imply a positive right to *have* a home or sufficient income to afford one.[10] Finally, although the UK Supreme Court was willing to hear a judicial review of compulsory, unpaid work placements for social security claimants that in part challenged their compatibility with Article 4 of the ECHR (the prohibition of forced labour), the judgment is clear that the Court does not consider work-for-your-benefit schemes to be in any way comparable to 'the mischief at which the Article is aimed'.[11]

The Council of Europe (CoE) does provide a more comprehensive statement of social rights in the form of the ESC, made in 1961 as a sister treaty to the ECHR. Every CoE member state, except Liechtenstein, Monaco and San Marino, has ratified either the 1961 Charter or the revised version of 1996[12] (all 47 are parties to the ECHR). However, in the UK at least, the profile of the Charter is much lower than that of the Convention. Its complete lack of media profile is partly explicable by the fact that the UK is not a participant in the collective complaints mechanism

6 *Airey v Ireland* Application No 6289/73, Merits, 9 October 1979, at para 26.

7 *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449; *Stec v United Kingdom* Application No 65731/01, Merits, 12 April 2006.

8 *SG*, ibid. at para 99 (per Lord Carnwath).

9 *Ala Anufrijeva and Another v London Borough of Southwark; R (on the application of N) v Secretary of State for the Home Department; R (on the application of M) v Secretary of State for the Home Department* [2003] EWCA Civ 1406, [2004] 2 WLR 603 at para 43 (per Lord Woolf).

10 *Chapman v United Kingdom* Application No 27238/95, Merits, 18 January 2001, at para 99.

11 *R (on the application of Reilly) v Secretary of State for Work and Pensions; R (on the application of Wilson) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 453 at paras 81–83 (per Lord Neuberger and Lord Toulson).

12 European Social Charter (revised) 1996, CETS 163 ('Revised Charter').

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introduced in the 1990s,[13] so there are no 'meddling Strasbourg judges' to intrude upon national sovereignty in a manner similar to the ECtHR.[14] However, the pronouncements on social rights by United Nations bodies *have* garnered more extensive, although not necessarily favourable, coverage in recent years.[15] Domestic judges, too, studiously ignore the Charter, even (with one notable exception)[16] in social security cases, to which its Articles would appear to be directly relevant. The author has found only three references to the ESC in cases before the House of Lords and none in any UK Supreme Court case[17]—only two more mentions in the highest court in the land than in Privy Council cases concerning New Zealand (the defendant unsuccessfully argued that the New Zealand Human Rights Committee's functions mirrored the ESC oversight mechanisms).[18] A further nine reported cases in which the Charter is mentioned (normally only in passing) have been heard by the Court of Appeal.[19] The Charter is also referenced in three UK cases referred to the Court of Justice of the European Union[20] and nine ECtHR or European Commission of Human Rights cases against the UK.[21] A similar picture prevails when the other major international social rights agreement is taken into consideration—the International Covenant on Economic, Social and Cultural Rights has been found elsewhere to have only two mentions in House of Lords/Supreme Court judgments.[22]

13 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints 1995, CETS 158.

14 Brown, 'MP Raps Meddling Strasbourg Judges', *Daily Express*, 21 April 2011.

15 de Schutter, 'Food Banks Can Only Plug the Holes in Social Safety Nets', *The Guardian*, 27 February 2013; McKinstry, 'How Dare This Idiot Preach at Britain on Human Rights?', *Daily Express*, 12 September 2013; Chapman, 'A Marxist Diatribe! Ministers' Fury as "Brazil Nut" UN Inspector Who Lectured Britain Publishes Report Condemning our Housing Benefit', *Daily Mail*, 3 February 2014; Butler, 'UN Panel Criticises UK Failure to Uphold Disabled People's Rights', *The Guardian*, 31 August 2017.

16 *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2012] HRLR 20.

17 *Spring v Guardian Assurance* [1994] 3 WLR 354; *United Kingdom Association of Professional Engineers v Advisory, Conciliation and Arbitration Service* [1981] AC 424; *Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64, [2005] 3 WLR 955, based on a search of the Westlaw database.

18 *Tangiora v Wellington District Legal Services Committee* [2000] 1 WLR 240.

19 *R (on the application of Carson) v Secretary of State for Work and Pensions* [2003] EWCA 797, [2003] HRLR 36; *Copsey v WWB Devon Clays* [2005] EWCA Civ 932, [2005] HRLR 32; *R (on the application of Morris) v Westminster City Council (No 3)* [2005] EWCA Civ 1184, [2005] HRLR 43; *Viking Line v International Transport Workers Federation* [2005] EWCA Civ 1299, [2006] 1 CMLR 27; *Abdirahman v Secretary of State for Work and Pensions* [2007] EWCA Civ 657, [2007] 3 CMLR 37; *Metrobus v Unite* [2009] EWCA Civ 829, [2009] IRLR 851; *Burnip*, supra n 16; *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763, [2014] 3 CMLR 43; *R (on the application of Boots Management Services) v Central Arbitration Committee* [2017] EWCA Civ 66, [2017] IRLR 355.

20 C-438/05 *International Transport Workers' Federation v Viking Line* [2007] ECR I-10779; C-350/06 and C-520/06 *Stringer v Revenue and Customs Commissioners* and *Schultz-Hoff v Deutsche Rentenversicherung Bund* [2009] ECR I-179; C-155/10 *Williams v British Airways* [2012] ICR 847.

21 *Young, James and Webster v United Kingdom* Application No 7601/76 and 7806/77, Merits, 13 August 1981; *Council of Civil Service Unions v United Kingdom* Application no 11603/85, Admissibility, 1 January 1988; *Sibson v United Kingdom* Application No 14327/88, Merits, 20 April 1993; *NATFHE v United Kingdom* Application No 28910/95, Admissibility, 16 April 1998; *Wilson v United Kingdom* Applications Nos 30668/96 et al., Merits and Just Satisfaction, 2 July 2002; *Stec,* supra n 7; *Associated Society of Locomotive Engineers and Firemen v United Kingdom* Application No 11002/05, Merits and Just Satisfaction, 27 February 2007; *N v United Kingdom* Application No 26565/05, Merits, 27 May 2008; *National Union of Rail, Maritime and Transport Workers v United Kingdom* Application No 31045/10, Merits, 8 April 2014.

22 *Quila v Secretary of State for the Home Department* [2011] UKSC 45, [2012] HRLR 2; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426.

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One obvious explanation can be found in the non-incorporation of the ESC into UK law. Despite Lord Kerr's recent assertion that human rights treaties should be treated as an 'exception to the dualist theory' with direct effect upon ratification,[23] the majority position among the judiciary remains that, in the dualist system, an international agreement is only enforceable in the domestic courts if incorporated into UK law by legislation. The ESC does form part of domestic law in many other states parties, mainly because of their monist constitutions, in some cases through specific incorporating legislation, although neither monism nor incorporation guarantees justiciability.[24] It is by now abundantly clear that social rights are not inherently non-justiciable—the growing number of collective complaints brought to the ECSR and recent judgments on benefit levels in Germany[25] and Belgium[26] mean it is no longer necessary to look to South Africa for evidence.[27] Rather, justiciability or non-justiciability is a question of the political and legal culture of each state.[28] In the UK specifically, there is relatively limited scope for the judicial enforcement of social rights because of the political decision not to incorporate the Charter rights into domestic law, in contrast with ECHR rights. This does not—or *should* not—mean the ESC can simply be ignored. The Vienna Convention emphasises the interdependence of all branches of international law,[29] the importance of social rights to the meaningful enjoyment of civil and political rights has been widely discussed[30] and the UK itself has stated that it intends to comply with those international agreements it ratifies.[31]

3. RELEVANT EUROPEAN SOCIAL CHARTER ARTICLES AND THE STATE'S OBLIGATIONS

Table 1 sets out the ESC Articles to be considered in this assessment. Articles 12 (the right to social security), 13 (the right to social and medical assistance) and 16 (the right to family protection) are particularly relevant in setting minimum standards for the UK's social security system. Although all cash benefits have been collectively referred to as 'social security' in the UK, many European countries draw the same distinction as the ESC. Social security refers to a specific scheme offering protection, on a contributory or non-contributory basis, against a specified social risk such as

23 *SG,* supra n 7 at para 254 (per Lord Kerr).

24 Benelhocine, *The European Social Charter* (2012) at 88.

25 BVerfG, 1 BvL 1/09, Judgment, 9 February 2010; BVerfG, 1 BvL 10/10, Judgment, 18 July 2012.

26 *Cleon v la Commisson communautaire française* [2011] Conseil d'État, section du contentieux administratif, arrêt no 215.309 du 23 Septembre 2011.

27 *Government of the RSA v Grootboom* [2001] (1) SA 46 (CC).

28 For discussion, see van Bueren, 'Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act' [2002] *Public Law* 456; King, *Judging Social Rights* (2012); Gearty, 'On Fantasy Island: British Politics, English Judges and the European Convention on Human Rights' [2015] *European Human Rights Law Review* 1.

29 Article 26 Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

30 Article 5 Vienna Declaration and Programme of Action, adopted by the World Council on Human Rights on 25 June 1993; King and Waldron, 'Citizenship, Social Citizenship and the Defence of Welfare Provision' (1988) 18 *British Journal of Political Science* 415; Lister, '"Marshall-ing" Social and Political Citizenship: Towards a Unified Conception of Citizenship' (2005) 40 *Government and Opposition* 471.

31 United Kingdom of Great Britain and Northern Ireland, 'Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant', E/C.12/GBR/5, 31 January 2008, at para 50.

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Table 1. ESC Articles of relevance to the UK social security system

Article	Text
1	**The right to work** With a view to ensuring the effective exercise of the right to work, the contracting parties undertake: 1) to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible 2) to protect effectively the right of the worker to earn his living in an occupation freely entered upon
11	**The right to protection of health** With a view to ensuring the effective exercise of the right to protection of health, the contracting parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia: 1) to remove as far as possible the causes of ill health
12	**The right to social security** With a view to ensuring the effective exercise of the right to social security, the contracting parties undertake: 1) to establish or maintain a system of social security
13	**The right to social and medical assistance** With a view to ensuring the effective exercise of the right to social and medical assistance, the contracting parties undertake: 1) to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources . . . be granted adequate assistance 2) to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights 3) to provide that everyone may receive . . . such advice and personal help as may be required to prevent, to remove or to alleviate personal or family want 4) to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other contracting parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance.
16	**The right of the family to social, legal and economic protection** With a view to ensuring the necessary conditions for the full development of the family. . . the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits . . . provision of family housing . . . and other appropriate means.
17	**The right of mothers and children to social and economic protection** With a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the contracting parties will take all appropriate and necessary measures to that end.

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'sickness, disablement, maternity, family, unemployment, old age, death, widowhood, vocational accidents and illnesses'. Social assistance consists of payments for the relief of 'individual need', however caused.[32]

Article 12 contains a number of paragraphs relating to the minimum level of social security provision,[33] progressive improvement of this provision and the rights of migrants. However, contracting states are not obliged to adhere to the Charter in its entirety and the UK does not accept these paragraphs. Nonetheless, the ECSR reads a minimum level of provision into Article 12(1). This requires coverage of a 'significant percentage' of the population or the economically active population (depending on the benefit) against specified social risks: healthcare costs, sickness, unemployment, old age, employment injury, family benefit and maternity. Replacement rates should be at least 40 per cent of equivalised median income, with total household income topped up as necessary by social assistance to comply with Article 13. Unemployment benefits must be payable for a 'reasonable' length of time and with an initial period in which the claimant can turn down employment opportunities that do not match his or her qualifications, skills, experience or previous remuneration.[34] What states must do to comply with the right to social security, therefore, is more precisely defined than under the UN system. The General Comment on Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) specifies nine major social risks against which protection should be offered and includes some provisions about coverage and non-discrimination but is less clear on the minimum level of benefits, stating only that this should guarantee an 'adequate standard of living' and access to healthcare.[35]

As applied by the ECSR, Article 13(1) effectively sets a guaranteed minimum income (from all sources) at 50 per cent of the equivalised median, without any diminution of social or political rights, seeking to move contracting states from charitable and discretionary to rights-based approaches to poverty relief.[36] 'Reasonable' conditions may be applied, including availability for employment, job seeking requirements or mandatory training schemes, and the state can reduce the benefits of non-compliant claimants without contravening Article 13(2). However, the application of a sanction must *not* deprive the claimant of his or her 'means of subsistence'.[37] Article 13(3) requires adequately resourced social security agencies and social services[38] as well as the provision or funding of sufficient advice services to ensure citizens are able to effectively avail themselves of their rights under the Article. Article 13(4) appears at face value to extend the same rights to lawful migrants from other states parties, regardless of duration of residence. In practice, though, the ECSR applies different standards to temporarily resident non-nationals, who

32 Committee of Independent Experts, *Conclusions XIII-4* (1996) 34.

33 The 1961 Charter requires compliance with minimum standards laid down by the International Labour Organization, the Revised Charter with those contained in the European Code of Social Security.

34 European Committee of Social Rights, *Digest of the Case Law of the European Committee of Social Rights* (2008) at 89-90.

35 Committee on Economic, Social and Cultural Rights, General Comment No 19: The Right to Social Security (Art. 9), 4 February 2008.

36 Committee of Independent Experts, *Conclusions I—Statement of Interpretation—Article 13* (1965-67).

37 European Committee of Social Rights, supra n 34 at 97-101.

38 European Committee of Social Rights, *Conclusions XV-1—United Kingdom—Article 13-3* (1997-98).

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need only receive 'appropriate' emergency assistance with food, clothing and accommodation.[39] However, the arbitrary setting of fixed periods of residence in order for a prospective claimant to demonstrate 'habitual residence' or a 'sufficiently close link' to the host state would not be in keeping with Article 13(1).[40] Again, the right is defined with greater precision than in ICESCR, which contains no specific right to social assistance. Article 9 of the ECSR includes an implied obligation to provide social assistance, but no guidance is given on how states should demonstrate compliance.[41]

In the 1961 Charter, Articles 16 and 17 can be read together.[42] The ECSR tends to find states compliant with the Article 16 requirement for economic protection of the family if they provide family benefits worth at least five per cent of equivalised median income per child. Case law suggests there are further considerations of relevance to social security systems and particularly to the role of conditionality within them. The reduction of family benefit for failure to ensure children attend school was held in *European Committee for Home-based Priority Action for the Child and the Family* (*EUROCEF*) to represent a disproportionate interference with rights protected by Article 16.[43] In part, this was because the policy was unlikely to achieve its stated objective—rather, cutting family income would make it *harder* to fulfil parenting responsibilities, although reference is also made in the decision to the imposition of collective punishments on the whole family for failures on the part of one or two members. This position is reinforced by the decision in *DCI* that the administration of policy on young asylum seekers in Belgium contravened Article 17, the applicant having argued that the breach stemmed in part from failure to respect the principle that children should not suffer 'unfit living conditions' because of the choices of their parents.[44] These provisions are arguably reinforced by Articles 26 and 27 of the Convention on the Rights of the Child (UNCRC),[45] which guarantee children's rights to benefit from social security and to an adequate standard of living, although neither UNCRC Article yet has an associated General Comment.

Articles 1 and 11 of the ESC are less directly relevant to social security but nonetheless merit highlighting. Article 1(1) could conceivably be relied upon in defence of a range of UK policies, from the provision of wage supplements to benefit cuts and claimant activation programmes that have been justified as necessary to promote job-seeking and employment. Article 1(2), on the other hand, could be interpreted as a

39 European Committee of Social Rights, *Conclusions XV-1—United Kingdom—Article 13-4* (1997-98). In some circumstances, repatriation may be an acceptable alternative to the provision of emergency assistance: see Committee of Independent Experts, *Conclusions VII—United Kingdom—Article 13-4* (1978-79).

40 European Committee of Social Rights, *Conclusions XV-1—United Kingdom—Article 13-1* (1997-98).

41 Committee on Economic, Social and Cultural Rights, supra n 35.

42 The close relationship between the two Articles is acknowledged in the ESRC's first interpretative guidance and since the turn of the century the Committee has treated the social and economic protection of mothers as integral to Article 16—Committee of Independent Experts, *Conclusions I—Statement of Interpretation—Article 16* (1965-67); European Committee of Social Rights, *Conclusions XV-2—Statement of Interpretation—Article 17* (2001).

43 *European Committee for Home-based Priority Action for the Child and the Family (EUROCEF) v France,* Collective Complaint No 82/2012, Admissibility and Merits, 19 March 2013.

44 *Defence for Children International (DCI) v Belgium* Collective Complaint No 69/2011, Merits, 23 October 2012 at para 26.

45 Convention on the Rights of the Child 1989, 1577 UNTS 3.

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barrier to some activation measures, although (as discussed in Section 3) to date there are no examples of mandatory work-related activity being found incompatible. The most recent statement of interpretation focuses on the removal of *barriers* to choosing certain professions (for example, on the basis of gender) rather than *compulsion* to undertake particular work,[46] although earlier interpretations have noted a close connection with the prohibition of forced labour.[47] While the right to protection of health understandably has a strong focus on access to healthcare services,[48] states must also seek to 'remove . . . causes of ill-health'. To date, statements of interpretation have not explicitly mentioned socio-economic causes of morbidity, but this link *is* recognised by the UN Committee on Economic, Social and Cultural Rights, academically and by national governments.[49] Given that in industrial and post-industrial societies a diet and housing underpinning good health are dependent on the ability to *pay for* suitable food or accommodation, a state that fails to ensure its citizens have sufficient income to do so could be argued to fall short of its responsibilities under the Charter.

The ESC rights highlighted dovetail with those conferred by other instruments. Articles 3(1), 26 and 27 of the UNCRC require social security policy-makers and decision-makers to treat the best interests of the child as a primary consideration and to protect the child's rights to social security and an adequate standard of living. Articles 9 and 11 of the ICESCR similarly protect *everyone*'s right to social security and an adequate standard of living (encompassing rights to food and housing). As noted, the ICESCR overlaps to a considerable extent with the ESC in terms of the social risks against which a social security system ought to protect but does not define minimum benefit levels. UK courts are also increasingly prepared to accept that Article 8 of the ECHR (the right to respect for private and family life) may underpin a right to a minimum standard of living, at least where children are concerned,[50] or offer some protection against retrogression in social security provision contrary to the best interests of children.[51] If (and it remains quite a big 'if') the judiciary were more open to considering compliance with the ESC, Articles 13 and 16 in particular could have a role to play in informing assessments of where this social floor lies. For adults, it seems clear that if Article 8 does set any minimum income floor, it is no higher than that required to avoid inhuman or degrading living conditions contrary to Article 3.[52] Finally, the right to freely chosen employment in Article 1(2) of the ESC appears in the ordinary meaning of the language to overlap with Article 4(2) of the ECHR, which prohibits forced or compulsory labour.

46 Committee of Independent Experts, *Conclusions XII-5—Statement of Interpretation—Article 1-2* (1994-95).

47 Committee of Independent Experts, *Conclusions I—Statement of Interpretation—Article 1-2* (1965-67); Committee of Independent Experts, *Conclusions III—Statement of Interpretation—Article 1-2* (1970-1).

48 European Committee of Social Rights, *Conclusions XVII-2—Statement of Interpretation—Article 11* (2005).

49 Committee on Economic, Social and Cultural Rights, General Comment No 14: The Right to the Highest Attainable Standard of Health, 11 August 2000. See also Wilkinson and Pickett, *The Spirit Level: Why Equality is Better for Everyone* (2010); Marmot, *Fair Society, Healthy Lives: Strategic Review of Health Inequalities in England Post-2010* (2010).

50 *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690; *R (on the application of Jamil Sanneh) v Secretary of State for Work and Pensions* [2013] EWHC 793 (admin), [2013] ACD 99.

51 *R (on the application of DA) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (admin), [2017] HLR 35. See also the dissenting judgments by Lady Hale and Lord Kerr in *SG*, supra n 7.

52 *Anufrijeva*, supra n 9.

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The ESC does not specifically prohibit retrogression in social rights in the same way as the ICESCR,[53] although the Belgian courts have read an implied 'standstill' obligation into the protection of social rights in that state's constitution despite the absence of any explicit provision to that effect.[54] Article 12(3) does carry a commitment 'to raise progressively the system of social security to a higher level' and so might be interpreted as a non-retrogression provision in the field of social security specifically for those states that accept it. However, the paragraph is among the provisions *not* accepted by the UK. Consequently, the state is arguably at liberty to raise or lower the standard of social security and other welfare service provision but may not drop below the floor of provision required for compliance with the Charter, unless war or another public emergency permits derogation in accordance with Article 30. Consequently, the bare fact that in the current period 'the UK Parliament is . . . rolling back rather than increasing its protection of [social] rights',[55] while problematic from an ICESCR perspective, does not lead inexorably to the conclusion that ESC obligations are being neglected. Nonetheless, it is the extent of retrogression in social security that makes this assessment of the UK's compliance necessary, and key developments since 2009 must therefore be highlighted.

4. ASSESSING COMPLIANCE WITH THE CHARTER IN THE TWENTY-FIRST CENTURY WELFARE STATE

A. Compliance in Recent Conclusions

In early reporting cycles, the ECSR was content to find the UK in compliance with a very literal interpretation of Article 12(1) of the ESC as requiring essentially *any* form of social security system.[56] Since 2003, the Committee has found the UK to be in breach of its obligations (in common with many other states parties) because of the 'manifestly inadequate' level of unemployment, incapacity and sometimes retirement benefits.[57] This should not be surprising: the mandated replacement rate of at least 40 per cent of equivalised median income is more in keeping with the insurance-based, conservative systems of continental Western Europe than the UK's liberal model.[58] Up to 2013, despite occasional expressions of concern at the rate at which some benefits are paid,[59] the level of support provided by the UK *was* found to comply with Article 13(1), based on 2011 benefit levels and coverage.[60] The level of benefits was again found to be adequate for compliance in the next reporting period, during which implementation of the 2012 reforms was underway.[61] The imposition of sanctions for non-compliance

53 Committee on Economic, Social and Cultural Rights, supra n 49. The ECSR has expressed concern at retrogression, but has not recorded a finding of non-compliance on its basis alone—Committee of Independent Experts, *Conclusions XII-1—United Kingdom—Article 12-1* (1988-9).

54 Hachez, 'Le Standstill, ou Comment les Juges ont Permis de Mieux Protéger les Droits Fondamentaux en Limitant des Possibilités de Recul', *Justice en Ligne*, 12 February 2016, available at: www.justice-en-ligne.be [last accessed 27 August 2018].

55 Shields, 'The Place of Human Rights in a Future Scotland' (2014) 65 *Scottish Human Rights Journal* 3.

56 Committee of Independent Experts, *Conclusions I—United Kingdom—Article 12-1* (1965-67).

57 European Committee of Social Rights, *Conclusions XVIII-1—United Kingdom—Article 12-1* (2003-04).

58 See McKeever and Simpson, 'Worlds of Welfare Collide: Implementing a European Unemployment Benefit Scheme in the UK' (2017) 19 *European Journal of Social Security* 21.

59 European Committee of Social Rights, *Conclusions XVII-1—United Kingdom—Article 13-1* (2001-02).

60 European Committee of Social Rights, *Conclusions XX-2—United Kingdom—Article 13-1* (2013).

61 European Committee of Social Rights, *Conclusions XXI-2—United Kingdom—Article 13-1* (2012-15).

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with job-seeking and training-related conditions was not found to be in breach of the Article in either of the last two periods, but previous favourable conclusions noted that benefit payments continued until the conclusion of any appeal,[62] which is no longer the case following the 2012 Act. Concern is expressed about the availability of emergency support for sanctioned claimants post-2012, the ECSR stating that if no satisfactory response is received 'there will be nothing to establish that there is an effective right to social assistance for all persons in need'.[63] Consistent findings of compliance have been recorded in respect of Article 13(2) and (3), even though the most recent conclusions on paragraph 3 acknowledge submissions that advice services have faced funding cuts 'at a time when demand is at an all-time high due to the extent and breadth of welfare reform'.[64] Other aspects of the social security system have at times (although not always) been found to breach Article 13, notably the requirement for an 'appreciable' period of residence in the state to be completed in order to establish eligibility for benefit[65] and the extent of emergency assistance to non-nationals without access to the mainstream system.[66]

Other provisions of relevance to social security can be dealt with briefly. While conclusions on Article 16 sometimes refer to the various child-related benefits the UK has provided, findings of compliance with the family's right to economic protection focus on the level of child benefit.[67] Conclusions on Article 17 pay little or no attention to social security, focusing on establishment of parentage, adoption, looked-after children, juvenile justice and corporal punishment.[68] Those on Article 1(1) cover many aspects of employment and labour market policy but include complimentary references to claimant activation programmes including the New Deals,[69] alongside recommendations that the number of unemployed claimants taking part in such schemes should be increased and that access to training should commence after shorter durations of unemployment.[70] No report finds activation measures incompatible with Article 1(2), but it is acknowledged in the most recent conclusions that the application of sanctions for refusal of an employment offer 'could amount, indirectly, to a restriction on the freedom to work'.[71] Finally, reports on Article 11 cover various contributors to ill health, including environmental pollution, food safety, tobacco and alcohol, but make no mention of socio-economic determinants of health.[72] Closer attention is paid to disadvantaged groups' access to healthcare services.[73]

62 European Committee of Social Rights, *Conclusions XVI-1—United Kingdom—Article 13-1* (1999-2000).
63 European Committee of Social Rights, supra n 61.
64 European Committee of Social Rights, *Conclusions XXI-2—United Kingdom—Article 13-3* (2012-15).
65 European Committee of Social Rights, supra n 40.
66 Committee of Independent Experts, supra n 39.
67 European Committee of Social Rights, *Conclusions XVIII-1—United Kingdom—Article 16* (2003-04).
68 See, for example, European Committee of Social Rights, *Conclusions XV-2—United Kingdom—Article 17* (1997-98).
69 European Committee of Social Rights, *Conclusions XV-1—United Kingdom—Article 1-1* (1997-8).
70 European Committee of Social Rights, *Conclusions XVI-1—United Kingdom—Article 1-1* (1999-2000): this report observes that the activation rate among unemployed claimants in the UK was the lowest among EU member states during the monitoring period.
71 European Committee of Social Rights, *Conclusions XX-1—United Kingdom—Article 1-2* (2007-10).
72 See, for example, European Committee of Social Rights, *Conclusions XV-2—United Kingdom—Article 11-3* (1997-98).
73 European Committee of Social Rights, *Conclusions XVII-2—United Kingdom—Article 11-1* (1999-2002).

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B. Welfare Reform Since 2009: Overview of Key Changes

The New Labour era saw an increase (often unheralded)[74] in the level of income replacement benefits, particularly for claimants with dependent children[75] in pursuit of the elimination of child poverty by 2021.[76] However, increasing employment among parents, particularly lone parents, was of at least equal importance in the approach to tackling child poverty in this period.[77] Labour's last major social security Act paved the way for mandatory 'work for your benefit' schemes, with financial penalties for non-participation.[78] The post-2010 coalition government would maintain this focus on activation, putting into practice the schemes envisaged[79] while dramatically increasing both the severity and the frequency of use of financial sanctions for non-compliance with a range of conditions attached to out-of-work benefits.[80] This time, the real value of working age benefits would be subject to an 'unprecedented' reduction,[81] justified in part as an element of the coalition's approach to claimant activation and intensifying on the election of a Conservative government in 2015.

Immediately upon taking office, the coalition moved to reduce the rate at which most working age benefits were uprated.[82] This was the first of three changes in uprating practice, culminating in a four-year freeze from 2016[83]—a real terms cut every year for 10 years. Although little remarked upon in the media in comparison to some reforms in the period, this change will have a profound cumulative impact on claimant incomes. Higher profile changes such as reducing the housing benefit entitlement of under-occupying claimants (popularly referred to as the 'bedroom tax') and capping the maximum benefit income of households in which no member is in paid employment for at least 16 hours per week followed in 2012, with a further reduction to the benefit cap in 2016.[84] Third or subsequent children born after 2017 will be ineligible for the main child-related benefits for low-income households—child tax credits and universal credit[85]—and claimants who are out of work because of ill health, but are expected to return to work in the future, will no longer receive a top-up to their benefit above that received by unemployed claimants.[86] Private tenants' maximum

74 Lister, 'Doing Good by Stealth: The Politics of Poverty and Inequality under New Labour' (2001) 8 *New Economy* 65.

75 Clark and Leicester, 'Inequality and Two Decades of British Tax and Benefit Reform' (2004) 25 *Fiscal Studies* 129.

76 Blair, 'Beveridge Revisited: A Welfare State for the 21st Century' in Walker (ed.), *Ending Child Poverty: Popular Welfare for the 21st Century?* (1999); Department for Work and Pensions and Department for Education, *Child Poverty in the UK: The Report on the 2010 Target* (2012).

77 HM Treasury, *Tackling Child Poverty: Giving Every Child the Best Possible Start in Life* (2001).

78 Section 1 Welfare Reform Act 2009 c24.

79 Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 No 917.

80 Regulation 2 Jobseeker's Allowance (Sanctions) (Amendment) Regulations 2012 No 2568; Regulations 110-111 Universal Credit Regulations 2013 No 376; Adler, 'A New Leviathan: Benefit Sanctions in the 21st Century' (2016) 43(2) *Journal of Law and Society* 195.

81 Stephens, *Income-replacement Benefits, Child Benefit and Inflation, 1992-2015* (2015) at 5.

82 HM Treasury, *Spending Review 2010* (Cm 7942, London: HM Treasury, 2010).

83 Sections 11 and 12 Welfare Reform and Work Act 2016 c2.

84 Section 96 Welfare Reform Act 2012 c5; Housing Benefit Regulations 2006 No 213 part 3, as amended; Benefit Cap (Housing Benefit) Regulations 2012 No 2994; Housing Benefit (Amendment) Regulations 2012 No 3040; Section 8 Welfare Reform and Work Act 2016 c7.

85 Sections 13 and 14 Welfare Reform and Work Act 2016 c7. The two-child limit applies to children born after April 2017 only; claimants whose first child is born after this date will also be ineligible for the family element of child tax credits.

86 Sections 15 and 16 Welfare Reform and Work Act 2016 c7.

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housing benefit entitlement [the local housing allowance (LHA)] was limited to the cheapest 30 per cent of rents in an area in 2012-13, with strict curbs on the eligibility of younger claimants and has fallen further since because of below-inflation uprating.[87] This cap was to be extended to social tenants from 2018, but this proposal has now been abandoned.[88] Assessing the impact of these reforms on compliance with the UK's obligations under the ESC is not straightforward, but some observations can be made.

C. Compliance With the Charter Following Recent Reforms

Even in 2013, it was possible to question the ECSR's conclusion that benefit levels in the UK complied with Article 13(1) of the ESC.[89] This applies to an even greater extent

Table 2. Benefit income and comparison with equivalised median income[93] for selected household types before and after housing costs (2013-14)

Household composition	Single adult	Couple with two children	Lone parent with two children
Income elements[90]			
-JSA	£71.70	£112.55	£71.70
-Child tax credits	£0	£115.10	£115.10
-Child benefit	£0	£33.70	£33.70
-Housing benefit[91]	£69.23/£255.50	£95/£347.48	£95/£347.48
Total eligibility BHC			
-Low-rent area	£140.93	£356.95	£315.50
-High-rent area	£327.20	£609.43 (cap £500)	£567.98 (cap £500)
% equivalised median BHC			
-Low-rent area	46.3%	51.5%	58.0%
-High-rent area	107.6%	87.9% (cap 72.2%)	104.4% (cap 91.9%)
Total income AHC[92]			
-Low-rent area	£71.70	£261.95	£220.50
-High-rent area	£71.70	£152.52 (capped)	£152.52 (capped)
% equivalised median AHC			
-Low rent area	32.0%	41.8%	47.5%
-High rent area	32.0%	24.4% (capped)	32.9% (capped)

87 Housing Benefit Regulations 2006 No 213 part 3; Chartered Institute of Housing, *Impact of Welfare Changes on Rented Housing in Northern Ireland* (2017).

88 HM Treasury, *Spending Review and Autumn Statement 2015* (Cm 9162, 2015); Department for Communities and Local Government and Department for Work and Pensions, *Funding Supported Housing: Policy Statement and Consultation* (2017).

89 European Committee of Social Rights, supra n 60.

90 Lasa/Rightsnet, *Benefit and Tax Credit Rates: 2013/14* (2013).

91 Figures reflect the lowest and highest local housing allowances for a one or three bedroom property in England (younger children would be expected to share a bedroom), according to Valuation Office Agency, 'Local Housing Allowance (LHA) Rates Applicable from April 2013–March 2014' (2013), available at: webarchive.nationalarchives.gov.uk [last accessed 27 August 2018].

92 Rent is assumed to be at the local housing allowance but will be higher for some claimants. The local housing allowance does not apply to social tenants, whose housing benefit award will match their rent unless under-occupying.

93 Shale et al., *Households Below Average Income: An Analysis of the Income Distribution 1994/95-2013/14* (DWP, 2015).

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following the 2017 conclusion. As noted in Section 2, the ECSR expects social assistance to offer an income floor not manifestly below 50 per cent of equivalised median income. Table 2 compares the likely weekly benefit incomes of three household types with the equivalised median, assuming no disability-related benefits or supplements are received.

As can be seen, benefit incomes before housing costs (BHC) compare favourably with the ECSR standard, with only the figure for a single adult below 50 per cent of the equivalised median. After housing costs (AHC)—a better indication of disposable income—the picture is less positive. All the household types examined have incomes below the 50 per cent threshold, with single adults and capped couple-with-children households particularly badly off. No account is taken of under-occupancy, which would further reduce the AHC income of affected claimants.[94] The current benefit freeze will almost inevitably result in incomes from social assistance falling progressively further behind the median[95] and the lower benefit cap (£442.31 per week in London) would have reduced the income after housing costs of a capped couple-with-children household in the most expensive broad rental market area to just 15.1 per cent of the equivalised median. Equivalised median incomes are not published for larger families but with third or subsequent children born after April 2017 ineligible for child tax credits or the child element of universal credit such households will inevitably be further below the threshold than those with two children.

Moving beyond the headline rates of benefit payable, the interdependence of rights becomes clearer, and it is impossible to separate the assessment of compliance with Article 13 from questions relating to Articles 1, 11, 16 and 17. It is clear that the UK social security system's general income floor falls some way short of the ECSR's minimum standards after housing costs. The problem is exacerbated for claimants subject to a financial sanction for non-compliance with conditions for receipt of their benefit. Conditional social protection systems are not inherently incompatible with Article 13(1): states parties may impose reasonable conditions upon unemployed claimants and may reduce benefits for non-compliance. This principle extends beyond obligations to actively seek and be available for employment, to encompass participation in training schemes or work placements. Article 1(2) of the ESC is no more a barrier to such schemes than Article 4 of the ECHR.[96] In a judicial review of unpaid workfare schemes, counsel for the applicant argued that any work 'exacted ... under menace of [a] penalty' (here, the possible

94 Private tenants who under-occupy a house with more bedrooms than their family size requires will be capped at the local housing allowance for a smaller property. Housing benefit in the social sector reflects rents by default, even if these are higher than the local housing allowance, but is reduced by 14 per cent if the tenant is under-occupying by one bedroom or by 25 per cent if under-occupying by two or more bedrooms. A total of 31 per cent of working-age social tenant households in Great Britain and 58 per cent in Northern Ireland under-occupy. Unless a discretionary housing payment is awarded, the shortfall must be made up from other sources, reducing the claimant's income after housing costs below that indicated in the table: see Gibb, *The 'Bedroom Tax' in Scotland* (SP paper 409, 2013).

95 Median income saw a decade of relative stagnation after 2003 but has generally been growing since 2012: see Wells, 'Household Disposable Income and Inequality in the UK: Financial Year Ending 2016' (2017).

96 *Reilly*, supra n 11; *European Roma Rights Centre v Bulgaria* Collective Complaint 48/2008, Merits, 18 February 2009.

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suspension of a benefit) represents 'prima facie forced labour'. However, a number of exemptions apply to the prohibition, including 'any work or service which forms part of normal civic obligations'. The Supreme Court held that such schemes fall within the exemption, being better described as 'instances of obligatory labour which are common features of life in democratic societies', in no way comparable with 'the type of exploitative conduct at which Article 4 is aimed'.[97] It was further noted that the ECtHR had on three occasions been asked to rule on the compatibility with Article 4 of work-related conditionality for benefit claimants,[98] on each occasion finding the scheme in question compatible.

More problematic than the *principle* of sanctioning is the *severity* of sanction available in the UK. The ECSR has endorsed sanctions for relatively serious failings, such as refusal to accept a suitable job offer, ranging from a 25 per cent reduction of benefit in Germany to a 26-week cessation of the jobseeker's allowance (JSA) in the UK.[99] It has not made any specific remark on the maximum sanction available in the UK post-2012—withdrawal of JSA or the universal credit standard allowance for three years—described as a 'far harsher' penalty than is available 'in any other benefit system'.[100] However, recent Conclusions note the stiffening of sanctions and identify the more restrictive criteria for hardship payments after 2012 as a *potential* failure to comply with Article 13(1).[101] Acceptance of sanctions also comes with the caveat that the claimant must have sufficient income to access his or her 'means of subsistence'.[102] At face value, this proviso seems at odds with a post-2012 conditionality regime that Webster asserts is 'deliberately designed to reduce people without other resources to complete destitution'.[103] When the impact on income (shown in Table 3) and the findings of other studies are considered,[104] it is difficult to disagree with Webster's assessment that, for some claimant groups at least, a sanction cannot but result in destitution, an extremely difficult outcome to reconcile with the requirements of Article 13(1).

Once a sanction is applied, income after housing costs for every type of claimant household considered is manifestly below 50 per cent of the equivalised median. However, the ECSR has not indicated that the test for whether access to means of subsistence is maintained involves a particular income standard. It is clear that a claimant with an income of zero after housing costs will be unable to meet his or her subsistence needs—indeed, some tenants (for example, a single person renting a house with two or more bedrooms or any private tenant whose rent is greater than the 30th percentile of the

97 *Reilly*, ibid. at paras 81–83 (per Lord Neuberger and Lord Toulson).

98 *X v The Netherlands* Application No 7602/767, Merits, 13 December 1976; *Talmon v The Netherlands* Application No 30300/96, Admissibility, 26 February 1997; *Schuitemaker v The Netherlands* Application No 15906/08, Admissibility, 4 May 2010.

99 European Committee of Social Rights, *European Social Charter: Addendum to Conclusions XV-1* (2001); European Committee of Social Rights, *Conclusions XVII-1 Vol 1* (2004); European Committee of Social Rights, *Conclusions XVII-1 Vol 2* (2004).

100 Child Poverty Action Group, written evidence to the Work and Pensions Committee inquiry into the benefit cap (BNC0073, 2017).

101 European Committee of Social Rights, supra n 60 at n 61.

102 European Committee of Social Rights, supra n 34.

103 Webster, 'Independent Review of Jobseeker's Allowance (JSA) Sanctions for Claimants Failing to Take Part in Back to Work Schemes: Evidence Submitted by Dr David Webster' (2014).

104 Fitzpatrick et al., *Destitution in the UK* (2016); Wright and Stewart, 'Welfare Conditionality First Wave Findings: Jobseekers' (2016); Patrick, *For Whose Benefit? The Everyday Realities of Welfare Reform* (2017).

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Table 3. Benefit income and comparison with equivalised median income for selected household types subject to JSA sanctions, with and without hardship payment (2013-14)

Household composition	Single adult	Couple with two children	Lone parent with two children
		Without hardship payment	
Total eligibility BHC			
-Low rent area	£69.23	£300.08	£243.80
-High rent area	£255.50	£552.56 (cap £443.73)	£496.28 (cap £428.30)
% equivalised median BHC			
-Low-rent area	22.8%	43.3%	44.8%
-High-rent area	84.0%	79.7% (cap 64.0%)	91.2% (cap 78.7%)
Total income AHC			
-Low-rent area	£0	£205.08	£148.80
-High-rent area	£0	£96.25 (capped)	£80.82 (capped)
% equivalised median AHC			
-Low-rent area	0%	32.8%	32.1%
-High-rent area	0%	15.4% (capped)	17.4% (capped)
		With hardship payment[105]	
Total eligibility BHC			
-Low-rent area	£112.25	£333.85	£286.82
-High-rent area	£298.52	£586.33 (cap £477.50)	£539.30 (cap £471.32)
% equivalised median BHC			
-Low-rent area	36.9%	48.2%	52.7%
-High-rent area	98.2%	84.6% (cap 68.9%)	99.1% (cap 86.6%)
Total income AHC			
-Low-rent area	£43.02	£238.85	£191.82
-High-rent area	£43.02	£130.02 (capped)	£123.84 (capped)
% equivalised median AHC			
-Low-rent area	19.2%	38.2%	41.3%
-High-rent area	19.2%	20.8%	26.7% (capped)

local market) could have a *negative* income after housing costs as rent would exceed housing benefit. For other household types, it is necessary to establish a destitution

105 The discretionary hardship payment is 60 per cent of the suspended benefit in most circumstances: see Regulation 145 Jobseeker's Allowance Regulations 1996 No 207; Regulations 116-118 Universal Credit Regulations 2013 No 376; Regulation 49 Jobseeker's Allowance Regulations 2013 No 378, as amended by Article 10 Welfare Benefits Up-rating Order 2014 No 147.

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threshold against which income can be tested. A candidate for such a threshold in the UK comes from *Refugee Action*'s judicial review of asylum seeker benefits.[106] While this does not definitively establish a level of income at which essential needs can be met, it does establish that the amounts then payable to asylum seekers were too low to meet their essential needs after housing costs, local taxes and utility bills (of which a citizen in receipt of social security benefits would have to pay at least the latter). The rates subject to judicial review were £36.62 for a single adult, £178.44 for a couple with two children or £142.54 for a lone parent with two children. These respectively equate to an income after housing costs at 16.3 per cent, 28.5 per cent and 30.7 per cent of equivalised median income. By this standard, couple-with-children and lone parent households subject to the benefit cap in high-rental areas would not be able to meet their essential needs,[107] with or without a hardship payment. Uncapped claimants with children would have an income just above the amount deemed inadequate by the High Court, so it is also questionable whether they would be able to meet their essential needs without a hardship payment, bearing in mind that average domestic water and energy costs in England for 2013 were at least £21 per week.[108] Even *with* a hardship payment a single, childless claimant would have an income not far above the level found wanting in *Refugee Action* and well below Fitzpatrick and others' destitution threshold of £70 per week (which even the full JSA payment barely surpasses), although a lone parent with two children is above their standard of £110 per week.[109]

Reliance on a discretionary payment to ensure income adequacy is arguably an unsatisfactory means of fulfilling a *right* to social assistance or to an acceptable standard of living.[110] While Marshall suggests that a well-administered discretionary safety net is capable of fulfilling the *moral* right to welfare even if a *legal* right is technically absent,[111] it would scarcely be credible to apply this description to the hardship payment for sanctioned claimants. In *SG* judicial review of the household benefit cap, Lady Hale finds discretionary housing payments cannot sufficiently mitigate the negative impact of the benefit cap on children to allow a finding that the policy complies with the UK's obligations under the UNCRC and ECHR because of the uncertainties around its award and the inefficiencies in its administration.[112] A similar logic could be applied to hardship payments given research findings that most claimants are not informed of their right to apply, with many reporting that they had not even been told that their

106 *R (on the application of Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin), [2014] ACD 99.

107 The benefit cap applies to the total benefit to which the claimant is *entitled*, rather than the amount he or she *receives*. This effectively means any sanction is applied to the capped benefit, reducing the maximum payment to a lone parent from £500 to £428.30 at 2013-14 rates: see Regulation 2(5) Benefit Cap (Housing Benefit) Regulations 2012 No 2994. For interpretative guidance, see Department for Work and Pensions, 'Explanatory Memorandum for the Social Security Advisory Committee: The Benefit Cap (Housing Benefit) Regulations 2012' (2012); Department for Work and Pensions, 'Benefit cap' in *Advice for Decision Making: Staff Guide* (2013) at para E5020.

108 OFWAT, 'PN 03/13 Water and Sewerage Bills to Increase', Press Release, 5 February 2013, available at: webarchive.nationalarchives.gov.uk [last accessed 13 September 2018]; OFGEM, *Review of Typical Domestic Consumption Values* (2013) at 12.

109 Fitzpatrick et al., supra n 104.

110 See Committee of Independent Experts, *Conclusions XII-1—United Kingdom—Article 13-1* (1988-89).

111 Marshall, 'The Right to Welfare' (1965) 13 *Sociological Review* 261.

112 *SG,* supra n 7 at paras 202–204 (per Lady Hale). See also *Burnip,* supra n 16 at para 46 (per Henderson J).

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benefit had been stopped or why,[113] and does in fact seem to have been taken into account by the ECSR in its latest Conclusions.[114] An unsuccessful bill that would have required an assessment of the eligibility for a hardship payment of *every* sanctioned claimant without the need for application points to one possible means of ensuring compliance.[115] Other claimants may never receive a hardship payment because they respond to the imposition of a sanction by simply disengaging with a system that does not appear to be giving them any support[116] or even (in US studies) experience 'involuntary case closure'.[117] The incidental termination of a housing benefit claim (which is supposed to continue regardless of any sanction) could result in a far greater loss of income, and threat to the claimant's subsistence needs, than the sanction itself.[118]

Any assessment of whether people can access means of subsistence raises questions of compliance with Article 11 of the ICESCR, the right to an adequate standard of living, which encompasses subsidiary rights to food and housing. The latter may in turn be linked to Article 16 of the ESC, under which the right to family protection includes a positive obligation regarding the provision of housing, and to Article 11 of the ESC, since inappropriate food or accommodation is likely to put health at risk. The "'heat or eat" trade-off' is a long-recognised phenomenon among older people in poverty,[119] but having to choose between food, energy and rental costs is increasingly associated with people of working age affected by welfare reform policies or precarious employment.[120] UN Special Rapporteurs have specifically linked weaknesses in the post-2012 social security system with food and housing insecurity.[121] Insufficient income is not only a threat to housing at the individual level, with arrears potentially leading to eviction and both social and private landlords reported to be more proactively vetting applicants' financial standing before even offering a tenancy,[122] but also on the supply side. The now-abandoned proposal to extend the local housing allowance to the social sector was projected to drive a further increase in arrears, potentially undermining housing associations' capacity to provide more new build accommodation. Average social rent on a two-bedroom social property exceeds the local housing allowance in five of Northern Ireland's eight broad rental market areas and, as few associations offer

113 Oakley, *Independent Review of the Operation of Jobseeker's Allowance Sanctions Validated by the Jobseekers Act 2013* (2014); Adler, supra n 80.

114 European Committee of Social Rights, supra n 61.

115 Benefit Claimants Sanctions (Required Assessment) HC Bill (2016-17) [11] cl 7.

116 Work and Pensions Committee, 'Oral Evidence: Benefit Sanctions Beyond the Oakley Review—Wednesday 7 January 2015' (HC 814, 2015); National Audit Office, *Benefit Sanctions* (HC 628, 2016).

117 Lindhorst, Mancoske and Kemp, 'Is Welfare Reform Working? A Study of the Effects of Sanctions on Families Receiving Temporary Assistance to Needy Families' (2000) 27(4) *Journal of Sociology and Social Welfare* 185 at 187.

118 Oakley, supra n 113.

119 Beatty, Blow and Crossley, 'Is There a "Heat or Eat" Trade-off in the UK?' (WP09/11, 2011).

120 Power et al., *The Impact of Welfare Reform on Social Landlords and Tenants* (2014); Lambie-Mumford, 'The Rise of Food Charity: Issues and Challenges' (2016) 101 *Geography* 11.

121 de Schutter, supra n 15; Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, Mission to the United Kingdom of Great Britain and Northern Ireland, A/HRC/25/54/Add.2, 29 August–11 September 2013.

122 Power and others, supra n 120; *DA*, supra n 51.

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shared accommodation, rents for single claimants under 35-years-old are more than £19 per week higher than the local housing allowance in *every* BRMA.[123]

Food insecurity is, unsurprisingly, more prevalent among lower-income households,[124] but the increased prevalence and use of foodbanks since 2009 have been found to correlate closely with decreases in social security expenditure and increases in sanctioning rates,[125] with claimants of the most conditional benefits (JSA and employment and support allowance) disproportionately likely to receive food aid.[126] Administrative delays in the payment of benefits have also been found to drive usage.[127] While food banks clearly play a role in reducing hunger, they are an unsatisfactory means of supporting a *right* to adequate food. Coverage can be geographically patchy; the contents of food parcels may be ill-suited to particular dietary requirements; and some individuals face barriers to accessing services including limited opening hours or stigma.[128] The *Refugee Action* judgment emphasises the dangers inherent in relying on charitable assistance as a means of relieving destitution or as an indicator of the cost of doing so.[129] Nor can 'family solidarity' be relied upon as a means of ensuring access to adequate resources in accordance with Article 13(1) of the ESC. Empirical studies highlight a final characteristic of food poverty: its tendency to impact most heavily upon women as a form of 'compulsory altruism';[130] mothers skip meals or subsist on toast so that partners and especially children have enough to eat.[131] Failure to secure women's rights under Article 11 of the ESC could raise questions about compliance with the ESC preamble, which requires that 'the enjoyment of social rights should be secured without discrimination on grounds of . . . sex', or with Article 17, which guarantees the social and economic protection of mothers.

Returning the focus specifically to sanctions raises further issues in relation to Article 17 as well as Article 16. As noted above, it has been argued before the ECSR that the infliction of negative consequences upon children as a result of their parents' choices or actions may be in breach of Article 17.[132] The Committee does not make clear whether it accepts this proposition, and the case is concerned with the Revised Charter of 1996, which the UK has not yet ratified. Nonetheless, a sanction that results from the failure of one individual to discharge responsibilities associated with a benefit

123 The LHA for claimants under 35 years is set at the rate for a room in a shared house. The study involved five housing associations, which collectively control more than 75 per cent of all social stock in Northern Ireland: see Chartered Institute of Housing, supra n 87.

124 See Bates et al., *Food and You* (2017).

125 Loopstra et al., 'Austerity, Sanctions and the Rise of Food Banks in the UK' (2015) 350 *British Medical Journal* 1775.

126 Loopstra, 'The Profile of People Using Trussell Trust Foodbanks Reflect Welfare Reforms and Food Bank Operations' (Social Policy Association Conference, Durham, 2017).

127 Perry et al., *Emergency Use Only: Understanding and Reducing the Use of Food Banks in the UK* (2014).

128 Ibid.; Loopstra et al., supra n 125; Garthwaite, *Hunger Pains: Life Inside Foodbank Britain* (Bristol: Policy Press, 2016); MacLeod, Kearns and Curl, 'Food Bank Use among Residents of Glasgow's Deprived Neighbourhoods' (Briefing Paper 28, 2016).

129 *Refugee Action,* supra n 106 at para 147 (per Popplewell J).

130 See Land and Rose, 'Compulsory Altruism for Some or an Altruistic Society for All?' in Bean, Ferris and Whynes (eds), *In Defence of Welfare* (1985) 74.

131 Patrick, 'Working on Welfare: Findings from a Qualitative Longitudinal Study into the Lived Experience of Welfare Reform in the UK' (2014) 43 *Journal of Social Policy* 705 at 710-13.

132 *DCI,* supra n 44.

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claim, but impacts seriously on the whole family,[133] might not be in keeping with the social and economic protection of children. The same might be argued of capping benefits on the basis of where parents 'choose' to live or limiting eligibility for child tax credits to two children should parents 'choose' to have more—although case law also acknowledges that remaining within a small, tight-knit community (such as a religious minority), staying close to a child's school or pregnancy are not necessarily matters of unfettered choice.[134]

Past interpretations of Article 16, which guarantees the social and economic protection of the family, have focused on housing supply (social protection) and family benefits (economic protection).[135] Although, as previously noted, there are concerns about the impact of welfare reform on the right to housing and on family resources, the ECSR maintains a divide—perhaps a slightly artificial one—between social assistance provision to 'remedy a need' at the household level and a 'true family policy . . . to operate in those fields where the needs of families become particularly pressing'.[136] Strictly applying this distinction, it cannot be taken for granted that a JSA or universal credit sanction raises issues of compliance with Article 16. Nonetheless, case law on deductions from family benefits for breach of conditions is relevant to an assessment of the proportionality of sanctions to unemployment benefits as an interference with Article 13 of the ESC or Article 8 of the ECHR (right to respect for private and family life) or P1-1 (right to peaceful enjoyment of property). In *EUROCEF*, reduction of family benefit could not be a proportionate response to parents' failure to ensure children attended school because it was unlikely to improve attendance and might be counterproductive.[137] If JSA sanctions do not improve claimants' prospects of entering employment—and there is empirical evidence that, often, they achieve neither this[138] nor the less ambitious goal of compliance with 'welfare department regulations'[139]—then it can be argued that they are a disproportionate response to the non-compliance they penalise. A similar critique could be made of wider benefit cuts that cannot make any significant contribution towards their stated objectives (typically reducing public spending, incentivising employment and promoting fairness). A dissenting judgment in *SG* did so in relation to the household benefit cap,[140] and the same could be argued about recent cuts to child tax credits, whose introduction was warmly welcomed by the ESCR,[141] and the child element of universal credit, two

133 The impact of sanctions on children is documented by Patrick, supra n 104.

134 *SG*, supra n 7 at paras 172 and 174 (per Lady Hale); *DA*, supra n 51 at para 30 (per Collins J)—in both cases it was concluded that the household benefit cap as applied was contrary to the best interests of affected children.

135 European Committee of Social Rights, supra n 34.

136 European Committee of Social Rights, supra n 42.

137 *EUROCEF*, supra n 43.

138 Griggs and Evans, *Sanctions within Conditional Benefit Systems: A Review of Evidence* (2010); Lambert and Henly, 'Double Jeopardy: The Misfit between Welfare-to-work Requirements and Job Realities' in Brodkin and Marston (eds), *Work and the Welfare State: Street Level Organisations and Workfare Policies* (2013); Wright and Stewart, supra n 104; Dwyer, 'Sanctions and Behaviour Change?' (Social Policy Association Conference, Durham, 2017).

139 Lindhorst et al., supra n 117 at 199.

140 *SG*, supra n 7 at paras 192–206 (per Lady Hale).

141 European Committee of Social Rights, *Conclusions XVI-1—United Kingdom—Article 16* (Strasbourg: Council of Europe, 1999-2000).

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benefits more explicitly directed towards supporting low-income families with children. An indirect threat to the social protection of the family may be posed by the potential impact of housing benefit reforms, and would have been exacerbated by extension of the local housing allowance to the social sector, on housing association finances.[142] Any reduction in the supply of affordable, good quality family housing would lessen the likelihood of compliance with Article 16.

Returning to Article 13(1), a final issue concerns migrants' access to the UK social security system. Following a period in which the UK's habitual residence test for migrants claiming benefit was considered to be in breach of the Article,[143] subsequent Reports found the revised version of the test to be in accordance with ESC requirements.[144] While Ewing suggests that the ECSR's criticism played a part in bringing the test into compliance,[145] it seems clear that the decision of the Court of Justice of the European Union (CJEU)—that it was unlawful to require an 'appreciable period of residence' on the part of a former resident returning to the UK in order to establish eligibility for social assistance—also played a role.[146] Crucial to this change of verdict from the Committee was a shift in administrative practice so that duration of residence became part of the habitual residence test only to the extent necessary to clear up any doubt as to the applicant's intention to settle in the UK after other considerations (for example, the sale of a house in, or transportation of, possessions from the other state).[147] The test has since been tightened, so that any individual seeking to claim any income-related benefit following less than two years' residence in the common travel area must satisfy an extended list of criteria to establish habitual residence in, and 'sufficient ties' to, the UK.[148] Eligibility for JSA has been withdrawn from European Economic Area (EEA) migrants of less than three months' residence and future reforms will see JSA eligibility limited to six months and access to housing benefit restricted for many EEA claimants.[149] While these changes appear to be in conformity with European Union (EU) law, the current trajectory of the CJEU being back towards treatment of access to social security in a host state as a *worker's* right, rather than a *citizen's* right,[150] it seems arguable that they are incompatible with Article 13(1)'s prohibition of duration of residence requirements in order to be eligible

142 Chartered Institute of Housing, supra n 87.

143 European Committee of Social Rights, supra n 40.

144 European Committee of Social Rights, supra n 60.

145 Ewing, 'Social Rights and Human Rights: Britain and the Social Charter—The Conservative Legacy' [2000] *European Human Rights Law Review* 91.

146 C-90/97 *Robin Swaddling v Adjudication Officer* [1995] ECR I-01075.

147 European Committee of Social Rights, *Conclusions XVIII-1—United Kingdom—Article 13-1* (2003-4); European Committee of Social Rights, supra n 60.

148 Department for Work and Pensions, 'Improved Benefit Test for Migrants Launched' (2013), available at: www.gov.uk [last accessed 27 August 2018].

149 Department for Work and Pensions, 'JSA(IB)—Three Months Residence Requirement' (Memo DMG 28/13, 2013); Department for Work and Pensions, supra n 148.

150 C-333/13 *Dano v Jobcenter Leipzig* [2015] 1 CMLR 48; C-67/14 *Jobcentre Berlin Neukölln v Alimanovic* EU:C:2015:597; C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v García Nieto* EU:C:2016:114. See also Harris, 'Demagnetisation of Social Security and Healthcare for Migrants to the UK' (2016) 18 *European Journal of Social Security* 130; Bebayev, 'Re-shaping the Paradigm of Social Solidarity in the EU: On the UK's Welfare Reforms and Pre- and Post-EU Referendum Developments' (2016) 18 *European Journal of Social Security* 356.

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for social assistance. The ECSR itself has requested further information before reaching a conclusion.[151]

5. CONCLUSION

Article 13 is the most important ESC provision for an assessment of the UK social security system; there can be no question that the UK continues to be in breach of Article 12(1) as benefits that were already manifestly inadequate for compliance have continued to fall in real terms since 2010. In any case, most of the key income replacement benefits can be more readily characterised as social assistance due to the limited role of the contributory principle in the system. Article 13(1), which is concerned with benefit levels and eligibility criteria, is particularly relevant. As noted above, previous ECSR conclusions have found benefits in the UK to comply with the requirement for an income floor not manifestly below 50 per cent of the equivalised median income. However, reports have also noted the low level of benefits and a finding of conformity has only been possible with the inclusion of housing benefit in the calculation.[152] As Table 2 shows, the income after housing costs of a single claimant or a family in a high-rent area subject to the benefit cap falls well below this target.

The extreme variability of rents across the UK raises questions about the appropriateness of the ECSR's use of income-before-housing-costs in its assessment. Rents are influenced by location and the level of subsidy to social housing providers to a greater extent than housing standards, while mortgage expenditure will vary depending on when the property was purchased, current interest rates and the stage of repayment reached.[153] Consequently, housing costs are a major driver of poverty in certain areas of the UK, with poverty rates in London twice as high after these costs are taken into account, even before post-2012 reforms opened up a gap between housing benefit payments and actual rents. Housing benefit in these areas may constitute a very high proportion of overall household income—78.1 per cent in the case of the single adult in Table 2—but is a *hypothecated* form of income that cannot be spent on anything other than rent and indeed is paid directly to landlords.[154] Subsidised social rents have been described as 'the most "pro-poor" and redistributive aspect of the entire welfare state.'[155] This function may even have been enhanced in some areas since 2012 if it keeps total income below the benefit cap but would have disappeared in others had the local housing allowance been extended to social tenants, who, like their counterparts in the private sector, would have become vulnerable to rents in excess of housing benefit entitlement. Although in the 1980s, Bradshaw and others found that low-income households could only afford food (sometimes still falling short of their nutritional requirements) through 'absurd' cutbacks elsewhere,[156] today it may be more pertinent

151 European Committee of Social Rights, supra n 61.

152 European Committee of Social Rights, supra n 60.

153 Mullan, Sutherland and Zantomio, 'Accounting for Housing in Poverty Analysis' (2011) 10 *Social Policy and Society* 471.

154 Direct payment to landlords will no longer be made on behalf of universal credit claimants in England and Wales, who will receive the housing element of the new benefit in cash, but the hypothecation principle remains as the claimant must pay his or her rent or ultimately face eviction. Direct payment will continue to be available in Scotland and Northern Ireland.

155 Tunstall et al., *The Links between Housing and Poverty: An Evidence Review* (2013) at 19.

156 Bradshaw, Mitchell and Morgans, 'Evaluating Adequacy: The Potential of Budget Standards' (1987) 16 *Journal of Social Policy* 165 at 179.

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to say that housing costs can only be paid by foregoing other necessities. Measuring income after housing costs is not without problems[157] and might pose difficulties for international comparison given the preference of the EU and the Organisation for Economic Cooperation and Development (OECD)'s preference for data before housing costs. Nonetheless, it unquestionably provides a better guide to a household's discretionary income. This reasoning underpins the Scottish Government's decision to propose a new duty to reduce child poverty after housing costs.[158]

Sanction-backed claimant conditionality is compatible with both Article 13(1) and Article 1(2), and claimant activation programmes are generally encouraged by Article 1(1). However, the fact that the ECSR has misgivings about the 2012 reforms was already apparent in 2013 and has become more explicit in its latest Conclusions.[159] Withdrawal of the JSA with grave uncertainty around access to hardship payments creates a very high chance that claimants' income will fall short of that required for subsistence, in clear contravention of Article 13(1). Cessation of payments before a final decision has even been made as to whether a sanction is justified[160] raises further questions about compliance. The replacement of individual assessment as to whether a claimant is habitually resident in the UK, with an arbitrary three-month deferral of and six-month cap on immigrants' eligibility for social assistance, also goes against the grain of previous ECSR Conclusions, although the Committee itself is reserving judgment for now.

The absence of any change in the ECSR's view that social assistance claimants experience no discrimination in their political rights contrary to Article 13(2) seems unproblematic at face value, although it has been noted that citizens' effective enjoyment of their political rights can be undermined by poverty, even if formally the set of rights held are unaffected.[161] It *is* possible to argue that some claimants—notably those subject to a sanction—are disadvantaged in their enjoyment of social rights. Such a conclusion may require the adoption of a broad view of social rights as including rights to housing and food that are more clearly protected by the Revised ESC and ICESCR than by the 1961 Charter, although if access to these essentials is put at risk so too are the rights to health (Article 11 ESC) and family protection (Article 16). The efficacy of sanctions, the imposition of a collective punishment on the family for the failings of one member and the limits on eligibility for child tax credits may be difficult to reconcile with Articles 16 and 17. There was no reason to expect revision of the Conclusion regarding compliance with Article 13(3), although the fact that there is no room either for complacency is acknowledged in the latest Report. Provision of advice in the UK is highly regarded by the ECSR, yet up to seven million people a year who would like to receive advice on a problem in England are unable to do so,[162] while the administrative

157 Mullan et al., supra n 153.

158 Child Poverty (Scotland) Act (2017) especially Section 6; Scottish Government, *Consultation on a Child Poverty Bill for Scotland* (2016); McCormick, 'Child Poverty (Scotland) Bill: The Joseph Rowntree Foundation's Response to the Social Security Committee's Call for Evidence' (2017).

159 European Committee of Social Rights, supra ns 60 and 61.

160 Judge, 'Independent Review of Jobseeker's Allowance Sanctions: CPAG's Response to the Call for Information' (2014).

161 King and Waldron, supra n 30; Lister, supra n 30; Patrick, supra n 104.

162 Hodges and Tulibacka, *Civil Justice in England and Wales: Beyond the Courts* (2009). See also Patrick, supra n 104.

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barriers to accessing a hardship payment or even housing benefit following imposition of a sanction and waiting times for new universal credit claimants[163] may also be relevant to future considerations. In the case of Article 13(4), previous findings of compliance are inevitably repeated, largely because the bar has been set extremely low.

The headline conclusion, then, is that, despite the adoption of a somewhat more critical position in 2017, the ECSR remains rather generous in its finding that the UK complies in most respects with Article 13(1). A finding of non-compliance with Article 16 may also be merited when conclusions on this Article are next published, and a close eye should be kept on developments under Articles 13(2) and (3). The domestic implications of a negative Conclusion are harder to assess. Not having been incorporated into UK law, the ESC in itself imposes no binding obligations on policy-makers, legislators or decision-makers. Lord Kerr's vision of direct effect for ratified human rights agreements seems some distance yet from the judicial mainstream, while the recommendations of the Commission on a Bill of Rights,[164] and reaction to those on a possible Bill for Northern Ireland,[165] demonstrate that the political climate in most of the UK is scarcely more predisposed to the incorporation of social rights. Arguably, then, the Charter is primarily a political tool for advocates of a social floor—and not, thus far, a terribly effective one given the state's history of 'one of the lowest levels of acceptance of Charter obligations and one of the poorest records of compliance'.[166] The possible exception is Scotland, where the governing party has expressed a commitment to enhancing the protection of social rights, albeit it is not yet clear that political rhetoric in support of social rights will find legislative expression.[167]

Judicially, there is greater scope to find a role for the ESC as an aid to interpretation of the ECHR rights. Its potential to act in this way has not thus far been realised; of the social rights treaties, only the UNCRC has had any significant influence on social security case law and that process is still in its infancy. Nonetheless, it can be argued that there are signs of convergence in the protection of social rights under the UNCRC and ECHR,[168] as it has been suggested is occurring in housing rights jurisprudence under the ESC, Revised ESC, ECHR and EU law.[169] These signs of greater judicial acceptance that Article 8 of the ECHR contains an implied right to social and economic protection for children at least would appear to open up space to argue that Articles 13(1) and 16 of the ESC should play a part in

163 Letter from Frank Field MP to Damian Green MP, 26 April 2017, available at: www.parliament.uk [last accessed 27 August 2018].

164 Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (2012).

165 Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (2008); Northern Ireland Office, *A Bill of Rights for Northern Ireland: Next Steps* (2009); Hadden, 'A Constitutional Bill of Rights for Communities and Individuals in Northern Ireland (Not a Bill of International Human Rights)' (Groundhog Day: Five Years on from the Bill of Rights Advice, Belfast, 2013).

166 Ewing, supra n 145 at 91.

167 Simpson, McKeever and Gray, *Social Security Systems Based on Dignity and Respect* (2017). See also McCall, 'Putting the Justice into Social Justice: How International Human Rights Can Deliver Progressive Social Change for Scotland' (2016) 72 *Scottish Human Rights Journal* 2.

168 Simpson, 'Social Rights Child Rights, Discrimination and Devolution: Untangling the Web' (2018) 40 *Journal of Social Welfare and Family Law* 3.

169 Kenna and Gailiute, 'Growing Coordination in Housing Rights Jurisprudence in Europe?' [2013] *European Human Rights Law Review* 606.

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establishing the level of this social floor alongside Articles 3(1), 26 and 27 of the UNCRC. Articles 13(1) and 16 are also potentially relevant to the proportionality test for interference with a social security entitlement protected by P1-1 to the ECHR through benefit cuts or sanctions, with a possible role for Article 11 of the ESC in assessing when a hardship payment must be awarded. Broadening the 'narrow beam' of rights protection at the UK level[170] in this manner would represent a further step towards realisation of the rhetorical claim that human rights are indivisible, reducing the relative marginalisation of social rights. The shining of a judicial light on the state's neglect of a set of rights it has undertaken to respect would of itself increase the scope for social rights to play their designated role of supporting human dignity and autonomy,[171] but could also increase the political potency of these rights as a campaigning tool for civil society organisations with the same objective.

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170 Williams, 'The European Convention on Human Rights, the EU and the UK: Confronting a Heresy' (2013) 24 *European Journal of International Law* 1157 at 1160, 1165.

171 Article 22 Universal Declaration of Human Rights, GA Res 217A (III), A/810 at 71 (1948).

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