



# The Benefit Cap

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## Introduction

1. In this paper I begin with a recap on the cap: what is it, who does it apply to, and who is exempt? I then briefly discuss the roll-out of the cap. The very recent High Court decision on the legality of the cap (*R(JS) v SSWP* [2013] EWHC 3350) is discussed, and I conclude with a section on early indications of the impact the cap is having.

## Recap – what is the Benefit Cap?

2. The benefit cap is one of a number of welfare reforms introduced by the Coalition Government. The statutory basis for the reform is s. 96 of the Welfare Reform Act 2012, which provides for regulations to be made introducing a benefit cap.
3. According to s. 96(2):

*“applying a benefit cap to welfare benefits means securing that, where a single person's or couple's total entitlement to welfare benefits in respect of the reference period exceeds the relevant amount, their entitlement to welfare benefits in respect of any period of the same duration as the reference period is reduced by an amount up to or equalling the excess.”*
4. In other words, where a person's benefit income exceeds the cap, their benefit entitlement will be reduced down to the level of the cap.
5. The level of the cap is required, by s. 96(6) of the Act, to be determined by reference to estimated average earnings. The estimate is to be arrived at in a manner the Secretary of State thinks fit, on the basis of his opinion as to what amount represents the average. Clearly there is a broad discretion to be exercised here. The setting of the cap by reference to average earnings links in to the explicit aim of the reform; to “make work pay”. As George Osborne put it: *“money to families who need it - but not more money than families who go out to work”*. The cap has been introduced at the level of £500 per



week in the case of a couple or lone parent, and at £350 per week in the case of single adults.

6. The Benefit Cap (Housing Benefit) Regulations 2012 were made under s. 96, and inserted new Part 8A into the Housing Benefit Regulations 2006. The Government decided that, until such time as Universal Credit comes into force, the benefit cap will be implemented via housing benefit entitlement. Where a claimant's total benefit income exceeds the cap, their housing benefit will be reduced by that excess sum.
7. New Reg. 75G of the Housing Benefit Regulations specifies which benefits are to be taken into account in determining the level of a claimant's benefit entitlement for the purposes of the cap. It follows from this that a number of benefits are disregarded for the purposes of the calculation. The key disregarded benefits are:
  - a. Council Tax benefit/reduction under new local schemes
  - b. Social fund payments
  - c. Statutory Sick Pay, Maternity/Paternity and Adoption Pay
  - d. Discretionary Housing Payments
  - e. Bereavement payments.
8. The application of the benefit cap is subject to a number of exemptions and exceptions.
9. First, anyone over the qualifying age for Pension Credit is exempt from the cap.
10. Second, there is an exemption for 'current work' and a partial exemption for 'recent work':
  - a. Where the claimant and/or partner works enough hours to be entitled to claim Working Tax Credit (even if their award is nil), the household is exempt from the cap throughout the period of entitlement to Working Tax Credits.
  - b. Where the claimant or partner has been in work for 50 out of the last 52 weeks, the household is subject to a 39 week 'grace period' from their last day of work before the cap kicks in.



11. Third, where the claimant or partner, or child for whom they are responsible, is in receipt of 'specified benefits' the household is exempt. The exemption also applies where the benefits would be received but for the fact that the claimant/partner/child is in a care home or hospital. The 'specified benefits' are, in broad terms, those which relate to disability/capacity for work, as follows:

- a. The support component of Employment and Support Allowance;
- b. Disability Living Allowance;
- c. Personal Independence Payment (or Armed Forces Independence Payment);
- d. Attendance Allowance;
- e. Industrial Injuries Benefit (and equivalent payments as part of a war disablement pension or armed forces compensation scheme); and
- f. War pensions.

12. Finally, although households living in 'exempt accommodation'<sup>1</sup> are not exempted from the cap as a category; by virtue of a pre-commencement amendment to new Part 8A their benefit entitlement is treated as nil for the purposes of the cap. So that effectively amounts to an exemption.

13. Claimants in receipt of Universal Credit are exempt from the new Housing Benefit rules, because the ultimate aim is for Housing Benefit to be subsumed within UC and the cap will be imposed via UC.

### **Rolling out the cap**

14. As with other recent welfare reforms, the Government has implemented the cap via a staged roll-out. The theory behind this is that lessons can be learned from the early stages of the roll out, which can enable the process to be fine tuned and any problems identified and resolved before everyone is affected.

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<sup>1</sup> That is, accommodation provided by a not-for-profit landlord to a vulnerable tenant, where the landlord also provides care, support or supervision to the tenant which is more than minimal.



15. The roll-out began on 15<sup>th</sup> April in four London authorities: Bromley, Croydon, Enfield and Haringey. At that stage, approximately 2,400 households were affected by the cap.
16. The nation-wide roll-out began on 15<sup>th</sup> July, in two tranches. The first tranche involved smaller local authorities, those with less than 275 households. The second tranche begun in August and involved the remaining local authorities, with over 276 households.
17. The intention was that the cap would start to be implemented via UC for new UC claimants from October 2013, when UC was supposed to be rolled out.
18. However, UC has not yet been rolled out, save for two extremely limited early trials. The DWP's official line is that:

*"We introduced Universal Credit in a slow, safe and controlled way in Manchester and this careful approach is working. We will build on these successes."*

However, the National Audit Office has issued a damning report<sup>2</sup> and the Guardian newspaper has recently reported on leaked risk assessment documents which warn that, due primarily to the severe IT problems besetting the reform, just 0.2% of all benefit recipients (maximum) will be transferred on to UC by the next general election.<sup>3</sup>
19. As such, we can expect the cap to continue to be implemented via Housing Benefit for the foreseeable future.

### **Challenge to the Cap - R (JS) v SSWP [2013] EWHC 3350**

20. On 5<sup>th</sup> November the Divisional Court (Elias LJ and Bean J) dismissed a judicial review, brought by three families, seeking to challenge the Benefit Cap (Housing Benefit) Regulations 2012.
21. There were originally four grounds of challenge, one of which (public sector equality duty) was not pursued at the hearing, leaving three as follows:

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<sup>2</sup> Executive summary here: <http://www.nao.org.uk/wp-content/uploads/2013/09/10132-001-Universal-credit.pdf>

<sup>3</sup> Report here: <http://www.theguardian.com/politics/2013/oct/31/universal>



- a. Discrimination contrary to Article 14 of the ECHR taken with Article 8 and/or Article 1 of Protocol 1 (A1P1);
  - b. Breach of Article 8 and/or the Secretary of State's obligations under the United Nations Convention on the Rights of the Child ('UNCRC') to ensure that the best interests of children are a primary consideration;
  - c. Irrationality and/or unreasonableness at common law.
22. The first point to note is that there was no challenge in respect of the primary legislation (e.g., declaration of incompatibility). That meant that:
- "there could be no challenge to the principle of a cap; nor to the fixing of one "relevant amount" for single claimants and another for all others subject to exceptions made in the regulations; nor to the fixing of each "relevant amount" by reference to estimated average net household earnings"*
23. In a theme which runs through the judgment, the court observed as a preliminary issue that the Regulations:
- "were approved by Parliament by affirmative resolution in each House. Whilst it is common ground that this is of itself no bar to judicial review, it is an important feature of the case .... The Welfare Reform Bill itself had been debated at length in both Houses. When [s. 96 was debated] the very issues which have been raised before us were explored ... As Lord Bingham of Cornhill observed in R (Countryside Alliance) v A-G [2008] AC 719 at [45] 'the democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament'. The same applies to questions of economic and political judgment."*
24. The 'best interests of the child' argument was dismissed at the outset. Although the international convention was of relevance where Convention rights were engaged the Court confirmed that *"all that is necessary is to give appropriate weight to the interests of children as a primary consideration in the overall balancing exercise"*, and it that had been done.



25. As to the ECHR rights, it was accepted that A1P1 applied so as to engage Art. 14 (discrimination in the enjoyment of the Convention rights). The Court found that the case might be “*within the purview*” of Article 8 via the ‘family life’ limb, but that “*in the circumstances of this case at least, Article 8 adds nothing to the argument based on A1P1.*”

26. In terms of Art. 14 discrimination, it was conceded that the policy has a disproportionate impact on women (the Equality Impact Assessment accompanying the Bill estimated that 60% of benefit claimants affected by the cap would be single women, the great majority with children). The Court did not find any of the ‘other statuses’ relied upon to be made out; but due to the disproportionate impact on women it was clear that the key issue of justification had to be considered.

27. In order to show unjustified discrimination under Art. 14, the Claimants had to show that the Regulations were ‘manifestly without reasonable foundation’. The Court held that this threshold was not met insofar as it was argued that the scheme was not a legitimate way of achieving the policy objectives:

*“The division of the resources of the state and more particularly the question to what extent state funds should be made available to those in need for one reason or another is par excellence a political question. Similarly, it is not for the court to engage in a debate whether the objectives can in principle be achieved or not. It is the considered view of the Secretary of State, supported by Parliament, that they can. They take the view that a change in welfare culture is critical in the longer term, and that the imposition of the cap is an important element of that objective ... Parliament has fully debated and considered many of the concerns now identified by the claimants, has chosen not to make the exceptions they seek, and has positively affirmed the regulations adopted.”*



28. The Court also considered whether the Regulations were justified in the sense of achieving the stated objective of bringing about fairness by requiring those on benefit to face similar hard decisions as those in work.
29. The Court noted that, assuming she remains in the same house and receives no DHP, Claimant MG *“will be in receipt of a weekly income several hundreds of pounds less than if she earned the national average wage together with benefits”* (because if she were working she would remain entitled to various benefits not related to work, but which were factored into the calculation of the cap).
30. The Court said:
- “We are uncertain as to whether the full impact of the differential between the income available to those in receipt of benefits and those who are in work, at least in the more extreme cases which have been drawn to the court's attention, was ever fully appreciated by Parliament, or indeed anyone else.”*
- However:
- “it was always appreciated that there was no equivalence between a worker in receipt of the average wage and someone who received the same amount through benefits; the latter would always be worse off, at least to some extent.”*
31. The scheme was consistent with the Secretary of State’s contention that the scheme complied with *“a broad political concept of fairness”*, that was ultimately a policy and the Court would not interfere.
32. The irrationality challenge was dismissed shortly, the Court finding that if the ECHR arguments failed, the common law argument would not succeed.
33. The case demonstrates again that the Court is unwilling to intervene in what are viewed as political judgments about how resources should be divided up between different groups, and that Claimants will face high hurdles in persuading judges to rule that legislation, based on decisions made by Parliament, is unlawful.





34. A statement on the website of the solicitors acting for the claimants says *“we are disappointed by this judgment ... The Claimants intend to take this challenge to the Court of Appeal”*. So watch this space, but for the time being the cap is very much here to stay.

### **Impacts of the Cap**

35. Last month the Chartered Institute of Housing (‘CIH’) issued a report, in partnership with the London Borough of Haringey, on the impacts of the benefit cap in the first phase of the roll-out, and the experiences of those affected by it.<sup>4</sup> The report is well worth reading for those interested.

36. It is already known that the 20 worst affected local authority areas, in terms of the cap, are all in London; and over half of all households affected by the cap will live in London.

37. The report found that 747 households in Haringey (including 2,400 children) had been affected by the cap between its commencement on 15<sup>th</sup> April 2013 and 16<sup>th</sup> August 2013. Just over half of all households (51%) had lost weekly income of between £50 and £199; although the reductions varied greatly, with some losing as little as 15p and others as much as £374.50 per week.

38. Despite the stated aims of the reform – to incentivise claimants to find work by ensuring that benefit entitlements could not exceed average earnings – the study found that only 74 people (10% of those affected) were known to have moved into work, while only 11 people had increased their hours sufficiently to avoid the cap.

39. In order to deal with the effects of the cap, nearly 50 per cent of affected households claimed DHP.

40. What conclusions can be drawn from the study?

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<sup>4</sup> Available here:

<http://www.cih.org/resources/PDF/Policy%20free%20download%20pdfs/Experiences%20and%20effects%20of%20the%20benefit%20cap%20in%20Haringey%20-%20October%202013.pdf>



41. **First**, although the study noted only a small number of evictions which had taken place due to the introduction of the benefit cap, it must be recalled that it will take time for rent arrears to begin mounting, the appropriate notices to be served, claims issued and heard in court. We can undoubtedly expect increases in rent arrears possession claims, and evictions, in due course.
42. **Second**, the study indicated that the predicted effects of forcing benefit claimants to move to cheaper areas had not yet materialised. There has been talk of ‘social cleansing’ of more expensive areas, with benefit claimants forced out en masse to live in cheap areas. Whilst those apocalyptic headlines have not come to pass, the CIH/Haringey report maintained that mass relocations to cheaper parts of the county remained “*visible on the horizon*”. As stated above, it will take time for the consequences of rising rent arrears to trickle down. It is difficult to see how larger families in particular will be able to continue to afford to live in Inner London, where rents are much higher than average. If families have to move to cheaper areas, they may be faced with the problem that many local authorities will give lower priority to those without a link to the area, and the fact that cheaper areas tend to be more deprived and therefore subject to higher levels of unemployment.
43. The High Court in the JS case lays gave a flavour of the types of issues which can be expected to arise for local authorities in due course, when it observed:
- “It seems to us inconceivable that an applicant, whether already housed or seeking housing, could properly be regarded as intentionally homeless where the rent has become unaffordable simply through the application of the benefit cap. Moreover, it would no longer be reasonable to expect them to remain in the accommodation ... The bottom line ... is that the local authority will retain an obligation to find some accommodation which the family can afford”.*
44. **Third**, it is not clear that the reform is necessarily achieving its aims – at least in the early phases. The migration of claimants from benefits to work has by no means been extensive. Although the changes incentivise work, they cannot address the deeper



societal issues which present barriers to work, in particular the cost of childcare and the lack of skills to obtain jobs in a competitive market. The CIH/Haringey report notes that *“there is evidence that the benefit cap is changing attitudes to work, but for many claimants there are still significant barriers”*. In any event, 2/3 of those affected by the benefit cap

45. **Fourth**, and leading on from the previous point, it is clear that the benefit cap will impose greater demands in terms of time and resources on those who are involved in advising and supporting. It does not need to be said that advice centres are already under great pressure, and quite clearly they will see an increase in their workload as a result of this reform and (perhaps more significantly), the in-combination impacts of the range of welfare reforms being implemented by the government at around the same time. The CAB reports a 136% increase in Discretionary Housing Payment enquiries and a rise in enquiries relating to rent arrears. In addition, because local authorities are responsible for implementing these changes, they will also see an increase in queries from the public. The DWP says (in its July 2013 FAQs on the benefit cap):

*“We appreciate that some claimants will not be able to afford to remain in the home they currently live in. In these instances the relevant local authority will support claimants with their future housing needs and discuss all possible options with the claimants affected.”*

These queries take time to deal with, and staff cuts are likely to mean that there are fewer people to deal with them.

46. **Finally**, and again a related point, the CIH/Haringey report shows that many claimants affected by the cap are seeking to fall back on Discretionary Housing Payments (DHPs). That is unsurprising: in the published FAQs to the benefit cap (July 2013) the DWP explicitly referred to the possibility of DHPs being awarded, and said that additional funding had been provided. Furthermore, the High Court in the *JS* case noted that:

*“the immediate hardships [of the cap] are in many cases alleviated by the DHPs. Whilst discretionary, temporary support of this nature manifestly does not*



*eliminate the hardships. And cannot come near to providing justification for the policy ... it is a factor which carries some weight.”*

47. DHPs are awarded out a finite budget. Once the money is gone, the local authority can award no more DHPs. As the CIH/Haringey report points out, the level of reliance on DHPs that was observed in that study *“will be unsustainable in the longer term because the scale of claims will exceed council budgets”*. Furthermore, there are already heavy demands on DHPs as a result of the bedroom tax. The use of DHPs to mitigate the long term affordability issues caused by the recent reforms is likely to mean that less money is available for the temporary/crisis role which DHPs have traditionally fulfilled; even with additional funding from the Government.

## **Conclusions**

48. Clearly it is still early days. As with any reform, it will take some time for the consequences of the benefit cap to bed in and for the impacts to be felt. The available evidence paints a rather bleak picture.

49. For tenants, the consequences are obvious and serious. The impacts on local authorities are also clear – greater demands on a small pot of money (DHPs) and limited staff resources to deal with the increasing need for advice.

50. The Courts have shown that, in respect of the benefit cap as with the bedroom tax, they are unwilling to intervene in this highly politicised area and we can therefore expect that the benefit cap is here to stay.

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