

Visit by the UN Special Rapporteur on extreme poverty and human rights to the UK



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I. Introduction

[1] Ten years after the global financial crisis, the UK continues to relentlessly pursue austerity measures and is drastically reducing welfare entitlements. These austerity reforms have been characterized by: (i) a prioritization of economic indicators over human rights; (ii) retrogression; and (iii) multiple substantive violations. We warmly welcome the UN Special Rapporteur on extreme poverty and human rights' upcoming visit to the UK. This submission sets out how the UK's fiscal policies are retrogressive and have negatively impacted human rights. It then proceeds, as an example, to analyze the changes to the child tax benefit. It focuses on the UK's policy of a "two-child limit" which has been subject to attention in the legislature and the courts. The policy is retrogressive, perpetuates stereotypes of people in poverty, and is a substantive violation of multiple rights.

II. Retrogression

[2] A wide range of retrogressive measures have been implemented by the UK as part of its austerity policy approach. The Rapporteur can be confident – following the guidance of the UN Committee on Economic, Social and Cultural Rights (CESCR) on this point – that these policies are *impermissibly* retrogressive, and therefore a violation of the UK's International Covenant on Economic, Social and Cultural Rights (ICESCR) obligations. The guidance issued by the CESCR on retrogression in the context of austerity noted that to avoid being retrogressive, States must ensure;

first, the policy is a temporary measure covering only the period of the crisis; second, the policy is necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights; third, the policy is not discriminatory ...; fourth, the policy identifies the minimum core content of rights ... and ensures protection of this...¹

[3] The UK has failed all of these criteria in relation to a wide range of rights.

Temporary Measure

[4] It is now ten years since the financial crisis. It is difficult to describe austerity policies as a 'temporary' and there is no indication that the austerity will end in the near future.

¹ Chairperson of the CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc HRC/NONE/2012/76, UN reference CESCR/48th/SP/MAB/SW.

The current situation in the UK has been described as an ‘age of austerity’. The duration of austerity bears little relation to the ‘period of the crisis’. While UK GDP dropped in 2009, it has risen every year since, and at times has exceeded the rate of growth that existed prior to the breaking of the crisis.² At best, the UK might be able to argue that it faced a period of crisis in 2008 to 2010. Austerity policies have continued well beyond this and, as such, the CESCR’s first test of retrogressive measures is not satisfied.

Necessary and Proportionate/ Other Policies More Detrimental

- [5] Understanding whether the policies pursued by the UK are necessary and proportionate requires their purpose to be weighed against their impacts. The widely stated objective of austerity measures in the UK was to increase market confidence in government bonds, amidst rumours that the State’s credit agency rating could be downgraded from ‘AAA’. This confidence was to be achieved by eradicating the budgetary deficit. Despite its policy agenda being held ransom to credit agencies, the UK had its rating downgraded³ (and has since had it affected by Brexit⁴). In any event, despite radical cuts to public services, the budget deficit has not been eliminated.⁵
- [6] The ‘progress’ on these objectives should be weighed against the immense personal and societal cost of austerity measures. Almost every economic, social and cultural right has been affected as have many civil and political rights. Food, health, housing, education, social security, work, fair trial, investigations required by the right to life and rights to decent conditions of detention, have all been ravaged by a decade of austerity. Weighing the objective against the impacts, it is difficult to say that austerity policies have been proportionate to the aim of securing market confidence.
- [7] In addition, this stage of the CESCR’s retrogression test asks whether other policy routes would have been more detrimental to economic and social rights. It is difficult to see what course of action would have been more damaging to rights than the policy choices of the last decade. While the State might argue that without austerity, market confidence in the UK would have been undermined and more detriment to rights would have resulted, this position is unsustainable. First, over the last decade the UK has not tested alternative approaches (for example Keynesian stimulus packages) so it cannot claim that other approaches would be less determinantal. Second, even in the case that austerity was the best policy approach, there have not been adequate mitigating measures (such as protections for the most vulnerable). It has often been the most vulnerable that have been hit by the UK’s fiscal policy choices, especially those in poverty, women, and ethnic minorities.⁶ Third, the UK has not ascertained whether, or attempted to implement, a path

² OECD records on quarterly GDP (OECD (2016), Quarterly GDP (indicator). doi: 10.1787/b86d1fc8-en.

³ ‘UK Loses Top AAA Credit Rating’ (*BBC News*, 23 February 2013) <<https://www.bbc.com/news/business-21554311>> accessed 13 September 2018.

⁴ ‘Moody’s Downgrades UK’s Credit Rating’ (*BBC News* 23 September 2017) <<https://www.bbc.com/news/business-41369239>> accessed 13 September 2018.

⁵ Office of National Statistics, ‘UK Government Debt and Deficit: March 2018’ (2018) Table 2 <<https://www.ons.gov.uk/economy/governmentpublicsectorandtaxes/publicspending/bulletins/ukgovernmentdebtanddeficitforeurostatmaast/march2018>> accessed 13 September 2018.

⁶ Note that the analysis published by the UK’s biggest NHRI is used here, but there are multiple other source confirming the same patterns. See, for examples; Sarah-Marie Hall and others, ‘Intersecting Inequalities: The Impact Fo Austerity on Black and Minority Ethnic Women in the UK’ (2017) Runnymede Trust and Women’s Budget Group.

<<https://www.runnymedetrust.org/uploads/PressReleases/Correct%20WBG%20report%20for%20Microsite.pdf>> accessed 13 September 2018; Andrew Hood and Tom Waters, ‘The Impact of Tax and Benefit Reforms on Household Incomes’ (2017) Institute of Fiscal Studies <<https://www.ifs.org.uk/uploads/publications/bns/BN196.pdf>> accessed 13 September 2018. The NHRI study is: Jonathan Portes and Howard Reed, ‘Distributional Results for the Impact of Tax and Welfare Reforms between 2010-17’ (2017) Equality and Human Rights Commission <https://www.equalityhumanrights.com/sites/default/files/impact-of-tax-and-welfare-reforms-2010-2017-interim-report_0.pdf> accessed 13 September 2018.

of fiscal austerity can be implemented without retrogressive impacts upon human rights. Fourth, there have been no continuing human rights impact assessment to reassess if new or better policy options have emerged in light of the unsuccessful current approach and the length of time it has been in operation.

- [8] The UK has not ensured that its scheme of austerity measures is necessary, proportionate, or less detrimental to socio-economic rights than other approaches. It therefore fails this part of the CESCR's test.

Non-Discrimination

- [9] States must not pursue direct or indirect discriminatory austerity measures. There is a wealth of evidence that the UK has failed to satisfy this requirement. The poorest income decile has been affected by UK policy most severely, followed by the second lowest decile, then the third lowest, etc.⁷ Black, Asian, and mixed ethnicity households have been impacted more harshly than White households.⁸ All categories of household with one of more disabled members have been affected more severely than non-disabled households⁹ and the more severe or numerous the disabilities within a household, the greater their income has been affected as a result of austerity.¹⁰ In all income deciles, women's incomes have been affected to a greater extent than men's and in all age groups except for the over 65s, women have been more severely impacted.¹¹ The UK manifestly fails this aspect of the CESCR's test for permissible retrogression.

Minimum Core

- [10] Avoiding impermissible retrogression requires the identification and protection of the minimum core. This has not been the case in the UK. The examples of the rights to food, social security and housing are instructive. The core of the right to food requires the prevention of hunger¹² yet millions of individuals have had to rely on foodbank parcels provided by voluntary organisations¹³ and doctors have encountered malnourished and hungry individuals.¹⁴ The minimum core of the right to social security requires as one element that existing social security systems are protected from unreasonable interference,¹⁵ yet a range of highly restrictive reforms have been implemented as a result of austerity policies, reducing access and restricting the routes for challenging decisions.¹⁶ The core of the right to housing requires that no significant number of individuals are without basic shelter or housing,¹⁷ yet the level of homelessness in the UK has risen alongside its policy of austerity. It is clear that the UK has failed to identify or pay any due regard to the minimum core in its implementation of austerity policies.

⁷ Portes and Reed (n 6) Figure 2.

⁸ *ibid* Figure 4.

⁹ *ibid* Figure 6.

¹⁰ *ibid* Figure 7.

¹¹ *ibid* Figures 13 & 14.

¹² CESCR, 'General Comment 12: The Right to Adequate Food (Art 11 of the Covenant)' (1999) UN Doc E/C12/1999/5 [6].

¹³ 'Food Bank Use in Britain Reaches Highest Rate on Record' (*The Independent*, 22 April 2018)

<<https://www.independent.co.uk/news/uk/home-news/food-bank-uk-benefits-trussell-trust-cost-of-living-highest-rate-a8317001.html>> accessed 12 September 2018.

¹⁴ Rachel Pugh, "It's a Life or Death Situation": Why GPs Are Referring Patients to Food Banks' (*The Guardian*, 9 February 2018)

<<https://www.theguardian.com/healthcare-network/2018/feb/09/life-death-situation-why-gps-referring-patients-food-banks>> accessed 12 September 2018.

¹⁵ CESCR, 'General Comment 19: The Right to Social Security (Art. 9 of the Covenant)' (2007) UN Doc E/C12/GC/19 [39].

¹⁶ CESCR, 'Concluding Observations: United Kingdom' (2016) UN Doc E/C12/GBR/CO/6 [40].

¹⁷ CESCR, 'General Comment 3: The Nature of States Parties Obligations (Art 2(1) of the Covenant)' (1990) UN Doc E/1991/23 [10].

[11] The four baseline protections that the CESCR requires of States in order to avoid a finding of retrogression, have all been subject to gross violations and disregard by the UK. This disregard, like austerity, continues.

III. Child Tax Credit

[12] The Rapporteur will undoubtedly be presented with a wide range of issues in the course of his visit. Here we use the example of cuts to child tax credits to demonstrate how, despite attention by the legislature and the courts, the UK is violating both the prohibition on retrogression and a range of substantive rights (including arts 9 & 2(2) ICESCR, arts 5, 11 & 14 CEDAW).

[13] Families who have a third child born after 6 April 2017 will not receive child tax credits for the third child (this has been known as a ‘two-child limit’).¹⁸ The High Court in *SC et al v Secretary of State for Work and Pensions* in April 2018 held that the two-child limit was compatible with the UK’s Human Rights Act 1998 (which incorporates the European Convention of Human Rights).¹⁹ The decision is being appealed by Child Action Poverty Group and the hearing is scheduled for December 2018.²⁰

[14] This is a clear retrogressive measure as over half a million families will, on average be £2,500 worse off and will have their right to social security less well protected.²¹ It is, further, an example of an impermissible retrogressive measure as it is not temporary, not proportionate, it is discriminatory, and it fails to identify the minimum core.

[15] Below, other substantive violations are identified. The discriminatory stereotypes against that underpin the law are analyzed and there is a demonstration of how the UK court used formal equality to overlook disadvantage. It also shows how a so-called “rape clause” exemption to the two-child limit perpetuates gender inequality.

Stereotypes on People in Poverty

[16] In the *SC* case, the court mapped the legislative background of the welfare reforms. This reveals the stereotypes that motivate the reforms to the child tax credit. Disappointingly, the court is inattentive to the negative cultural attitudes perpetuated by these changes. For instance, the Treasury and Department of Work and Pensions stated that the objective of the child tax credit policy was to encourage parents ‘to think carefully about whether they can afford to support additional children’.²² This characterizes people in poverty as promiscuous, irresponsible and not able to reflect on their readiness to be parents without negative financial incentives. Rather than challenge these stereotypes the court accepts that the government’s rationale.

[17] In a similar vein, the government’s Impact Assessment held that the two child limit ‘will increase financial resilience’.²³ This portrays people in poverty as incapable of making “good” economic and financial choices so as to protect their ‘financial resilience’. Poverty is therefore framed as a personal moral failing. The government ignores the structural factors—such as low and stagnating wages, lack of legal protection for informal

¹⁸ The Welfare Reform and Work Act 2016, ss 13-14.

¹⁹ [2018] EWHC 864.

²⁰ Child Action Poverty Group, ‘Two Child Limit’ <<http://www.cpag.org.uk/content/two-child-limit-challenge>> accessed 13 September 2018.

²¹ Brian Milligan, ‘15 big changes to your finances in April’ (*BBC News*, 13 March 2017) <<https://www.bbc.co.uk/news/business-39441970>> accessed 13 September 2018.

²² *SC* (n 19) [30].

²³ *ibid* [37].

employment and the high costs of childcare, education, housing and transportation—that trap people in poverty.²⁴ Again, the court in *SC* accepts rather than interrogates the assumptions that underpin the changes in the child tax credit.

Formalistic Approach of Equality

[18] In its assessment of whether the two-child limit is compatible with human rights the court repeatedly draws on a formal model of equality. Justice Ouseley holds that ‘welfare benefits are inherently discriminatory in the obvious sense that they are not made available to all regardless of circumstance.’²⁵ This ultimately leads the court to conclude that the changes to the child tax credit are not discriminatory. This formalistic approach to equality ignores the reality of welfare provision and overlooks the reality that poverty clusters around historically marginalised identity groups such as women and ethnic minority groups. It is well established that achieving equality requires differential treatment including targeted positive measures.²⁶ Welfare benefits should be seen as an integral component of redressing disadvantage and a necessary tool to achieve substantive equality.

[19] In seeking to justify the two-child limit, the government explains that it aims to ensure equality between benefit and non-benefit recipients. All parents, regardless of their benefit-status, have to make the same choices on their ability to financially support a third child.²⁷ The court, again, does not question whether this surface-level equality perpetuates deeper, structural inequalities. There is no appreciation that the effect of the child tax credit limit is that having a family of three or more children becomes a privilege of the wealthy. Furthermore, international human rights law guarantees an equal right to freely choose the number of children.²⁸ There is no recognition in *SC* that to achieve equality in sexual and reproductive health rights that positive measures, such as a child tax credit for all children is needed.

Weak Accountability

[20] The court held that ‘the scope of welfare benefits...belongs in the political sphere’.²⁹ It noted that it is not the role of the court to require ‘some other welfare provision...should be cut, or that [the child tax credit] should not be cut.’³⁰ Excluding from human rights accountability the predominant areas of life where people in poverty interact with the government means that human rights are deprived of a significant aspect of their importance.

[21] Drawing on traditional separation of powers arguments, the court is highly deferential to the government. The court accepts the government’s purpose of the two-child limit is threefold: (i) reduce the State’s budgetary deficit; (ii) equality in decisions on family size between recipient and non-recipient of benefits; and (iii) encourage recipient benefits to work. These aims are held as legitimate by the court and further that two-child limit is rationally connected to these aims and it is a less intrusive measure.³¹ The court does not require the government to present any evidence that the two child limit will meaningfully

²⁴ Women’s Budget Group, ‘The Female Face of Poverty: Examining the Cause and Consequences of Economic Deprivation for Women’ (July 2018) 15-21

²⁵ *SC* (n 19) [88].

²⁶ Sandra Fredman, *Discrimination Law* (2nd ed, OUP, 2011).

²⁷ *SC* (n 19) [40].

²⁸ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13, Article 16(1)(e).

²⁹ *SC* (n 19) [90].

³⁰ *ibid* [149].

³¹ *ibid* [151].

reduce the deficit. There is a real concern that these violations of multiple rights use a fiscal austerity agenda as a pretext for the State's ideological choices or preferences. Alternative measures that reduce the deficit and uphold the human rights of people in poverty are not explored. Neither does the court balance the projected budget savings against the negative impact on human rights or long-term costs of childhood poverty. In fact, the court seems dismissive of the arguments that the two-child limit will plunge children and families below subsistence levels. Justice Ouseley states: 'some of [these arguments] I consider to be rather overstated description of the effects' of the two-child limit.³²

[22] The court does not require evidence of the contention that child tax credit will encourage employment. In fact, one of the claimants in the case was self-employed and another was employed. The government's arguments on the relationship between the two-child limit and work have not been substantiated. The Women's Budget Group recently explained that employment is not a guaranteed safeguard against poverty.³³

[23] While there is little evidence of the policy's ability to meet its aims, by contrast, there are a range of negative consequences of reforms. It has been widely argued that the two-child limit would directly cause people to limit the size of their family, undermine their rights to family and private life and perpetuate childhood poverty.

"Rape Clause" Exemption

[24] There are several exceptions to the two-child limit. Another exception is if a woman can prove that the third child is the result of sexual violence then she can claim child benefits for that third child. This has been broadly termed the "rape clause."³⁴

[25] The "rape clause" perpetuates dangerous stereotypes about victims of sexual violence.³⁵ The law effectively categorizes women as deserving or undeserving of support from the state. Only women who are victims of sexual violence are deemed worthy of receiving child benefits for all of their children.

[26] Proving that the third child is the product of sexual assault is deeply intrusive. Private and very intimate health care information would need to be shared with government officials to successfully make a claim for benefits for a third child. This can be humiliating, re-traumatizing and shows a complete disregard to the privacy of women. The government has provided minimal assurances that claims will be handled with sensitivity.³⁶

[27] Furthermore, sexual assault does not always result in bruises or physical evidence of an attack. This raises a concern that in requiring proof of sexual assault to access child benefits, the law will only recognize the 'ideal' victim; the one who engages in a physical struggle. Such stereotypes on consent are deeply ingrained and it is the duty of the State under human rights law to reduce, rather than perpetuate, them. The government has publically done very little to address the real risk that claims for child benefits will fail

³² *ibid* [122].

³³ Women's Budget Group (n 24).

³⁴ Tom Batchelor, 'Government Accused of Using Trump Inauguration to Sneak Out Controversial Tax Credit "Rape Clause"' (*The Independent*, 22 January 2017) <<https://www.independent.co.uk/news/uk/home-news/government-bury-rape-clause-child-tax-credit-donald-trump-inauguration-victim-sexual-abuse-evidence-a7540351.html>>.

³⁵ This is drawn from Meghan Campbell, 'Revictimizing Victims of Sexual Assault: UK Child Benefits Law' (7 April 2017) OxHRH Blog <<http://ohrh.law.ox.ac.uk/re-victimizing-victims-of-sexual-assault-uk-child-benefit-laws/>> accessed 14 September 2018.

³⁶ 'Consultation response-Exceptions to the limiting of the individual Child Element of Child Tax Credit and the Child Element of Universal Credit to a maximum of two children' (January 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584802/government-response-to-universal-credit-and-child-tax-credit-exceptions-to-the-2-child-limit-consultation.pdf>.

because the government officials does not recognize the complex and varied responses women have to sexual violence.

IV. Conclusion

[28] The UK's fiscal policies continue to violate a wide range of human rights standards. The State has failed to make steps to avoid taking impermissible retrogressive measures, and the result is a punishing regime of cuts to rights protections and social standards. There are many examples where both this prohibition of retrogression and the standalone rights have been violated. The 'two child limit' is one example in this regard. It engrains stereotypes, violates rights to social security, sexual and reproductive health rights and an adequate standard of living and is retrogressive. This measure has had attention from both the legislature and a UK court without being invalidated, and therefore urgent attention from the Rapporteur.

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