IN THE COURT OF APPEAL OF NEW ZEALAND CA 457/2012

UNDER PART 1A HUMAN RIGHTS ACT 1993

BETWEEN CHILD POVERTY ACTION GROUP INCORPORATED (CPAG)

Appellant

AND THE ATTORNEY GENERAL

Respondent

SUBMISSIONS FOR THE APPELLANT
22 April 2013

Geraldine Whiteford
Davenport City Law
23 Vermont St
Ponsonby 1011
PO Box 47 500
Auckland City 1144
P: 09 917 1650
F: 09 917 1660
E: gew@dclaw.co.nz

Frances Joychild/Jenny Ryan
Barrister
Lvl 7, 20 Waterloo Quadrant
Auckland
PO Box 47 947
Ponsonby
P: 09 309 7694
F: 09 309 7633
E: francesjoychild@clear.net.nz

1. SUMMARY OF ARGUMENT

1. This case is about 200,000 of New Zealand's poorest children and the In-Work Tax Credit (IWTC).[1] The IWTC is a payment of $60 or more per week to the caregiver of financially dependent children.[2] It became payable in 2006 as part of the Working for Families package of welfare and tax reforms (WFF).[3] The Appellant, Child Poverty Action Group (CPAG), claims that the exclusion of families from the IWTC where caregivers are on income tested benefits constitutes unjustified discrimination under NZBORA and so breaches Part 1A Human Rights Act 1993 (HRA).[4] Part 1A represents a new role for the courts, admitting claims with serious resource implications and a political purpose.[5]

2. When WFF was being developed, the Government was aware of the significant level of child poverty in New Zealand, with children in beneficiary families more likely to be in significant and severe poverty than other children.[6] The situation remains the same today. Child poverty negates children's basic human rights such as access to adequate food, housing, education, health and the ability to develop to their full potential and it creates grave problems for society. The WFF package was intended to respond to these concerns, and aimed to alleviate child poverty and incentivise parents into paid work.[7]

3. There were two family income assistance components to WFF. The first was an increase to the pre-existing Family Tax Credit (FTC), a payment available to low income families regardless of parental employment status. However most beneficiary parents had FTC gains largely offset by other benefit reductions, which helped to fund WFF. The second was the IWTC, a new tax credit

---

[1] In 2008, there were 200,000 children in beneficiary families, representing 18% of all children: MSD, *Household incomes in New Zealand: trends in indicators of inequality and hardship 1982 to 2008* ("Household incomes in New Zealand"), COA vol 10, p 3889. The In-Work Tax Credit is payable under s MD4 Income Tax Act 2007

[2] The weekly rate is $60 for families with 1-3 children; larger families receive an additional $15 per child

[3] The IWTC continues to be payable; the off-benefit rule is still in operation.

[4] The Appellant is an incorporated society formed in 1994 to advocate for more informed social policy to support New Zealand children, especially those living in poverty. Its members include academics, doctors, educationalists and social workers: Janfrie Wakim 1st SOE paras 4 to 7, COA vol 2, tab 10, p 343

[5] See Miller J in *Attorney-General v Human Rights Review Tribunal*, (2006) 18 PRNZ 295 (HC) at [65]

[6] See paras 7-8. Note that there is no single, official poverty measure in New Zealand. The Ministry of Social Development (MSD) uses both income and consumption based forms of poverty measurement. Both are cited in these submissions.

[7] See *Reform of Social Assistance: Working for Families Package*, 31 March 2004 ("WFF Cabinet Paper"), COA vol 8, p 2956 at [8].

available only to those off benefit and working defined hours. It was intended to operate, and still operates, as an income adequacy measure for eligible families.[8]

4. The Appellant says there were other means by which the Government could have created a work incentive and maintained a gap between benefit and work income which did not involve excluding beneficiary families from a substantial child poverty alleviation measure, as the IWTC does. Such exclusion is a departure from international human rights obligations.[9] While normally a reasonably wide margin of deference would be owed by the courts to government where a matter engages political and macro-economic issues, there are several factors which significantly reduce the deference owed in this case.[10]

5. There are two key questions for this Court to consider. First, are the 200,000 children in beneficiary families and their parents subject to prima facie discrimination on the grounds of employment status in circumstances where the parents are excluded from the IWTC because they are both on benefit and unable to meet the work hours requirements? The Appellant says they are because (i) the two exclusionary factors are inextricably/inherently linked (99.2% are in both groups);[11] and (ii) regardless of the work hours requirement, being on benefit is a material ingredient in their exclusion from the IWTC.

6. Second, since the enactment of Part 1A HRA, is the Government justified in enacting legislation which provides significant financial support to low income working parents so as to ensure income adequacy and alleviate child poverty, but excludes beneficiary families because the payment also has a work incentive objective? The Appellant says that when context is taken into account, the answer is no.

---

[8] The Appellant says this case is about differential access to child-related family assistance: Susan St John 2nd SOE, COA vol 3, tab 15, p 602, paras 20-27. The amounts received as main benefits are not a relevant comparison as they provide income for adults to replace income that would generally be obtained through paid employment: Donald Grey, 1st SOE, COA vol 4, tab 18, p 1146, para 35.

[9] See para 45 below

[10] See paras 44 to 53 below.

[11] See footnote 82 below

2. NARRATIVE OF FACTS RELEVANT TO APPEAL

2.1 Child poverty in New Zealand

7. Since the 1991 benefit cuts, child poverty has been a significant problem in beneficiary families.[12] In 2004, when the WFF legislation was enacted, there were around 245,000 children living in beneficiary families.[13] Of those, approximately 185,000 were living in hardship, with 150,000 of those in 'significant' or 'severe' hardship.[14] In percentage terms, 32% of children in beneficiary families were in severe hardship, 26% significant hardship and 14% some hardship. The comparable rates for children in working families were: 5% severe hardship, 7% significant hardship and 11% some hardship.[15] In 2008, after WFF was fully implemented, there was a drop in the overall child hardship rate from 26% to 19%. However, there was "little change in hardship rates for children from beneficiary families."[16]

8. Children in beneficiary families are also disproportionately represented in income-based poverty statistics.[17] The table below shows the percentage of children below the 60% after-housing costs fixed poverty line by parental work status.[18]

---

[12] The poverty rate among children in workless households increased from 25% in 1990 to 78% in 1992. See: *Household incomes in New Zealand*, table H.3: COA vol 10, p 3946.
[13] *Household incomes in New Zealand*, table C.1, COA vol 10, p 3889.
[14] Janfrie Wakim 1st SOE at paras 35-37, COA vol 2, tab 10, p 347
[15] MSD, *New Zealand Living Standards 2004*: COA vol 9, p 3469. The figures from the 2000 report are similar: 19% of children in beneficiary families were living in very restricted circumstances, 16% in restricted and 23% in somewhat restricted circumstances. The rates for children in working families were 2% very restricted, 4 % restricted and 10% somewhat restricted: MSD, *New Zealand Living Standards 2000*, COA vol 7, p 2603. Note the Living Standards reports use the Economic Living Standards Index, which is a non-income measure of material wellbeing. It considers factors such as what people are consuming, their household facilities and their social participation. This measure relates to the Royal Commission on Social Security's acceptance that an adequate standard of living is one which enables individuals to participate in the community and not merely survive.
[16] MSD, *Non-income measures of material wellbeing and hardship*, COA, vol 10, p 4078. In 2008, 53% of children in beneficiary families were in hardship levels 1/2, compared with 12% of children in working families (4079). The report comments: "It would be very difficult to argue against the proposition that those in Levels 1 and 2 are materially deprived when measured against society's expectations in New Zealand, and this report does not shy away from making that judgment call. They are without a doubt (in the author's view) experiencing serious hardship and unacceptably severe restrictions on their living conditions for citizens in a developed nation like New Zealand" (p 4067).
[17] Income-based poverty measurement (or 'poverty lines') analyses how many households fall below the level of 50% or 60% of median household income. Income can be calculated on either a before-housing or after-housing costs basis. The lines can be updated by either a fixed line approach or a moving line approach.
[18] *Household incomes in New Zealand*, table H.3, COA vol 10, p 3946. The report uses the 60% AHC fixed line as the primary measure for income poverty (p 3869). CPAG prefers to use the 60% AHC

Parental work status	**1998**	**2001**	**2004**	**2007**	**2008**
One or more in full-time work	17	17	14	8	10
Workless	71	77	60	58	67

9. Poverty has many grave consequences for children and has critical effects for society. For example child mortality rates are higher for poor children;[19] they suffer serious medical problems, injury and risk of maltreatment at much higher rates than their peers;[20] by adulthood they are at high risk of suffering from multiple disorders;[21] and their educational opportunities and achievement are severely impacted.[22] Both the Tribunal and the High Court recognised that there are real issues of child poverty in New Zealand.[23]

2.2 Working for Families package

10. The WFF policy development process began in 2001, culminating in a paper considered by Cabinet on 7 April 2004.[24] WFF had three key objectives: to make work pay by supporting families with dependent children so they are rewarded for their work effort; to ensure income adequacy with a focus on low and middle income families with dependent children, to significantly address issues of poverty, especially child poverty; and to achieve a social assistance system that supports people into work.[25] There were six components to the WFF package, one of which was 'Family Income Assistance and the IWTC.'[26]

---

moving line measure as it shows relative poverty: Susan St John affidavit of 25 November 2009 at para 7, COA vol 3, tab 15, p 955.

[19] Professor Antony Blakely, Director, Health Inequalities Research Programme, University of Otago, COA vol 2, tab 11, p 397.

[20] Professor Innes Asher, Head of Paediatrics Department, University of Auckland School of Medicine, COA vol 2, tab 9, p 293

[21] Professor Richie Poulton, Director of Dunedin Multi-disciplinary Health and Development Research Unit, para 14, COA, vol 2, tab 8, p 261.

[22] Janfrie Wakim 1st SOE paras 51-52, COA vol 2, tab 10, pp 351-352; Kay Brereton, Benefit Rights Co-ordinator, Wellington People's Centre, SOE paras 52-53, COA vol 2, tab 12 p 434.

[23] See HC decision at [2]: "Child poverty is recognised as a social ill with significant long-term adverse social and economic consequences. For a so-called developed economy and in a society that aspires to be "caring" (which in the formal sense is manifested in our accession to various international covenants on human rights), New Zealand has a poor record on child poverty." COA vol 1, tab 6, p 86. See also the HRRT decision at [10], fn 15, [191], [270]: COA vol 1, tab 7, pp 159, 224, 252.

[24] The policy process is described in the HRRT's decision at [31] to [44]: COA vol 1, tab 7, pp 166-170.

[25] WFF Cabinet Paper, para 8, COA vol 8, p 2956

[26] WFF Cabinet Paper, para 5, COA vol 8, p 2955. The others involved changes to Childcare Assistance, Accommodation Supplement, Invalid's Benefit and Special Benefit and consequential changes to other social assistance programmes: COA vol 8, p 2955-6. The timetable for the reforms is set out at p 2957.

11. WFF legislation was introduced and had all three readings under urgency on Budget day, 27 May 2004.[27] The Attorney-General presented a s 7 NZBORA report raising issues relating to sexual orientation discrimination but it did not mention employment status discrimination. Both the Tribunal and the High Court expressed concern at the lack of mention of employment status discrimination in the report.[28]

2.3 Relevant components of WFF[29]

Increase in Family Tax Credit (formerly Family Support Credit)[30]

12. The Family Tax Credit (FTC) was a pre-existing payment for low-income families with children regardless of employment status, paid according to the number and age of the children. FTC rates were increased on 1 April 2005 by $25 per week for the first child and $15 per week for each subsequent child.[31] There was a further increase of $10 per child per week from 1 April 2007.[32] However, while working families obtained the full benefit of the increase, many beneficiary families had their increase significantly offset by the removal of the child component of their benefit and decreases in hardship assistance.

Removal of child component of main benefits

13. From 1 April 2005, the "child component" was removed from most main benefits paid to families with dependent children, which was estimated to result in net decreases of between $17.54 and $21.89 per week.[33] This was intended to help "offset" the overall cost of the WFF initiative.[34]

---

[27] The Bill introduced was the Future Directions (Working for Families) Bill; this was divided into the Social Security (Working for Families) Amendment Bill and the Taxation (Working for Families) Bill before the Third Reading.
[28] HC decision at [25], COA vol 1, tab 6, p 92; HRRT decision at [76] to [79], COA vol 1, tab 7, p 181
[29] These submissions discuss the components of WFF relevant to this case. WFF also made changes to the Accommodation Supplement (which went to all low income families) and provided increased funding for Childcare Assistance (which largely went to working parents).
[30] Note the names for the different WFF payments changed from 1 April 2008 as a result of the Taxation (Business Taxation and Remedial Matters) Act 2007. Family Support Credit is now known as Family Tax Credit; Family Tax Credit is now known as Minimum Family Tax Credit; and In-Work Payment is now known as In-Work Tax Credit. See Michael Nutsford 1st SOE at para 7, COA vol 4, tab 17, p 1041.
[31] WFF Cabinet Paper, COA vol 8, p 3002
[32] WFF Cabinet Paper, COA vol 8, p 3003
[33] The rates of Unemployment Benefit, Sickness Benefit, Domestic Purposes Benefit, Widow's Benefit and Invalid's Benefit paid to sole parents with two or more children were removed and replaced with the lower sole parent rate. The rates of Unemployment Benefit and Sickness Benefit paid to married couples

Changes to Hardship Assistance

14. Special Benefit calculations were altered from 1 April 2005 so that recipients with children were expected to face an average weekly reduction of $13.43.[35] From 1 April 2006, Special Benefit was no longer available for new hardship applicants. It was replaced with Temporary Additional Support (TAS) a short term, less discretionary, hardship payment.[36] The changes to Hardship Assistance were expected to save the Government $221.85 million from 2004 to 2008.[37] There was evidence that many families had relied on Special Benefit in their attempt to make ends meet and that TAS was much harder to qualify for.[38]

Creation of an In-Work Tax Credit (formerly In-Work Payment)

15. The IWTC is a payment of $60 per week for families with 1-3 children ($75 if 4 children, $90 if 5 children and so on) who have income below a certain threshold.[39] It became available on 1 April 2006 under s KD 2AAA Income Tax Act 2004. The eligibility criteria are: (a) being 16 years or older; (b) being the principal caregiver of a child;[40] (c) meeting residence requirements; (d) not being on a benefit; and (e) being a full-time earner.[41]

Abatement of WFF tax credits

16. WFF tax credits abate as family income increases. A family's IWTC does not begin to abate until their FTC has abated entirely.[42] Prior to WFF, family tax credits began to abate at a rate of 18% from annual income of $20,356, increasing to 30% once annual income reached $27,481.[43] The WFF Cabinet

---

with children were removed and replaced with the lower rate paid to married couples with no children. The sole parent with one child rate did not change. WFF Cabinet Paper, COA vol 8, p 3003, para 8

[34] WFF Cabinet Paper, COA vol 8, p 3003, para 7

[35] In 1,206 cases, individual case management would be needed to avoid any overall loss of income for beneficiaries receiving Special Benefit. WFF Cabinet Paper, COA vol 8 p 3027, paras 112-114. This "grandparenting" arrangement only applied to those who were already receiving a Special Benefit when the changes took place: Susan St John 1st SOE at para 153, COA vol 3, tab 15, p 583.

[36] WFF Cabinet Paper, COA vol 8, p 3030 para 134-135

[37] WFF Cabinet Paper, COA vol 8, p 3031, para 138

[38] Kay Brereton SOE, COA vol 2, tab 12, p 431, paras 25-26

[39] See COA vol 9, p 3731 for a table which shows the relevant income levels and amounts.

[40] As most caregivers are parents, these submissions primarily use that term.

[41] ss MD4 to MD9 Income Tax Act 2007. The full-time earner test is: 20 hours per week for a sole parent and 30 total for a couple: s MA 7(1) Income Tax Act 2007. This means a caregiver who is not working may receive the IWTC for a child if his/her partner is working 30 or more hours per week.

Paper proposed that from 1 April 2006, WFF payments would not begin to abate until annual income of $27,500 and there would be a single abatement rate of 30%.[44] However, this abatement regime never came into effect. As part of the 2005 election campaign, the Government promised to extend the IWTC to higher income earners.[45] It did this by raising the abatement threshold to $35,000 and lowering the abatement rate to 20 cents.[46] This came into effect before the IWTC became payable.[47]

Other relevant payment - Minimum Family Tax Credit

17. The Minimum Family Tax Credit (MFTC) predates WFF.[48] It is a payment which guarantees a certain minimum after-tax family income[49] for those working full-time and not on a benefit.[50] This operates to create an income gap between working and beneficiary families.[51]

2.4 Nature of the In Work Tax Credit

18. The Court ultimately accepted that the IWTC is an income adequacy/child poverty alleviation measure for those who are eligible for it, despite finding that its sole purpose was to make work pay.[52] The Tribunal found that the IWTC

---

[42] Michael Nutsford 1st SOE, COA vol 4, tab 17, p 1050, para 48
[43] WFF Cabinet Paper, COA vol 8, p 3006, para 20.
[44] WFF Cabinet Paper, COA vol 8, p 3006, para 21. This would have meant that one-child families could receive the full IWTC of $60 per week for income up to $39,500 and a part-IWTC on incomes up to $50,000. A three-child family could receive a full IWTC up to $56,000 and a part-IWTC on incomes up to $66,500: see IRD, *Family Assistance 2007*, COA vol 9, p 3323. This abatement regime was enacted in s 13(5) Taxation (Working for Families) Act 2004, which amended sKD2 Income Tax Act 2004.
[45] Michael Nutsford x-exam, COA, vol 4, tab 17 p 1087 lines 24-35; p 1088 lines 1-6; p 1091 lines 21-29.
[46] Michael Nutsford SOE, COA vol 4, tab 17, p 1050, para 48. This meant a one-child family could receive the full IWTC for income up to $56,000 and a part-IWTC until $71,000. A three-child family could receive the full IWTC until $84,500 and a part-IWTC on income up to $101,000: IRD, Working for Families Tax Credits Registration Pack, COA vol 9 p 3731.
[47] The amending legislation was passed under urgency. The Taxation (Annual Rates and Urgent Measures) Bill was introduced on 8 November 2005, had its first reading on 16 November 2005 and its second reading on 8 December 2005. While the Bill was referred to the Finance and Expenditure Select Committee, it did not call for public submissions due to the short time for consideration. At the Committee of the Whole House stage it was divided into three bills, with the WFF changes included in the Taxation (Urgent Measures) Bill. Section 5 of this Bill amended s KD(2) Income Tax Act 2004.
[48] This was previously called the Guaranteed Minimum Family Income Tax Credit (1986-1999) and the Family Tax Credit (1999-2007).
[49] In 2008, this was $18,460 per year: Michael Nutsford EIC, COA vol 4, tab 17, p 1065, line 13. The MFTC abates by a dollar for each dollar earned so that as income from work increases, it abates at the same rate until the minimum income level is reached: Susan St John 1st SOE, COA, vol 3, tab 15, p 558, para 34.
[50] Michael Nutsford 1st SOE, COA vol 4, tab 17, p 1049, para 39.
[51] Susan St John 2nd SOE, COA, vol 3, tab 15, p 618, paras 127, 131-132
[52] HC decision at [162]: "…If there was a realistic expectation that the IWTC would move all, or substantially all, beneficiaries into full-time employment, then the objectives would remain

was targeted at families because it was meant to assist with the costs of children. It also had a work incentive objective.[53]

19. There is ample evidence that the IWTC was intended to operate, did operate, and continues to operate, as a child poverty alleviation measure for working families on low incomes. See for example: policy documents showing the assumption that the IWTC would be spent on children[54] and that extra income from IWTC would be spent in a way that reduced child poverty;[55] the fact that having children is a key eligibility criterion for IWTC;[56] an MSD/IRD report which refers to WFF payments being spent on family needs;[57] OECD evidence that the appeal of in work benefits was their dual focus;[58] the evidence of Crown witness Suzanne Mackwell;[59] the WFF Cabinet paper which lists IWTC with FTC under the heading 'Family Income Assistance.'[60] The IWTC of $60 is a significant amount, representing almost 25% of a weekly sole parent benefit.[61]

2.5 Policy development process

20. There are three significant features of the policy development process. First, Cabinet was aware that 98.2 % of beneficiary parents would not be incentivised into work by the IWTC.[62] Second, there was no analysis of the impact on children of beneficiaries of either the exclusion from the IWTC or of WFF as a

---

complementary because payment of the IWTC addresses poverty alleviation for those who receive it." COA, vol 1, tab 6, p 133. See also HC decision at [135] – COA p 124.

[53] HRRT decision at [171], COA vol 1, tab 7, p 216 "...The fact that the challenged measure is targeted at families seems to us to say a very great deal about its objectives. Indeed, the fact that the IWTC has a purpose of assisting with the costs of raising children is the only sensible explanation we can see for the fact it was targeted at families. It has a work incentive purpose as well..."

[54] WFF Cabinet Paper, COA vol 8, p 3006, para 22; MSD, *Future Directions: Papers for the 15 December 03 Joint Ministers Meeting* (12 December 2003), COA, vol 8, p 2859, para 3.

[55] MSD, *Intervention Logic and Assumptions: Working for Families* (March 2005), COA, vol 8, p 3088.

[56] Section MD4(1) of Income Tax Act 2007 – person entitled to IWTC 'for a child'.

[57] Working for Families Q&As, COA, vol 9, p 3706

[58] Mark Pearson and Herwig Immervoll SOE, vol 5, tab 20, p 1778 (paras 6-7), 1789 (para 37), 1790 (para 39), 1791 (para 48), 1809 (para 119).

[59] Suzanne Mackwell, 2nd SOE: "Stricter work testing obligations could have been introduced as part of WFF as an alternative to the IWP, but would not have improved the financial returns from employment or addressed poverty among work families." COA vol 5, tab 19, p 1612, para 33.

[60] WFF Cabinet Paper, COA vol 8, p 2983. Note that the payments were called In-Work Payment and Family Support at that stage.

[61] The Domestic Purposes Benefit sole parent rate was $255.65 from 1 April 2007: Donald Grey 1st SOE, Annex 3, COA vol 4, tab 18, p 1177.

[62] Kalb, Cai and Tuckwell, *The Effect of Changes in Family Assistance: Allowing for Labour Supply Responses* (November 2005), COA vol 8, p 3285: WFF was predicted to increase sole parents labour force participation by 1.8 percentage points. MSD officials had hoped the figure might have been closer to 5% - see Suzanne Mackwell x-exam, COA vol 5, tab 19, p 1646, lines 10-21. The reason for this low estimate was the barriers to work faced by beneficiaries: COA vol 5, tab 19, p 1646 lines 22-28.

whole.[63] Despite the sponsoring Minister describing WFF as the biggest change to New Zealand's social assistance system in over a decade, the legislation was enacted through all stages in one day. At no stage was there any consultation with affected groups or the public or scrutiny by the select committee process.

21. Third, the IWTC was not well tailored. The two payment option[64] selected by Ministers for the WFF package was based upon an understanding that officials had $100m to $500m to work with. In late 2003/early 2004 when Ministers advised officials there was approximately $1.1 billion available for WFF, it was too late to go back and reconsider the two payment approach.[65] Ms Mackwell conceded that the design may have been very different had officials and Ministers known earlier that $1.1 billion was available.[66] In 2005, further funding was made available to extend the IWTC to higher income earners.[67]

2.6 Effectiveness of IWTC: incentivising work/alleviating poverty

22. Donald Grey's evidence suggested that WFF had led to increased sole parent employment and movement off benefit.[68] Dr St John's response was that if the period June 2006 to June 2009 was used to assess whether the IWTC had an effect on the sole parent employment rate, then there had been virtually no improvement.[69] It declined by 8.4 percentage points between 2007 and 2009, while the single adult employment rate had increased by 0.3 percentage points.[70]

---

[63] See HRRT decision at [190(e)], COA vol 1, tab 7, p 223.
[64] The two payment approach involved the FTC and the IWTC. A one payment approach (i.e. FTC only) was also considered. See: Suzanne Mackwell, 1st SOE COA vol 5, tab 19, p 1587, para 90.
[65] Suzanne Mackwell, questions from the HRRT, COA, vol 5, tab 19, p 1735 and 1749-1750.
[66] Suzanne Mackwell, questions from the HRRT, COA, vol 5, tab 19, p 1735 lines 12-16.
[67] See para 16 above. In the original WFF package, it was estimated that it would cost $349.3 million to fund the IWTC in 2007/8 and outyears: *Reform of Social Assistance: Working for Families Package – Revised Recommendations* (19 April 2004): COA vol 8, p 3071. There was evidence that the estimated expenditure on the IWTC in the year to June 2008 was in fact $593 million: Michael Nutsford 1st SOE, vol 4, tab 17, p 1045, para 22. This suggests that the 2005 abatement changes added an extra $244 million per year to the cost of the IWTC.
[68] Affidavit of Donald Gray of 21 December 2009, COA, vol 5, tab 18, p 1554-1555, paras 9-16
[69] Affidavit of Susan St John of 4 February 2010, COA vol 3, tab 15, p 965-6, paras 4-6. Note that the IWTC came into effect in April 2006.
[70] Affidavit of Susan St John of 4 February 2010, COA vol 3, tab 15, p 967, para 8

Dr St John's evidence was that benefit levels fell between 2004-2007, but increased back again in 2009.[71]

23. WFF has been largely successful in alleviating child poverty in working families eligible for the IWTC but has had little or no impact upon child poverty in beneficiary families (see paras 7-8).

2.7 Discriminatory use of child assistance measures

24. Until 1996 social security measures to support children have either been paid universally or targeted to income level. The Family Benefit was paid to all caregivers, whether working or on benefit.[72] Family Support (now FTC) was introduced in 1986 and paid to all low income families regardless of source of income.[73] In 1996 the Independent Family Tax Credit of $15 per child per week for working parents was introduced; this became the CTC in 1999.[74] This development was of great concern to the Appellant and once Part 1A HRA became operative, it made a complaint to the HRC.[75] When the IWTC was announced, this was added to the Appellant's complaint.

3. SUBMISSIONS ON SECTION 19 NZBORA

25. The test for s 19 NZBORA has been established by this Court in *Ministry of Health v Atkinson*.[76] It comprises two limbs. First, was there differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination?[77] Both the Tribunal and the Court found this limb was proved in this case.[78] Second, when viewed in context, does that differential treatment impose a material

---

[71] Affidavit of Susan St John of 25 November 2009, COA vol 3, tab 15, pp 958-9, paras 18-20. Her evidence was that the downwards trend in benefit numbers between 1997 and 2007 was due to the buoyant economy: 2nd SOE at paras 91-93, COA vol 3, tab 15, p 613.
[72] Susan St John, 1st SOE, COA vol 3, tab 15, p 556, para 23.
[73] Susan St John, 1st SOE, COA vol 3, tab 15, p 557, paras 26-27
[74] Susan St John, 1st SOE, COA vol 3, tab 15, p 561, paras 47-48. In effect, Family Support was increased by $20 to compensate for inflation, but $15 was marked off and made available only to those who were 'independent from the state'.
[75] CPAG had earlier made a complaint to the HRC about the IFTC but was told there was no jurisdiction to consider the complaint at that point.
[76] *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA)
[77] *Ministry of Health v Atkinson* at [55], [109]
[78] HRRT decision at [161] to [162] and [192]: COA, vol 1, tab 7, p 213, 224. HC decision at [102] to [103], [129]: COA vol 1, tab 6, p 114, 122.

disadvantage on the person or group differentiated against?[79] The Tribunal held this had been established, while the Court did not (except in relation to the small number of beneficiaries who met the IWTC work hours requirement).[80]

(a) Court's analysis on disadvantage

26. The Appellant submits the Court erred in two ways in applying the test for the second limb of s 19 (i.e. disadvantage). First, it applied a causation test, when this belonged in the first limb of the s 19 test; and second, it applied the wrong causation test.

27. When addressing the issue of disadvantage, the Court said:[81]

> It is artificial to characterise the absence of opportunity to qualify for the IWTC as a real disadvantage, when the statistics reveal how small a number might then qualify...the full-time earner requirement will still exclude a very substantial majority of beneficiaries from qualifying for the IWTC.
>
> The 'lack of comparable gain' focussed on by the Tribunal has not been caused by the off-benefit rule. Absent that requirement, beneficiaries who do not work 20 hours per week would still not qualify for the IWTC unless they became 'full-time earners'. Although the concept of lack of comparable advantage focused on by the Tribunal might constitute adequate disadvantage where that is caused by the prohibited ground of discrimination, the present is not such a situation.

28. Hence the Court held that because the very substantial majority of beneficiaries would be excluded by another eligibility requirement of the IWTC (the full time earner requirement in s MD 9 ITA 2007) they were not disadvantaged by the off-benefit rule. The only beneficiaries disadvantaged on the basis of employment status were the 1267 who could meet the full time earner requirement (less than 1% of beneficiaries).[82]

---

[79] *Ministry of Health v Atkinson* at [109]

[80] HRRT decision at [191]: COA, vol 1, tab 7, p 224; HC decision at [117] to [128]: COA vol 1, tab 6, p 118.

[81] HC decision at [117] to [118]: COA vol 1, tab 6, p 118.

[82] HC decision at [122] COA vol 1, tab 6, p 120. The evidence was that in 2007 there were 1267 DPB recipients who were working 20 or more hours per week: Donald Gray, 1st SOE, COA, vol 4, tab 18, p 1150, para 45. The HRRT took 165,000 as a reasonable estimate of the number of beneficiary families: COA vol 1, tab 7, p 207, para 147(a). See also Janfrie Wakim, 1st SOE, COA, vol 2, tab 10, p 346, para 28 (citing a 2003 report showing there were 167,600 families in receipt of core benefits).

(b) Appellant's response - disadvantage

29. The Appellant respectfully submits that the Court's reasoning does not address the question of whether there was disadvantage. It has not applied the test established in *Atkinson* i.e. whether there is material disadvantage, when viewed in context.[83] The Appellant submits that all beneficiary families experience material disadvantage as a result of their exclusion from the IWTC, when viewed in the context of the WFF package as a whole. First, as the Tribunal found, they were disadvantaged by being excluded from a 'comparable gain'.[84] Second, beneficiary families were denied an opportunity for a significant child poverty alleviation/income adequacy measure. In a situation where they were already disproportionately in poverty and there was no other measure to materially address this in the WFF package, there can be little doubt that children in beneficiary families were materially disadvantaged by the exclusion.

30. In fact, the Court was addressing a causation issue which should have been considered under the first limb of s 19 i.e. was there differential treatment on a prohibited ground? In relation to the Court's reasoning on causation, the Appellant notes that the vast majority of beneficiary parents are on benefit for the very reason that they cannot meet the working hours requirement.[85] That is why they are eligible for a benefit under the Social Security Act.[86] Hence, it is submitted that those two qualifying factors are inextricably linked. To exclude parents because they are not working full-time is essentially a substitute for discrimination against those on income tested benefits. In *Air NZ v McAlister* the Supreme Court found that age was a discriminatory factor in the demotion because it was inextricably linked to the reason the company gave for the demotion of a senior pilot (that the United States had adopted a rule prohibiting persons over 60 from being pilots in command).[87]

---

[83] *Ministry of Health v Atkinson* at [136]
[84] HRRT decision at [178], [190(f)], [191], COA vol 1, tab 7, p 218, 224.
[85] See footnote 82 above. Using these figures, less than 1% of beneficiaries work 20-plus hours per week.
[86] See ss 27B, 40, 54, 89 Social Security Act 1964
[87] *Air New Zealand v McAlister* 2010] 1 NZLR 153. The case was under a provision in the Employment Relations Act 2000 which is nearly identical to a provision in Part 2 HRA. It is submitted that where possible there should be a harmony between Part 1A and Part 2 HRA and the same test should apply.

31. However, even if the work hours requirement and being in receipt of a benefit are not seen to be inextricably linked as there is not a perfect match (99.2% cannot the work hours requirements) then the Appellant submits that beneficiaries who cannot meet the work hours requirement are still discriminated against. The off-benefit rule is still an excluding factor to which they are all subject, whether or not they can meet the work hours requirement. The employment status ground is, at least, a material ingredient in the discrimination complained of. In *HRC v Eric Sides Motors*, the Tribunal held that the prohibited ground had to be 'a substantial and operative factor' in the refusal to employ Mr Robinson.[88] In *McAlister* the Supreme Court reduced the requirement to a 'material factor' or 'material ingredient' and held that age was a material factor or ingredient in Mr McAlister's demotion.[89] In this case, the Tribunal held that employment status (being on benefit) was the 'substantive reason' for the differentiation.[90] The Appellant submits that the *McAlister* test (rather than the very strict test applied by the High Court) should apply in Part 1A as it does in Part 2 HRA.

32. Essentially the High Court's decision requires the prohibited ground to be the sole operative factor in the discrimination complained of.[91] This approach is contrary to comparable overseas jurisdictions. In neither the United Kingdom nor Canada is the prohibited ground required to be the sole operative factor before a finding of prima facie discrimination can be made.[92]

---

[88] *Human Rights Commission v Eric Sides Motors* (1981) 2 NZAR 447 (EOT) at 457. Mr Sides gave other reasons for not employing Mr Robinson. He gave great weight to a person's ability as a worker when considering employment and he considered it unfavourable that Mr Robinson after several short jobs was currently unemployed. The Tribunal could not, in these circumstances, be sure that religious belief was the substantive and operative reason for the refusal to employ.

[89] *McAlister v Air New Zealand* at [40] (per Elias CJ and Blanchard and Wilson JJ) and [49] to [50] (per Tipping J).

[90] HRRT decision at [162], COA vol 1, tab 7, p 213

[91] By using the terminology of "absent that requirement", the High Court is effectively requiring a sole ingredient and applying a very strict "but for" test: HC decision at [118], COA, vol 1, tab 6, p 118 This test is inappropriate for New Zealand and is not applied in overseas jurisdictions (see footnote 92 below).

[92] See *Patmalniece (FC) v Secretary of State for Work and Pensions* [2011] 3 All ER 1 (HL) where Ms P was excluded by UK regulation from pension eligibility because she did not meet the 'habitually resident in the UK' requirement (which some UK citizens also could not meet) and also because she did not have a 'right to reside' in the UK under the regulations, though those born in the UK had such right. Lord Walker, who found direct discrimination, stated: 'The right to reside condition is not a sufficient condition for entitlement, but it is a necessary condition, and it is one that is automatically satisfied by every British national. The fact that there is another cumulative condition (actual or deemed habitual residence) is irrelevant.' (para 65-66). See *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 where the respondent argued the age discrimination was only one of an interplay of

33. It is also significant that the work hours requirement, while not pleaded, is indirectly discriminatory on the grounds of employment status as it has the effect of treating beneficiaries less favourably.[93] As such, it would require justification under s 5.

34. In conclusion, the Appellant submits that if the Court had applied the material ingredient/factor test, it would have concluded that the off-benefit rule of the IWTC (s MD8 ITA 2007) involved differential treatment on the grounds of employment status resulting in material disadvantage (when viewed in context), whether or not beneficiary parents could meet the 'work hours requirement.'

4. SUBMISSIONS ON SECTION 5 NZBORA

35. Both parties have always accepted that s 5 analysis is to be undertaken according to the formula set out by the Supreme Court in *R v Hansen* [2007] 3 NZLR 1. This is the approach applied by the Tribunal and High Court.

4.1 Summary of Appellant's argument on section 5

36. The Appellant does not challenge the Court's conclusions that: (i) the objective to be considered is that of the off-benefit rule;[94] (ii) the objective of the off-benefit rule is to incentivise work;[95] (iii) this objective is sufficiently important to justify some discrimination (although the Appellant disagrees that the Court's task (at that stage) was to consider whether the objective was 'sufficiently important to justify the extent of the discrimination');[96] and (iv) there is a rational connection between the objective and the off-benefit rule.[97]

37. The Appellant submits that the Court erred in its s 5 analysis by giving undue deference to the legislature and failing to undertake the required analysis of

---

three factors determining eligibility for a pension. Iacobucci J for the unanimous court at 553: 'In my opinion it does not follow from the fact that any one of several criteria, including age, might determine entitlement to a survivor's pension, that the legislation does not draw a distinction on the basis of age.'

[93] See *Northern Regional Health Authority v Human Rights* Commission [1998] 2 NZLR 218 (HC) where Cartwright J found the NZBORA to prohibit indirect as well as direct discrimination. See s 65 HRA for definition of indirect discrimination.

[94] HC decision at [164], COA vol 1, tab 6, p 133. In its HC submissions, the Appellant had proposed alternatives: the Court could consider either the objectives of the IWTC or of the off-benefit rule.

[95] HC decision at [166], COA vol 1, tab 6, p 134

[96] HC decision at [192], COA vol 1, tab 6, p 142

[97] HC decision at [198], COA vol 1, tab 6, p 144

whether: (i) the off-benefit rule impaired the right or freedom no more than was reasonably necessary for sufficient achievement of its purpose; and (ii) the off-benefit rule was in due proportion to the importance of its objective.

4.2 Deference

38. All judgments in *Hansen* recognised the court's need to consider deference when undertaking the s 5 exercise. Tipping J used a shooting target metaphor where the margin of discretion left to Parliament is that area outside the bull's-eye but still on the target with the court's job to say whether Parliament's measure hits or misses the target.[98]

(a) Court's analysis on deference

39. The High Court indicated that the extent of deference would depend on the level of abstraction at which it undertook the analysis i.e. whether against the objective of the off-benefit rule or of the whole WFF package.[99] (It chose the former). The Court also addressed deference when considering proportionality. It referred to the evidence of Crown witness John Yeabsley and indicated that while deference was needed due to the expertise and deliberation committed to developing WFF, it would be unrealistic to expect too high a standard in achieving the objectives, at least without a period of fine tuning.[100] The Court adopted dicta from the High Court's decision in *Atkinson* which recognised that

---

[98] *R v Hansen* [2007] 3 NZLR 1 (SC) at [119]. Tipping J indicated 'some weight should be given to Parliament's appreciation of the matter' the more so where there is a report from the Attorney-General under section 7 which indicated a limit is reasonable and justified. Even in such a case, the Court was not bound by the Attorney-General's assessment or Parliament's concurrence (108-111). The Chief Justice saw the Court's task as focusing on the text, purpose and context of the NZBORA so as to keep within its proper sphere (18). McGrath J noted that there is not the same justification for courts to defer to Parliament in respect of the policy decision as there is to the objective itself (211). Anderson J accepted a margin of appreciation where the nature of the issues affected the court's inquiry, but said that in any even the courts should not be diffident about calling attention to encroachment on fundamental rights and freedoms (267-268).

[99] HC decision at [146]. It also acknowledged at [145] that its concern under Part 1A, as opposed to a judicial review hearing, was with the 'substantive quality of the measure that has limited the freedom' though it was not a merits review and it could not substitute its own view. COA vol 1, tab 6, p 127.

[100] HC decision at [218] to [219], COA, vol 1, tab 6, p 149. It was difficult for government to pursue 'pure' goals and social adjustment often had to be prioritised. It indicated that Mr Yeabsley's observations suggested that while deference was due to the expertise and deliberation committed to developing the relevant measures, it would be unrealistic to expect too high a standard in achieving the objectives, at least without a period of fine tuning. "We have had regard to that consideration in weighing CPAG's criticisms of what could have been done better, and its analysis of the failures in relation to the relevant objectives, against what might reasonably be expected in such macro-economic/social policy areas. It is not an area in which government should be marked down for not "hitting the bull's eye" in Tipping J's terms. Deference in this context requires a reasonably wide outer circle around the bull's eye before the government could be said to have missed the target entirely."

governments must make distinctions between people if they are to govern effectively and must be free to target social programs so that those whom they consider should benefit from them do so.[101]

(b) Appellant's response - deference

40. The Appellant respectfully submits the Court erred in framing the Appellant's claim as that the IWTC/WFF had not met its objectives.[102] Its claim is, rather, about the exclusion of beneficiary parents from the IWTC. Further, showing deference should not mean that the wider context of the IWTC (in particular, the nature of the IWTC and the objectives of WFF as a whole) is ignored. Also, it is trite that government must make distinctions. It is only those distinctions that unjustifiably discriminate which are a breach of Part 1A.

41. The Appellant acknowledges that the s 5 exercise must be undertaken by the courts with all due deference to government. The critical issue is the appropriate level of 'due deference' in this case. The Appellant submits that while the Court articulated the correct standard, it gave greater deference than was warranted in this case. The Appellant agrees that in general, a reasonably wide outer circle around the "bull's eye" can be drawn in which the court gives latitude to government in claims involving political issues or complex macro-economic policy areas. However, there is still an outer limit, outside of which the courts must intervene. There is significant authority on this point.[103]

42. In a case involving the "highly contentious social issue" of adoption by unmarried couples, the House of Lords said that cases about discrimination in an area of social policy will always be appropriate for judicial scrutiny, as "the constitutional responsibility in this area of our law resides with the courts."[104] In another case, the House of Lords rejected a submission that because housing

---

[101] HC decision at [220], COA, vol 1, tab 6, p 150
[102] HC decision at [167], COA, vol 1, tab 6, p 134
[103] The expert committee overseeing ICESCR has criticised suggestions that resource allocation issues should be outside the jurisdiction of the courts: Committee on Economic, Social and Cultural Rights, *General Comment 9: the domestic application of the Covenant*, E/C.12/1998/24, CESCR, 19th sess, (1998). So has the International Commission of Jurists which points to one of the range of possibilities for justiciability of economic, social and cultural rights being the application of the prohibition of discrimination: *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, Comparative experiences of Justiciability, Human Rights and Rule of Law Series: No 2, Geneva 2008.
[104] *In Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173 (HL) at paras 1-3, 15, 48-58.

policy involved complex questions of social or economic policy, courts should enter with trepidation.[105] In a claim for degrading treatment raising resource allocation issues, the House of Lords unanimously found a breach of the European Convention where the State had denied social security benefits to asylum seekers who had not claimed asylum at the first available opportunity.[106] In Canada, the Supreme Court found that the lack of provision of sign language interpreters which would require additional costs was an unjustified infringement of s 15 (1) Charter.[107]

43. There has been a mixed response by UK and Canadian superior courts to claims of discrimination in relation to government social benefits. These range from the statements approved by Lord Walker in *Carson* (cited in both the Tribunal and High Court decisions)[108] to the deeply divided Canadian Supreme Court in

---

[105] *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113 (HL). Baroness Hale at [135]: "Everyone has the right to respect for their home. This does not mean that the state - or anyone else - has to supply everyone with a home. Nor does it mean that the state has to grant everyone a secure right to live in their home. But if it does grant that right to some, it must not withhold it from others in the same or analogous situation. It must grant that right equally, unless the difference in treatment can be objectively justified." See also *A & Ors v Secretary of State for the Home Department* [2005] 2 AC 68 (HL) (where the Court held that although national security was a matter of political judgement for the executive and Parliament, where Convention rights were in issue, national courts were required to afford them effective protection by adopting an intensive review of whether such a right had been impugned).

[106] *R (Limbuela) v Home Secretary* [2006] 1 AC 396 (HL). While there was no right to be provided with a home or social security by the State the situation was different when the State imposed a statutory regime which barred groups of persons from social security and left them 'utterly destitute' as a matter of policy. (425).

[107] *Eldridge v British Colombia (Attorney-General)* [1997] 2 SCR 624. See also *Chaoulli v Quebec* [2005] 1 SCR 791 at 837 per Deschamps J, citing G Davidov in '*The Paradox of Judicial Deference*': "Courts do not have to define goals, choose means or come up with ideas. They do not have to create social policies; they just have to understand what the other branches have created. No special expertise is required for such an understanding" and stating "When the courts are given the tools they need to make a decision, they should not hesitate to assume their responsibilities." See also *RJR-McDonald v Canada (AG)* [1995] 3 SCR 199 at 331-332 per McLachlin J: 'It is established that deference accorded to Parliament or the legislatures may vary with the social context in which the limitation on rights is imposed….As with context, however, care must be taken not to extend the notion of deference too far.....To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded."

[108] *R (Carson) v Work and Pensions Secretary* [2006] 1 AC 173 concerned persons eligible for a UK pension being excluded from a UK cost of living increase because they chose to live overseas. Lord Walker's cited the principle that in major political social or economic decisions the constraining role of the courts, absent a florid violation of established legal principles, is correspondingly modest (199). See also *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 (HC) (where the Court declined a claim by a disabled plaintiff that because he was homeless he was excluded from a disability housing premium. It deferred to the Government's reasons being to encourage the homeless disabled into housing and that homeless disabled were less in need of an accommodation supplement.)

Gosselin[109] and the recent decision of the Court of Appeal of England and Wales in *Burnip*.[110] In the latter successful appeal, the Court undertook the proportionality analysis by reference to the 'usual standard for review' not an enhanced one.[111] In none of these decisions is the excluded group so vulnerable, the exclusions so total or the effects so deleterious as in this case. The decision in *Gosselin* comes the closest to the facts here. The Appellant endorses the minority approach, while noting that it is not directly applicable to Part 1A as this Court has declined to adopt the Canadian approach to discriminatory impact (*Atkinson*).[112]

Factors relevant to deference in this case

44. The Appellant submits there are several factors unique to this case that were given no or insufficient weight by the Court in undertaking its s 5 analysis and which diminish the level of deference appropriate.

(i) <u>New Zealand's international human rights obligations and lack of consideration of those affected</u>

45. International human rights obligations are important aids to the construction of relevant domestic law, in this case the Income Tax Act 2007 and Part 1A HRA.[113] The Appellant submits that Part 1A should generally be presumed to provide protection at least as great as that afforded by similar provisions in

[109] In *Gosselin v Quebec* [2002] 4 SCR 429, adults under a specified age received less social security payment if they did not attend training programmes. The Court was split 5:4, with the minority finding that programmes left too many opportunities for young people to fall through the seams of the legislation See Bastarache J at 587: "In the legislative and social context of the legislation, which provided a safety net for those without means to support themselves, a rights-infringing limitation must be carefully crafted."

[110] In *Burnip v Birmingham City Council & Anor* [2012] EWCA Civ (15 May 2012), the Court of Appeal upheld Mr Burnip's claim of article 14 discrimination in relation to the Council not providing Mr Burnip, a severely disabled person who needed an overnight carer, with an allowance covering two bedrooms.

[111] *Burnip* at [28].

[112] *Gosselin* at 581 per Bastarache J: "the design of the programs was not tailored in such a way as to ensure that there would always be programs available to those who wanted to participate," 583: "even though 85 000 single people under 30 years of age were on social assistance, the government at first only made 30 000 program places available," and 580: only 11% were in fact enrolled in programs which allowed them to receive the full benefit. "This in and of itself is not determinative of the fact that the legislation was not minimally impairing, but it does bring to our attention the real possibility that the programs were not designed in a manner that would infringe upon the appellant's rights as little as is reasonably possible."

[113] See: *Ye v Minister of Immigration* [2010] 1 NZLR 104 at [34]; *Smith v Air New Zealand* [2011] 2 NZLR 171 (CA) at [55]; *Director of Human Rights Proceedings v NZ Thoroughbred Racing Inc* [2002] 3 NZLR 333 (CA) at [21].

international human rights documents which New Zealand has ratified.[114] Under ICESCR and UNCROC, the state has clear obligations to assist families, particularly those with dependent children, including ensuring minimum living standards through social security.[115] Discrimination on the grounds of a child's parental status is specifically prohibited when special measures of protection and assistance are taken by government.[116]

46. Despite these specific human rights obligations, there is no reference to them in the WFF policy documents. There is no analysis or audit of the impact of the policy changes on beneficiary families or of New Zealand's compliance with the aforementioned international human rights obligations.[117] The WFF package ignored the right of children not to be discriminated against on the grounds of parentage when special measures to ensure income adequacy are being taken. It also ignored the advice of the Committee on the Rights of the Child, which in 2003 urged New Zealand to assist parents and caregivers to implement the child's right to an adequate standard of living.[118] Similar urgings were made by the Committee on Economic, Social and Cultural Rights while WFF was under development.[119] This omission to consider human rights obligations of those excluded reduces the deference which should be shown.[120]

---

[114] See *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1056, where Dickson CJ reiterated a comment he had made in *Reference Re Public Service Employee Relations Act* [1987] 1 SCR 313: "The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified." See also *Lovelace v Ontario* [2000] 1 SCR 950 at 991 where the unanimous court cited the concluding observations of the Committee on Economic, Social and Cultural Rights (Canada, 1998) as evidence of the fact that aboriginal people experience high rates of poverty.

[115] For example art 10.1 ICESCR: "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children" and art 11.1 ICESCR: everyone has the right to an adequate standard of living for them and their family including adequate food, clothing and housing and to the continuous improvement of living conditions. See also articles 9,12, 15 ICESCR and articles 3.2, 6.2, 2, 26, 27 UNCROC.

[116] Article 10.3 ICESCR states: "Special measures of protection and assistance should be taken on behalf of all children and young persons *without any discrimination for reasons of parentage* or other conditions" (emphasis added). See also art 2.2, 27.2 and 27.3 UNCROC.

[117] After considering the evidence, the HRRT noted that international human rights obligations did not appear to have been given any significant consideration at all: COA, vol 1, tab 6, p 181 at [74]

[118] Committee on the Rights of the Child, *Concluding Observations: New Zealand* (27 October 2003), CRC/C/15/Add.216, paras 14, 15, 22, 23, 41, 42. The HRRT referred to this at [22] to [23] and [74] to [75]: COA, vol 1, tab 7, p 163, 181.

[119] Committee on Economic, Social and Cultural Rights, *Concluding Observations: New Zealand* (26 June 2003), E/C.12/1/Add.88 at paras 17, 28, 32. The Committee noted with concern that nearly one-quarter of New Zealanders live in poverty; recommended that assistance be targeted more specifically to

(ii) Policy development and legislative process

47. The policy options that comprised WFF were not tailored to the final funding parameters. Officials conceded that had they known the total funding available at the outset, they might have made different recommendations to Cabinet.[121] The focus was on two options (a single payment or two payment approach) and without any consideration which of those or any other options might be a less intrusive measure. Hence there is no right to deference based upon a policy process which carefully considered the extent to which the right would be affected.[122] Further, the option chosen was one that excluded all beneficiary parents from the only real child poverty alleviation measure in the WFF. That too reduces the level of deference.[123]

48. The Attorney-General made no comment on potential employment status discrimination in the section 7 report, despite CPAG having already complained about the predecessor CTC on employment status grounds.[124] Thus there is no right to deference based on a considered review by the Attorney-General.[125]

49. The Regulatory Impact Statement in the Future Directions (Working for Families) Bill creates a misleading impression by stating that the package 'is designed to help all families with dependent children have sufficient income for an adequate standard of living'. The Minister's introductory speech gives the clear impression that, through the WFF package, *all* families will have 'enough

---

disadvantaged and marginalised groups; said that concerns about cost containment should not lead to a decrease in levels of social protection; and recommended that New Zealand develop a national plan to combat poverty.

[120] See *Saskatchewan (Human Rights Commission) v Whatcott* 2013 SCC 11, Rothstein J (for the Court) stated at [67]: "…the balancing of competing Charter rights should also take into account Canada's international obligations with respect to international law treaty commitments."

[121] See para 21 above and HRRT decision at [43], COA vol 1, tab 7, p 169

[122] See *Health Services and Support v British Columbia* [2007] 2 SCR 391 at [448] per McLachlin CJ

[123] See *Quebec (Attorney-General) v A* 2013 SCC 5 at [362] per Abella J: "The antipathy towards complete exclusions is hardly surprising, since the government is required under s. 1 to "explain why a significantly less intrusive and equally effective measure was not chosen"…This will be a difficult burden to meet when, as in this case, a group has been entirely left out of access to a remedial scheme."

[124] Both the High Court and HRRT expressed concern about this point: COA vol 1, tab 6, p 92 at [25]; COA vol 1, tab 7, p 181 at [76] to [79]. There was evidence that officials were aware of CPAG's HRC complaint at the time WFF was being developed: Suzanne Mackwell x-exam, COA vol 5, tab 19, p 1705, lines 4-25.

[125] See *Hansen* at [109] per Tipping J

income for an adequate standard of living.'[126] Again in the Minister's second reading speech, when addressing child poverty issues, there is no qualification on the stated principle of increasing family incomes, leaving the public to understand all children would have their family income increased to address child poverty.[127] Neither this speech nor the Court set the real context to WFF, namely that the increases in FTC would be largely offset for beneficiary parents and beneficiary families were already disproportionately living in poverty.

50. Due to the extraordinary speed under which the legislation was passed, there was no opportunity for interested groups such as CPAG to have input into the legislative process. This is despite WFF being heralded as the biggest change to New Zealand's social security system in a decade and CPAG being a significant NGO with a stated interest in government measures to alleviate child poverty. This factor points to less deference being due to the Government.[128]

(iii) The content of the infringed right in this case

51. The right at issue is freedom from discrimination.[129] Part 1A HRA and s19 NZBORA are the domestic implementation this right, which is contained in pre-

[126]Future Directions Bill (Working for Families) - First Reading 617 NZPD 13424. "This bill is further evidence of this Government's commitment to improving the lives of low and middle income families with children. It provides more support to working families, will make people better off in work, *and ensures that families have enough income for an adequate standard of living*."

[127] Future Directions Bill (Working for Families) – Second Reading 617 NZPD 13451: " ...the five principles that drive the legislation the National Party opposes: making work pay and moving parents off benefits; increasing family incomes, increasing accommodation affordability; increasing childcare assistance, and simplifying the system…We are worried about poverty on this side of the House..."

[128]*Health Services and Support v BC* [2007] 2 SCR 391. See Le Bel and McLachlin CJ at 467: "The record discloses…virtually no consultation with unions on the matter. Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful to consider, in the course of the s1 justification analysis, whether the government considered other options or engaged consultation with affected parties, in choosing to adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored." Note the majority considered the infringement was not justified.

[129] See Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113 (HL) at 118 per Lord Nicholls: "Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced" and at 156 per Baroness Hale: "…it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not."

eminent places in all major human rights treaties signed by New Zealand.[130] This case involves the ground of employment status, namely that those affected receive a benefit under the Social Security Act 1964: s 21(1)(k)(ii) HRA.[131]

52. This ground grants protection from discrimination to those reliant on the State because they are without work or other adequate means to support themselves and their families.[132] Families on income tested benefits are all but entirely dependent on the State for their survival.[133] As a group, at the time of WFF development and today, they constitute the poorest and most economically vulnerable group in New Zealand.[134] They also experience widespread negative social stereotyping and stigma.[135] Due to the correlation between poverty and being a beneficiary, excluding those on benefits from a child poverty alleviation/income adequacy measure is a very serious intrusion into the right at issue.[136] The evidence that the IWTC was intended to help alleviate child

---

[130] See long title HRA and NZBORA; International Covenant on Civil and Political Rights art 2.1 and 26, International Covenant on Economic, Social and Cultural Rights art 2.2 and 10.3; Convention on the Rights of the Child art 2; and the Convention on the Rights of Persons with Disabilities.

[131] This ground was added in 1993 on the recommendation of the Human Rights Commission which reported discrimination occurring. See Report of Dept of Justice to Chair Human Rights Sub committee of Justice and Law reform committee on Human Rights Bill, 28 May1993. Note other comparable jurisdictions have semi-equivalent grounds e.g. 'receipt of social assistance' (Ontario and Saskatchewan) and 'source of income' (Nova Scotia, Alberta, Manitoba, Prince Edward Island, British Columbia and the Yukon). Note also that children of beneficiaries have their own claim to discrimination being a 'relative' of the person being discriminated against: s 21(2) HRA.

[132] To be eligible for an income tested benefit under the Social Security Act 1964 a person must fit into one of four main categories: s 89 Unemployment: not in full time employment though seeking it and no income (or less than would fully abate the benefit); s 54 Sickness: not in full time employment; willing to undertake it but because of sickness, injury or disability is limited in capacity to do so and no income (or less than would fully abate the benefit); s 40 Invalid's: totally blind or permanently and severely restricted capacity to work due to sickness, injury or disability; s 27B Domestic Purposes Benefit: has one or more dependent children and has lost the support of (or is inadequately supported by) a former spouse/partner.

[133] Subject to an allowance to earn a very limited amount of money without abatement of benefit. In 2008, any income over $80/week would lead to benefit abatement: Donald Gray, 1st SOE, COA vol 4, tab 18, pp 1149-53, paras 42, 51, 53, 57, 59.

[134] See paras 7-9 above. Note also the very low benefits that are payable in New Zealand - at 1 April 2007, the weekly Domestic Purposes Benefit (sole parent) rate was $255.65 (net). Donald Gray's 1st SOE, Annex 1, COA, vol 4, tab 18, p 1174.

[135] See Report from Dr Karen Davis on *Discrimination on the Grounds of Employment Status*, commissioned by the HRC in 2000; Lesley Patterson 2nd SOE paras 38-40, COA, vol 2, tab 14, p 512. See also HRC 2013 survey showing that beneficiaries are now the group New Zealanders consider are the most discriminated against: NZ Herald, *Beneficiaries 'attacked on all sides'* (6 February 2013).

[136] Note in *Gwinner v Alberta* 217 DLR (4th) 341, the Court of Queen's Bench of Alberta applied the *Law* test (s 15 Charter test) so as to recognise the context in which the exclusion took place. Grekol J saying that the effect of the exclusion was the claimants must rely on social assistance stated at [158]: "Social assistance provides lower benefits, is more difficult to qualify for, requires an in-depth monthly review and, by the Crown's own evidence, is laden with social stigma." Though the *Law* approach does not apply in New Zealand, the Appellant submits the *Atkinson* test still requires context to be considered at the disadvantage stage.

poverty in eligible families (and has done so) underscores the gravity of the exclusion.[137]

53. The Appellant endorses the comments of the Court and Tribunal that there is no basis in the HRA or NZBORA to suggest a hierarchy of importance or seriousness in the list of grounds in s 21 HRA.[138] Even if there were, employment status would warrant strict scrutiny in this case, given the evidence on how difficult it is to change in the short to medium term and its correlation with poverty.[139] The Appellant endorses the Tribunal criticisms of the Crown suggesting that persons "choose" to receive and stay on a benefit.[140]

4.3 Minimal Impairment

(a) Court's analysis of minimal impairment

54. The Court identified its task as set out in *Hansen*.[141] Following a very brief discussion, it concluded that it was "certainly not persuaded that in the quantitative sense there is a greater disparity and therefore greater impairment on the right than was necessary to achieve the objective of incentivising those who can move from benefit status to being employed."[142] It relied on a chart at [41] showing the IWTC represented a gain of $23 for a couple and $35 for a sole parent moving off benefit.[143] Earlier in its decision the Court rejected CPAG's complaint about the means chosen because it would impose a constraint on government at odds with the Court's jurisdiction.[144]

---

[137] See paras 7-8 and 19 above.
[138] HC decision at [67], COA vol 1, tab 6, p 104; HRRT decision at [221] to [222], COA, vol 1, tab 7, p 235.
[139] See, for example, Susan St John 1st SOE, COA vol 3, tab 15, p 609 paras 72-77 and p 611 paras 84-88; Lesley Patterson 2nd SOE vol 2, tab 7, p 506, paras 8-23; Donald Grey x-exam, COA vol 4, tab 18, p 1335 lines 20-26; Suzanne Mackwell x-exam, COA vol 5, tab 19, p 1643 lines 7-11. See also *Falkiner et al v Director of Income Maintenance Branch, Ministry of Community and Social Services* (2002) 212 D.L.R. (4th) 633 (Ont. C.A.) at [89].
[140] HRRT decision at [188]: COA vol 1, tab 7, p 221
[141] HC decision at [201] citing the tests in *Hansen* of Tipping J and McGrath J, i.e. was it "satisfied that the limit imposed…is no greater than is reasonably necessary to achieve Parliament's objective" or "whether there was an alternate but less intrusive means of addressing the legislature's objective which would have a similar level of effectiveness. COA vol 1, tab 6, p144-5
[142] HC decision at [205], COA vol 1, tab 6 p 145
[143] HC decision at [41] and [204], COA vol 1, tab 6 p 97, 145
[144] HC decision at [156], COA vol 1, tab 6 p 130. The Court stated that that the Government "should be free to justify its actions on their substantive effect, and not be trapped by the form in which it has pursued discrete objectives."

55. The Court discussed and dismissed in one paragraph Dr St John's evidence of alternative ways the Government could have structured a work incentive so as to separate out the child poverty alleviation component.[145] The Court rejected this evidence on the basis that it was only using the work incentive objective in the analysis and so it was not relevant. However, in case it was wrong, to the extent the IWTC was an income adequacy initiative it was justified because that was a consequence of the IWTC necessarily establishing a gap between beneficiaries and those in work.[146] Finally it said once the relevant category was confined to those caring for dependent children, a distinction could appropriately be drawn between beneficiaries and those in work.[147]

(b) The Appellant's response to Court's analysis on minimal impairment

56. The Appellant respectfully submits that the Court has failed to undertake the analysis required of it by the *Hansen* test. The Court relied on one aspect of the chart at [41] (the gap between beneficiaries working 20 hours and those off-benefit working 20 hours)[148] and held that the IWTC necessarily created a gap between those in full time employment and those on benefits.[149] However, the Appellant says the chart shows that even without the IWTC, there was already an income gap between those working 20 hours and those on benefit and not working.[150] The gap problem was largely confined to the very small group of beneficiary families who were working 20 hours per week and remaining on benefit, largely for security of income reasons (less than 1%).[151] As discussed below, there were alternative measures which could have been targeted at that group (and working families of similar income levels). Aside from this small group, the majority of those receiving the IWTC were earning much more than

---

[145] HC decision at [209], COA vol 1, tab 6 p 146
[146] HC decision at [210]. COA vol 1, tab 6, p 147. The Court concluded: "Accordingly, if we had to address this issue by reference to the wider objectives of the WFF package, we would still be satisfied that the intrusion is not to any greater extent than is justified."
[147] HC decision at [211]. COA vol 1, tab 6, p 147: "From that perspective the limiting measure does not impair the right to be free from discrimination on the grounds of employment status more than is reasonably necessary to achieve the objectives of the IWTC."
[148] HC decision at [41], COA vol 1, tab 6, p 97
[149] HC decision at [210], COA vol 1, tab 6, p 147
[150] The difference is $88.43 for a sole parent working 20 hours ($593.08 minus the IWTC of $60, compared with $394.65). The difference for a couple is $45.16 ($541.62 - $60 compared with $436.46). Note that the majority of the gap is created by the MFTC of $158.29. See also: Susan St John, 2nd SOE paras 131-140, COA vol 3, tab 16, p 618.
[151] Donald Grey x-exam: COA vol 4, tab 18, p 1372, lines 23-35.

beneficiaries, were already in work and likely to stay there. A gap did not need to be created for the entire group eligible for the IWTC (both as designed in 2004 and as implemented) and they did not need to be incentivised into work or encouraged to stay there. The IWTC was not justifiable for this group on the basis of creating a financial gap or providing a work incentive. Rather, the IWTC served (and was intended to serve) as an income adequacy measure for them. The Appellant says this is a very important objective but Part 1A required that to be met through a non-discriminatory means (such as the FTC).

57. There was evidence before the Tribunal that the IWTC was extremely expensive for the expected work incentive gains.[152] This is recognised by the Court as the part of CPAG's case with the strongest impact.[153] There was also evidence of the grave impact of the exclusion on those children affected and on society as a whole.[154] In these circumstances it behove the Court to fully and seriously assess whether there were other ways of meeting the objective of incentivising a small group of beneficiary parents into work which did not exclude their children from a real child poverty alleviation measure.

(c) Evidence of alternative means of incentivising work/creating a gap

58. The Appellant says the evidence of Dr St John and the OECD witnesses demonstrated there were other means of incentivising work and creating a gap, which could have been targeted at the small group affected.[155] A low-income tax rebate or initial tax free band could have been used to increase the amount of net pay that individuals with low earnings from employment receive.[156] The MFTC could have been increased to create a greater financial gap.[157] A type of lump sum 'in work benefit' for those entering employment, as occurs in Australia

---

[152] See Dwyer, *Dissecting the Working for Families Package*, COA, vol 8, p 3147, calculating that the WFF changes would cost up to $84,600 per beneficiary moved into work. This report was prior to the 2005 changes, so the actual figure will be higher.
[153] HC decision at [221]. COA vol 1, tab 6, p 150. See also Dwyer, *Dissecting the Working for Families Package*, COA, vol 8, p 3148: "The impact on work effort of beneficiaries of WFF is at best likely to be small and extraordinarily costly…The inescapable conclusion is that WFF will do little to make work pay, which is one if its key objectives."
[154] Paras 7-9 above
[155] Susan St John 1st and 2nd SOE, COA, vol 3, tab 15, p 553-636. Evidence of Mark Pearson and Herwig Immervoll, COA vol 5, tab 20, pp 1777-1865.
[156] Susan St John 2nd SOE, paras 180-186, COA, vol 3 tab 15, p 627
[157] Susan St John 2nd SOE, paras 126-129, COA vol 3, tab 15, p 618

could have been developed.[158] A United Kingdom type 'Working Tax Credit' could have been developed, which is not child related and is received by the worker at the time of transition to work.[159] The minimum wage could have been increased.[160] The abatement rates could have been changed.[161]

59. Dr St John's evidence pointed to the design similarities between the IWTC and FTC;[162] that both options before government had potential to address the gap and that the one payment option did not discriminate;[163] that there were numerous design options;[164] that abatement changes could serve to incentivise work;[165] and that financial incentives were not the only work drivers (others were making childcare more affordable and subsidising transport costs).[166] Further, her evidence was there was no obvious social benefit in transferring beneficiaries working 20 hours off benefit and onto MFTC where their state subsidies were as great and the only difference was in name. Such a move off benefit should not be taken as success of the IWTC as it may not involve an increase in work effort or independence from the state.[167]

60. OECD witness Mark Pearson confirmed the dual purpose of in-work payments as addressing both income adequacy and work incentives.[168] While the OECD supported in-work benefits in general, his evidence did not endorse the design of New Zealand's IWTC.[169] The design of in-work benefits varied markedly across

---

[158] Susan St John 2nd SOE, para 198, COA vol 3, tab 15, p 629
[159] Susan St John, questions from HRRT, COA, vol 3, tab 15, p 706 lines 29-35 and p 707 lines 1-5. The Appellant notes that the Court erred in finding the UK system similar to the NZ one. The UK work incentive is available to all low income workers moving into work. See HRRT decision at [20], COA, vol 1, tab 7, p 162. In the end, it appeared to be accepted by both parties that comparisons with other countries were difficult due to each one's unique policy settings.
[160] Susan St John 2nd, para 193, COA vol 3, tab 15, p 628
[161] See Michael Nutsford, x-exam, COA vol 4, tab 17, p 1084
[162] Susan St John x-exam, COA vol 3, tab 15, pp 794-802
[163] Susan St John x-exam, COA vol 3, tab 15, pp 760, line 20
[164] Susan St John x-exam, COA vol 3, tab 15, p 833
[165] Susan St John x-exam, COA vol 3, tab 15, p 839-40. Dr St John said that raising the abatement threshold for FTC and reducing the rate was a very good work incentive and better than the IWTC.
[166] Susan St John 2nd SOE, COA vol 3, tab 15, p 609-610, paras 72-77
[167] Susan St John x-exam, COA vol 3, tab 15, p 721, line 27. Susan St John affidavit of 4 February 2010, COA vol 2, tab 15, p 968 paras 11-12.
[168] Mark Pearson/Herwig Immervoll SOE paras 7, 37, 48, 119(a), COA vol 5, tab 20, pp 1778, 1789, 1791, 1809.
[169] Mark Pearson/Herwig Immervoll x-exam, COA vol 5, tab 20, p 1829, lines 4-12. There were only 6 countries in the OECD who had a significant in work payment that was dependent on there being children, Canada, France, Ireland, South Korea, Slovakia, United States: COA vol 5, tab 20, p 1830, lines

OECD countries.[170] His evidence was that making work pay measures needed to be "well targeted and implemented carefully"[171] and that in-work benefits in most other countries were more tightly targeted than the IWTC.[172] Mr Pearson's evidence was that it was unusual to have a 20/30 hours work requirement for receipt of an in-work benefit, with most countries phasing in the payment with less money for fewer hours.[173]

61. The OECD evidence does not support the proposition that a work incentive policy inevitably requires some to be left in severe poverty. Mr Pearson did not consider that the creation of a financial gap to encourage movement into work required high levels of poverty at the bottom of the gap.[174] Herwig Immervoll gave evidence that "there's nothing to prevent you, if you have in-work benefits and you increase the gap using that policy tool to, at the same time improve also the income situation for the out of work group and still maintain a gap that guarantees that work incentives are intact."[175] According to Mr Pearson, governments must do everything they can to ensure children get the best possible start in life. When asked if that meant just trying to deal with child poverty via an in-work mechanism, he strongly rejected this.[176]

62. A large part of the Respondent's evidence was focussed on dispelling the claim that the IWTC had income adequacy/child poverty alleviation objectives. The Appellant endorses the Tribunal's firm rejection of this proposition and the Court's characterisation of the IWTC as targeted assistance to supplement the

---

6-21. (However there was no comparable evidence on the measures these countries had to support income adequacy in workless families).

[170] Mark Pearson/Herwig Immervoll SOE para 54, COA vol 5, tab 20, p 1792.

[171] Mark Pearson/Herwig Immervoll x-exam, COA, vol 5, tab 20, p 1831 lines 11-13

[172] Mark Pearson/Herwig Immervoll x-exam, COA, vol 5, tab 20, p 1836, lines 11-13. He said the OECD would not support a payment that went as far up the earnings distribution as the IWTC, where a lot of money was going to people for a reason that could not be defended as an anti-poverty strategy: COA, vol 5, tab 20, p 1833 lines 5-11. As to whether paying the IWTC to higher income earners was in reality a tax cut, he said whenever governments introduced an in-work payment through the tax system for presentational purposes, it was always emphasised as a tax cut: COA, vol 5, tab 20, p 1836 lines 1-13. He also confirmed that the IWTC was actually a disincentive for secondary earners in families and described that as a trade-off: COA vol 5, tab 20, p 1852, lines 5-19; p 1853 lines 10-20; p 1854 lines 16-25.

[173] Mark Pearson/Herwig Immervoll x-exam, COA vol 5, tab 20, p 1862, lines 30-35, p 1863 lines 1-12.

[174] Mark Pearson/Herwig Immervoll x-exam, COA vol 5, tab 20, p 1837, lines 22-26.

[175] Mark Pearson/Herwig Immervoll, questions from HRRT, COA vol 5, tab 20, p 1876 lines 22-27.

[176] Mark Pearson/Herwig Immervoll x-exam, COA vol 5, tab 20, p 1842 lines 31-35 and p 1843 lines 3-7: "No, absolutely, I think child poverty has been ignored by too many OECD countries, it is - what most countries do is inadequate given the evidence on the returns to actually investing heavily in children, especially early in their life."

income of eligible families.[177] While the Respondent challenged Dr St John on the difficulties with the alternate options suggested, there was no denial that there were other possible options. In fact, the WFF policy process focused on only two options: a one payment approach (increase FTC) or a two payment approach (FTC and IWTC). Work on the MFTC as an option appears not to have been proceeded with because it did not have strong enough work incentives, but Dr St John's evidence was that it could have been altered.[178] In the end, the Government knew its chosen model would lead to very modest work incentive effects and was very expensive in terms of what it should achieve from the work incentive perspective.[179] Officials acknowledged the design was not aligned with the financial parameters and that it had not been assessed against human rights standards or those who missed out.[180]

(d) Conclusion on minimal impairment

63. The Appellant has always accepted it is appropriate for government to create a work incentive and gap. It is the means chosen that is challenged. With respect, the Court's refusal to review the form of policy option chosen is wrong. In doing so it has misunderstood its task and also shown undue deference to the legislature. It is an integral part of proportionality analysis to review the design of the government policy initiative at issue.[181] The court does not have to identify a particular alternative with a similar level of effectiveness before determining the right is more than minimally impaired.[182]

---

[177] HRRT decision at [171], COA, vol 1, tab 7, p 216, HC decision at [115], COA, vol 1, tab 6, p 117
[178] Suzanne Mackwell 2nd SOE, vol 5, tab 19, p 1611, para 31; Susan St John 2nd SOE, COA vol 3, tab 15, p 618, paras 126-128
[179] See footnotes 152, 153.
[180] See paras 46, 47
[181] See, for example, *Burnip, Health Services, Gosselin, Eldridge, Quebec, Hansen.*
[182] See for example *Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (HC) at [267]. Note in *R v Hansen* where the Court did determine the alternative measure was a reasonable alternative and less rights infringing but in a situation where there were only two real alternatives. See *Quebec (Attorney-General)* v *A* 2013 SCC 5 at [399]: "This is only one of a number of possible solutions, and I mention it only to illustrate the fact that the legislative has less intrusive means at its disposal. The finding that there is a total exclusion from support without any mitigation of the effects of that exclusion is sufficient for me to conclude…that this measure is not justified under s.1 of the Charter." Also *Ontario (A-G) v Fraser* [2011] 2 SCR 30 at 158 per Abella J: "Preventing *all* agricultural workers from access to a process of collective bargaining in order to protect family farms, no matter their size or character, is the antithesis of minimal impairment. Such a limitation harms the s 2(d) right in its entirety, not minimally" and at 167 "The government has therefore not justified why achieving protection for agricultural viability and production requires so uniquely draconian a restriction on s 2(d) rights. The limitation is, in fact...not even remotely tailored to meet the government's objective in a less intrusive way. It is, in fact, not tailored at all."

64. The Respondent has not demonstrated that the off-benefit rule of the IWTC was a reasonable means of achieving its objective of incentivising work. It has the burden of doing so.[183] It has not demonstrated why it could not use one of the many available work incentive designs other than a $60-plus payment to eligible families (which incorporated within it a child poverty alleviation payment for working parents, with no comparative payment for beneficiary parents). That design impaired the right severely and the evidence discloses that it was not reasonably necessary to achieve its objective.

4.4 Proportionality

(a) The Court's analysis – due proportion

65. The Court identified its task as focussing on the extent of the intrusion into the right to be free from prohibited discrimination, relative to the importance of the objective of encouraging beneficiaries into work.[184] It started its discussion by indicating that, the 'form' in which the exclusion occurred (the way the IWTC is structured) should not determine the decision on proportionality.[185] It opined that CPAG's complaint, in the end, was that the Government was not doing enough to alleviate child poverty for beneficiary families.[186] That fact did not render the off-benefit rule out of proportion to the social advantage pursued by the imposition of the rule.[187] As noted above, the Court referred to evidence of Crown witness John Yeabsley as to the rather imprecise process of developing social policy and said that governments must make distinctions.[188]

66. The Court indicated that CPAG's argument with the most impact was the relatively modest levels of success on the objectives of encouraging beneficiaries into work and alleviating child poverty, when such significant

---

[183] See *R v Bryan* [2007] 1 SCR 527, Fish J at 560 "And the government, I repeat, is bound when it invokes s 1 of the Charter...to *demonstrate* that Parliament's limitation of a constitutionally protected right or freedom is justified in a free and democratic society such as ours. Mere assertion will not suffice."
[184] HC decision at [223], COA, vol 1, tab 6, p 150.
[185] HC decision at [215], COA, vol 1, tab 6, p 148. This is in response to CPAG's said complaint of the way the IWTC was structured (use of one instrument to achieve two objectives).
[186] HC decision at [216], COA, vol 1, tab 6, p 148. It acknowledged CPAG's said complaint could be justified statistically and was strengthened by the 2005 changes which demonstrated the availability of further funding that, with different priorities, might have been applied to redesign WFF.
[187] HC decision at [217], COA, vol 1, tab 6, p 148
[188] Para 39 above

resources were committed to the WFF package overall.[189] However, the Court continued that on its more confined analysis of evaluating the proportionality between the exclusion of beneficiaries from the IWTC and the aim of encouraging them into work the extent of the impairment was not out of proportion with the objective of the IWTC.[190]

(b) Appellant's response to Court's analysis – due proportion

67. The Canadian Supreme Court has stressed the importance of the due proportion stage.[191] The Appellant says that, while the Court correctly identified the proportionality step as requiring a balance to be struck between social advantage and harm to the right,[192] it has simply not undertaken the analysis required.[193] It erred in saying CPAG's complaint was that the Government is not doing enough about child poverty. That may be CPAG's broader complaint, but its claim in this Court is that the salutary effects of the off-benefit rule of the IWTC do not outweigh its deleterious effects (as well as harming the right more than reasonably necessary to achieve its goals). The Court's task was to consider whether the benefit of having a small number of beneficiaries moved into work by use of an extraordinarily expensive work incentive represented sufficient social gain to justify keeping 165,000 children and their families in severe and

[189] HC decision at [221], COA, vol 1, tab 6, p 150
[190] HC decision at [221], COA vol 1, tab 6, p 150
[191] *Canada (AG) v JTI Macdonald Corp* [2007] 2 SCR 610 at 633 per McLachlin CJ: "Although cases are most often resolved on the issue of minimal impairment, the final inquiry into proportionality of effects is essential. It is the only place where the attainment of the objective may be weighed against the impact on the right. If rational connection and minimal impairment were to be met and the analysis were to end there, the result might be to uphold a severe impairment on a right in the face of a less important objective."
[192] HC decision at [212], COA vol 1, tab 6, p 147, citing *R v Hansen* at [134]. See also the description of the task at this stage in *Quebec (Attorney-General) v A* 2013 SCC 5 McLachlin CJ at [448] "Ultimately the infringement of a protected right must be proportionate to the benefits of pursuing the state objective, having regard to the impact of the law on the exercise of the right and the broader public benefits it seeks to achieve."
[193] See *RJR-McDonald v Canada* (A-G) [1995] 3 SCR 1999 at 331: "The s1 inquiry is by its very nature a fact-specific inquiry…In determining proportionality, [the court] must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions." In *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at 16 the House of Lords decided the task of an appellate authority in a proportionality exercise was to balance competing considerations and give appropriate weight to the judgments made by the Secretary of State concerning the importance of other countervailing considerations (at [16]).

significant poverty. That question must take account of the extraordinary expense in doing so – both before the 2005 changes and even more so after.[194]

68. The High Court (and Tribunal) erred in reasoning that the effect of challenging a work incentive is to take an extreme view that government cannot create financial incentives to work at all.[195] It has never been CPAG's case that government cannot create and maintain a gap between benefit and work income or that it cannot provide monetary benefits to incentivise work. The issue here is the particular work incentive chosen.

69. The Court isolated the off-benefit rule from its context and failed to take account of key characteristics of the IWTC in the proportionality analysis. These include: that the IWTC was intended to alleviate poverty for those eligible; that WFF had no other real child poverty alleviation measure for beneficiaries; and that the exclusion had dire effects. In removing context from the consideration of proportionality, the Court has taken a technical and literal approach, contrary to the construction required in human rights adjudication.[196]

70. The Appellant says that when the anticipated modest gains from the work incentive are considered against the serious negative impact of the exclusion (which was readily predictable before the IWTC came into effect), the measure is not in due proportion. The IWTC was only expected to have a modest work incentive effect, because the priority of WFF was to address income adequacy objectives. [197] It was always going to be dependent upon buoyant economic conditions to work at even a modest level. Its impact in recessionary times, where jobs are hard to find, radically reduces its effectiveness as a work incentive.[198]

---

[194] See footnote 152 above.
[195] HC decision at [222], approving a passage in HRRT decision: COA vol 1, tab 6, p 150.
[196] See for example *Director of Human Rights Proceedings v NZ Thoroughbred Racing Inc* [2002] 3 NZLR 333 (CA) at [21] to [23]. See also *Talleys Fisheries Ltd v Lewis & Edwards* (2007) 8 HRNZ 413 (HC) at [32].
[197] MSD, *Future Directions: Working for Families Impacts* (16 March 2004), COA vol 8, p 2981
[198] It also means that people who lose their job also lose government family support, at a time they need it most.

71. The real effect of the exclusion of beneficiary families was that over half the children of beneficiaries would remain in dire poverty. The disadvantage was not simply a lack of comparable gain.

72. In conclusion the Appellant says the Court erred in its conclusion that there was prima facie discrimination only in relation to the very small proportion of beneficiaries who met the work hours requirements. It submits that all beneficiaries are subjected to prima facie discrimination further to the off benefit rule of the IWTC. Further the exclusionary rule is not demonstrably justified. It intrudes into the right to be free from employment status discrimination more than is reasonably necessary to achieve its goals and the depth of the intrusion into the right is out of proportion to the goal of the rule.

F M Joychild / J M Ryan
Counsel for the Appellant
22 April 2013

APPELLANT'S LIST OF AUTHORITIES

LEGISLATION

Human Rights Act 1993, long title, Part 1A (ss 20I-20L), s 21, s 65
Income Tax Act 2007, ss MA 7(1), MD 4-MD9
Income Tax Act 2004, s KD 2AAA, KD 2(6)
New Zealand Bill of Rights Act 1990, long title, ss 5**,** 19
Social Security Act 1964, ss 27B, 40, 54, 89
Taxation (Urgent Measures) Act 2005
Taxation (Working for Families) Act 2004

CASE LAW

New Zealand
Air New Zealand v McAlister [2010] 1 NZLR 153 (SC)
Attorney-General v Human Rights Review Tribunal (2006) 18 PRNZ 295 (HC)
Director of Human Rights Proceedings v NZ Thoroughbred Racing Inc [2002] 3 NZLR 333 (CA)
Human Rights Commission v Eric Sides Motors (1981) 2 NZAR 447 (EOT)
Ministry of Health v Atkinson [2012] 3 NZLR 456 (CA)
Ministry of Health v Atkinson (201) 9 HRNZ 47 (HC)
Northern Regional Health Authority v Human Rights Commission [1998] 2 NZLR 218 (HC)
R v Hansen [2007] 3 NZLR 1 (SC)
Smith v Air New Zealand [2011] 2 NZLR 171 (CA)
Talleys Fisheries Ltd v Lewis & Edwards (2007) 8 HRNZ 413 (HC)
Ye v Minister of Immigration [2010] 1 NZLR 104 (SC)

United Kingdom
A & Ors v Secretary of State for the Home Department [2005] 2 AC 68 (HL)
Burnip v Birmingham City Council & Anor [2012] EWCA Civ (CA)
Ghaidan v Godin-Mendoza [2004] 3 WLR 113 (HL)
Huang v Secretary of State for the Home Department [2007] 2 AC 167 (HL)
In Re G (Adoption: Unmarried Couple) [2009] 1 AC 173 (HL)
Patmalniece (FC) v Secretary of State for Work and Pensions [2011] 3 All ER 1 (HL)
R (Carson) v Work and Pensions Secretary [2006] 1 AC 173 (HL)
R (Limbuela) v Home Secretary [2006] 1 AC 396 (HL)
R (RJM) v Secretary of State for Work and Pensions [2009] 1 AC 311 (HC)

Canada
Canada (AG) v JTI Macdonald Corp [2007] 2 SCR 610 (SCC)
Chaoulli v Quebec [2005] 1 SCR 791 (SCC)
Eldridge v British Columbia (Attorney-General) [1997] 2 SCR 624 (SCC)
Falkiner et al v Director of Income Maintenance Branch, Ministry of Community and Social Services (2002) 212 D.L.R. (4th) 633 (Ont. C.A.)
Gosselin v Quebec (Attorney-General) [2002] 4 SCR 429 (SCC)
Gwinner v Alberta 217 DLR (4^{th}) 341(CQB)
Health Services and Support v BC [2007] 2 SCR 391(SCC)

Law v Canada (Minister for Employment and Immigration) [1999] 1 SCR 497 (SCC)
Lovelace v Ontario [2000] 1 SCR 950 (SCC)
Ontario (A-G) v Fraser [2011] 2 SCR 30 (SCC)
Quebec (Attorney-General) v A 2013 SCC 5 (SCC)
RJR-McDonald v Canada (Attorney-General) [1995] 3 SCR 199 (SCC)
R v Bryan [2007] 1 SCR 527
Saskatchewan (Human Rights Commission) v Whatcott 2013 SCC 11
Slaight Communications Inc v Davidson [1989] 1 SCR 1038 (SCC)

INTERNATIONAL MATERIAL

Convention on the Rights of the Child
Convention on the Rights of Persons with Disabilities
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
Committee on Economic, Social and Cultural Rights, *General Comment 9: the domestic application of the Covenant*, E/C.12/1998/24, CESCR, 19th sess, (1998)
Courts and the Legal Enforcement of Economic, Social and Cultural Rights, Committee on the Rights of the Child, *Concluding Observations: New Zealand* (27 October 2003), CRC/C/15/Add.216, paras 14, 15, 22, 23, 41, 42
Committee on Economic, Social and Cultural Rights, *Concluding Observations: New Zealand* (26 June 2003), E/C.12/1/Add.88 at paras 17, 28, 32
International Commission of Jurists, *Comparative experiences of Justiciability*, Human Rights and Rule of Law Series: No 2, Geneva 2008.

OTHER MATERIAL

Future Directions Bill (Working for Families) – First Reading 617 NZPD 13424
Future Directions Bill (Working for Families) – Second Reading 617 NZPD 13451
Report of Dept of Justice to Chair Human Rights Sub committee of Justice and Law reform committee on Human Rights Bill (28 May1993)
Karen Davis, *Discrimination on the Grounds of Employment Status* (2000)
NZ Herald, *Beneficiaries 'attacked on all sides'* (6 February 2013)