

RESEARCH ARTICLE

# Food, dignity, and the European Court of Human Rights

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## Abstract

Austerity measures and the cost-of-living crisis have led to rising poverty rates and violations of socio-economic rights in the UK and Europe. However, there are limited routes of redress for these violations in many European countries. Claims using Article 3 of the European Convention on Human Rights (ECHR) to address violations of socioeconomic rights are suggested but not fully described in the academic literature. The European Court of Human Rights has found violations of the Convention in very limited circumstances caused by poverty and destitution. These circumstances include violations of the ECHR in cases of insufficient food being provided to those detained by the state. This paper considers possible violations of Article 3 ECHR in relation to food poverty. It argues that hunger is a violation of human dignity and provides tangible evidence of degrading treatment. It identifies benefit caps, the two-child limit, and benefit sanctions as policies that can lead to food poverty and, as a result, could amount to degrading treatment. For some living in food poverty due to these policies, Article 3 ECHR may provide a route of redress.

**Keywords:** human rights; right to food; Article 3 European Convention on Human Rights; degrading treatment; poverty

## Introduction

High levels of hunger persist in developed states across the world. In the UK, the Covid-19 pandemic highlighted the growing use of food banks and rising levels of food insecurity.<sup>1</sup> However, levels of food insecurity in the UK were concerning prior to the Covid-19 pandemic, and are continuing to rise following lifting of Covid-19 restrictions.<sup>2</sup> In a developed nation, such as the UK, lack of food is almost always income related, and food bank charities have been particularly critical of the UK benefits regime and the introduction of Universal Credit as causes of the increased demand at food banks.<sup>3</sup> High levels of hunger and dependence on charitable food parcels are likely violations of the individual right to food. However, human rights protections for socioeconomic rights in the UK are limited. Legal cases brought to challenge welfare policies often rely on indirect protection by using the Human Rights Act and the ECHR. The impact of the International Covenant on Economic Social and Cultural Rights (ICESCR) and European Social Charter (ESC) on UK law and policy are limited. This paper demonstrates that the ECHR does provide some protection, but this protection is limited to specific groups of people affected by food poverty.

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<sup>1</sup>The Food Foundation 'Covid-19: latest impact on food' (*The Food Foundation*, March 2020).

<sup>2</sup>P Alston 'Statement on the visit to the UK' (UN Office of the High Commissioner for Human Rights, 16 November 2018) available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23881&LangID=E>.

<sup>3</sup>The Trussell Trust 'Universal credit and food banks', available at <https://www.trusselltrust.org/what-we-do/research-advocacy/universal-credit-and-foodbank-use/>.

Although the ECHR mainly protects civil and political human rights, the European Court of Human Rights (ECtHR) has considered violations of socioeconomic rights indirectly.<sup>4</sup> In relation to food, the ECtHR has found violations of Article 3 ECHR – which prohibits torture, inhuman and degrading treatment, or punishment – in relation to inadequate food being provided for those in detention.<sup>5</sup> In such situations, people are wholly dependent on state authorities for their basic needs. However, academic commentary has suggested that austerity measures and a lack of welfare provision could also amount to degrading treatment under Article 3 ECHR, most recently by Simpson et al.<sup>6</sup> This paper extends these arguments by considering how our common understanding of hunger as a form of suffering and violation of human dignity may provide a route to challenge violations of socioeconomic rights using Article 3 ECHR.

It will be argued that for some individuals Article 3 ECHR is being violated: most likely carers, children and those unable to work due to disability and ill-health, who are dependent on state benefits, and then subject to sanctions, the two-child limit, or benefit caps. Although the House of Lords stated that Article 3 ECHR jurisprudence indicates living in poverty is not ‘treatment’ for the purposes of Article 3 ECHR,<sup>7</sup> this paper will argue that the scope of Article 3 ECHR may mean this is not the case. As people fall deeper into poverty, due to the current cost of living crisis, following a period of austerity policies, the ECHR may provide an avenue for redress for some of those living in food poverty.

This paper is structured as follows. The first substantive section considers the nature of the UK benefits regime and why there are limited routes for redress for those whose right to food is likely being violated. The second section analyses the normative links between hunger and human dignity. It is argued that under specific circumstances hunger could amount to a form of degradation in violation of Article 3 ECHR. The third section discusses the approach of the ECtHR to the prohibition of degrading treatment as it applies to lack of food. The final section of the paper considers when Article 3 ECHR could apply to situations of food poverty. This section considers the threshold for degrading treatment, a need for a specific treatment, the knowledge of the state, and state dependence as components of degrading treatment. It demonstrates that for those in receipt of benefits and unable to work, such as carers, children, and those with disabilities, who are then subject to benefit sanctions, caps and limits, food poverty is likely a violation of Article 3 ECHR. The paper then considers how the discriminatory nature of the UK’s benefits regime, that disadvantages single parents and women, may add another dimension to the potential violation of the ECHR. Finally, it argues that concerns about the financial impact of the ECtHR finding of a violation of Article 3 ECHR, in relation to welfare benefits, should not prevent finding of a such a violation in some of the wealthiest nations in the world.

## 1. Welfare provision and the right to food

Recent austerity policies in the UK and Europe have reduced welfare spending, resulting in potential violations of the right to food, and other socioeconomic rights.<sup>8</sup> Before the Covid-19 pandemic, the UK was criticised for the consequences of austerity by the UN Special Rapporteur for poverty,

<sup>4</sup>See for example: *van Volsen (Francine) v Belgium* Application No 14641/89, Merits, 9 May 1990; *Budina v Russia* Application No 45603/05, Admissibility, 18 June 2009; *MSS v Belgium and Greece* Application No 30696/09 Grand Chamber, Merits and Just Satisfaction, 21 January 2011.

<sup>5</sup>See *Stanev v Bulgaria* Application No 36760/06 Grand Chamber, Merits and Just Satisfaction, 17 January 2012; *RR and Others v Hungary* Application No 36037/17, Merits and Just Satisfaction, 2 March 2021, *Dudchenko v Russia* Application No 37717/05, Merits, 7 November 2017.

<sup>6</sup>L Oette ‘Austerity and the limits of policy-induced suffering: what role for the prohibition of torture and other ill-treatment’ (2015) 15 Human Rights Law Review 669; A Cassese ‘Can the notion of inhuman and degrading treatment be applied to socio-economic conditions’ (1991) 2 European Journal of International Law 141; M Adler *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK* (Palgrave Macmillan, 2018); M Simpson et al ‘Legal protection against destitution in the UK: the case for a right to subsistence minimum’ (2023) 86 Modern Law Review 307.

<sup>7</sup>*R (Adam, Limbuela, Tesema) v Home Secretary* [2005] UKHL 66 at [65]–[66].

<sup>8</sup>A Nolan ‘Human rights and the cost-of-living-crisis’ (2023) 41 Netherlands Quarterly of Human Rights 1.

indicating 1.5 million people were ‘destitute’ and ‘unable to afford basic essentials’.<sup>9</sup> Food is often the first necessity people cut back on as their incomes fall,<sup>10</sup> and so food insecurity due to lack of income, referred to in this paper as food poverty, is a good indicator of poverty more generally. As such, food poverty could also be an indicator of wider violations of socioeconomic rights. Food bank usage in the UK and Europe rose throughout the Covid-19 pandemic and is continuing to rise due to the current cost of living crisis.<sup>11</sup>

In the UK, certain aspects of the welfare benefits regime have come under criticism for causing people to struggle to afford basics and feed themselves adequately.<sup>12</sup> The UK benefits scheme involves sanctions for claimants who do not meet certain requirements.<sup>13</sup> Although those sanctioned can apply for loans and emergency payments to avoid destitution,<sup>14</sup> benefit sanctions are identified as a cause of food poverty.<sup>15</sup> In addition, the UK has a ‘benefit cap’, which limits the amount of benefits out of work families can receive,<sup>16</sup> and a ‘two-child limit’ which means families do not receive additional means tested benefits for third and subsequent children born after 2017.<sup>17</sup> These policies have contributed to rising levels of child poverty, with families unable to afford basic necessities, including food.<sup>18</sup> In the fourth section of the paper, these benefits policies will be demonstrated to constitute degrading treatment for the purposes of Article 3 ECHR when they are applied to individuals dependent on state support, that the UK Government knows or ought to know are at risk of food poverty.

However, before turning to examine the link between food and dignity, the approach of the ECtHR to a lack of food and Article 3 ECHR, and then finally why these benefits policies amount to degrading treatment, there is a final point that needs to be considered. There are limited protections for people in the UK and some other European countries whose right to food is being violated.<sup>19</sup> The focus of this paper is on the ECHR, due to the limited impact other protections for the right to food in international human rights law have on UK law and policy. Although the ICESCR contains the most expansive statement of the right to food in international human rights law and Article 11(2) indicates: ‘The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger,’<sup>20</sup> these obligations are not incorporated into UK law. The Committee for Economic, Social and Cultural Rights has indicated that there is a core content of the right to food and that

<sup>9</sup>Alston, above n 2.

<sup>10</sup>K Pettifer and M Patel ‘FSA 22-06-09 Household food insecurity main report’ (FSA, 15 June 2022), available at <https://www.food.gov.uk/print/pdf/node/9711>.

<sup>11</sup>D Warshawsky ‘Food insecurity and the COVID pandemic: uneven impacts for food bank systems in Europe’ (2022) Agriculture and Human Values available at <https://doi.org/10.1007/s10460-022-10387-2>; N de Hoog et al ‘How the cost of living crisis is hammering UK households’ (*The Guardian*, 21 June 2022), available at [https://www.theguardian.com/business/ng-interactive/2022/jun/21/cost-of-living-crisis-uk-households-charts-inflation?utm\\_term=Autofeed&CMP=tw\\_t\\_gu&utm\\_medium&utm\\_source=Twitter#Echobox=1655812883](https://www.theguardian.com/business/ng-interactive/2022/jun/21/cost-of-living-crisis-uk-households-charts-inflation?utm_term=Autofeed&CMP=tw_t_gu&utm_medium&utm_source=Twitter#Echobox=1655812883).

<sup>12</sup>For example see I McRae and H Westwater ‘Food poverty in the UK: the causes, figures and solutions’ (*The Big Issue*, 2 May 2023), available at <https://www.bigissue.com/news/social-justice/food-poverty-in-the-uk-the-causes-figures-and-solutions/>; The Food Foundation ‘Food insecurity in households in receipt of benefits’ (May 2022), available at [https://foodfoundation.org.uk/sites/default/files/2022-08/Universal%20Credit%20and%20Food%20Insecurity%20Briefing%202022\\_1.pdf](https://foodfoundation.org.uk/sites/default/files/2022-08/Universal%20Credit%20and%20Food%20Insecurity%20Briefing%202022_1.pdf).

<sup>13</sup>M Simpson ‘Assessing the compliance of the United Kingdom’s social security with its obligations under the European Social Charter’ (2018) 18 Human Rights Law Review 745 at 755 and 759.

<sup>14</sup>Ibid.

<sup>15</sup>R Jenkins et al ‘The relationship between austerity and food insecurity in the UK: A systematic review’ (2021) 33 *Eclinical Medicine* 100781, available at <https://reader.elsevier.com/reader/sd/pii/S2589537021000614?token=B092C099B795B3999DDB8E2DCFD405AF1C289A5C0B41170DFACDAC6D43B678E5F1944C24273AEE80811F8903AEB87FCA&originRegion=eu-west-1&originCreation=20220901101207>.

<sup>16</sup>R Patrick et al ‘Needs and entitlements. Welfare reform and larger families’ (largerfamilies.study, 2023), available at <https://largerfamilies.study/publications/needs-and-entitlements/> at p 6.

<sup>17</sup>Welfare Reform Act 2012, s 10(1A).

<sup>18</sup>Patrick et al, above n 16, p 7.

<sup>19</sup>Oette, above n 6, at 670.

<sup>20</sup>Art 2(1) International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

when a ‘significant number of individuals is deprived of essential food stuffs’ the state is ‘prima facie, failing to discharge its obligations under the covenant’.<sup>21</sup> Given the widespread food poverty in the UK, it is likely the UK is violating its obligations under the ICESCR. Yet, the UK is not a signatory to the Optional Protocol to the ICESCR, which allows for individual complaints concerning violations of rights within the ICESCR. This limits avenues of redress for those experiencing food poverty in the UK.

The ESC is an additional source of socioeconomic rights in Europe. The right to food in the ESC is grouped together with health, social security, and social protection.<sup>22</sup> The reporting procedure of the ESC has criticised the high levels of child poverty in the UK in 2019,<sup>23</sup> the level of welfare benefits provided in 2017,<sup>24</sup> and the level of deaths in the UK related to dietary factors in 2017.<sup>25</sup> Simpson has argued that both the conditions required for receipt of state benefits in the UK benefits system and the levels of benefits provided are unlikely to conform with Article 13, the right to social assistance, and Article 16, the right to family protection, of the ESC.<sup>26</sup>

However, the ESC also has little impact on the socio-economic policies of the UK because the UK is not party to its collective complaints procedure.<sup>27</sup> Therefore, the only concrete contribution is that the periodic reports (and examination) of the European Committee of Social Rights could highlight violations of the ESC in the UK.<sup>28</sup> O’Cinneide has argued that, although the ESC should have more impact, the impact in the UK is limited due to British Euroscepticism, the more prominent role of the ECHR, and the mixed impact of the Charter in other European countries.<sup>29</sup> So, although the ESC is another international human rights treaty which is very likely to have been breached by the UK due to the impact of benefits policy on socio-economic rights in the UK, the fact that there is no access to the individual complaints mechanism means that its direct impact on the relevant UK policies remains limited.

These shortcomings of the ESC and ICESCR have resulted in the ECtHR adjudicating cases in relation to socioeconomic rights. Examples include applications concerning welfare benefits levels,<sup>30</sup> and the treatment of asylum seekers by state authorities in Europe.<sup>31</sup> Typically, these cases involve violations of socioeconomic rights, alongside violations of the civil and political rights expressly contained within the ECHR. The ECtHR stated in *Airey*:

Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.<sup>32</sup>

This demonstrates that the ECHR does provide a potential route of redress for those whose socioeconomic rights have been violated – although, arguably, the scope of the available protection

<sup>21</sup>UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1 of the Covenant)*, 14 December 1990, E/1991/23, at [10].

<sup>22</sup>C Benelhocine *The European Social Charter* (Council of Europe Publishing, 2012) p 45.

<sup>23</sup>European Committee of Social Rights UK conclusions (2019), available at <https://rm.coe.int/rapport-gbr-en/16809cfbf3>.

<sup>24</sup>European Committee of Social Rights UK conclusions XXI-2(2017), available at <https://www.coe.int/en/web/european-social-charter/united-kingdom>.

<sup>25</sup>European Committee of Social Rights UK conclusions XXI-2(2017), available at <https://rm.coe.int/conclusions-xxii-2-2021-united-kingdom-en/1680a5da33>.

<sup>26</sup>Simpson, above n 13, at 768.

<sup>27</sup>C O’Cinneide ‘The European Social Charter and the UK: why it matters’ (2018) 29 *King’s Law Journal* 275 at 276 and 279.

<sup>28</sup>Benelhocine, above n 22, p 50.

<sup>29</sup>O’Cinneide, above n 27, at 279.

<sup>30</sup>See *van Volsen (Francine) v Belgium*, above n 4; *Budina v Russia*, above n 4.

<sup>31</sup>See *RR and Others v Hungary*, above n 5; *MSS v Belgium and Greece*, above n 4.

<sup>32</sup>*Airey v Ireland* Application No 6289/73 Merits, 9 October 1979 at [26].

could be limited given it is a convention concerning civil and political rights. It is therefore necessary to explore whether the prohibition of degrading treatment under Article 3 ECHR, which protects individuals from serious violations of human dignity,<sup>33</sup> could apply in the case of food poverty. To answer this question, the relationship of hunger with human dignity needs to be considered and so is discussed in the next section.

## 2. Hunger and dignity

The precise meaning and content of human dignity is contested.<sup>34</sup> Nevertheless, this does not undermine its use as one of the foundations of human rights.<sup>35</sup> Conceptions of dignity consider things that make us uniquely human, including agency,<sup>36</sup> the nature and features of a human life,<sup>37</sup> and the equality of these features amongst all humans.<sup>38</sup> The impact of starvation and hunger are defined and described not only as negative physiological states, but something that causes pain and other unpleasant emotions.<sup>39</sup> It is difficult to make free choices and relate to others if you are hungry. It is also difficult to live a dignified life, a life that reflects one's inherent worth and equal moral status if you are malnourished. Although this point cannot be analysed in full detail here, hunger can cause (and is often caused by) serious moral wrongs that are an affront to human dignity.

Evidence of hunger and starvation as an affront to human dignity can be seen throughout history. Hunger was used as a weapon by besieging armies, resulting in desperate acts from those under siege.<sup>40</sup> During the periods of starvation in Petrograd (1919–20) people would steal food even though the penalty if caught was death by firing squad. People also ate food known to be poisonous.<sup>41</sup> These events are just some examples that suggest that hunger and starvation are largely incompatible with the ideas of personal autonomy and basic equality,<sup>42</sup> which lie at the foundations of human dignity.

Religious and charitable responses to starvation through history are also well documented and described,<sup>43</sup> suggesting that preventing hunger appeals to our collective sense of wrong. During the Covid-19 pandemic, there were debates in Parliament and the media concerning the level of Government support that people facing food poverty in the UK should be provided.<sup>44</sup> When the Government did not want to extend free school meal provisions during school holidays, the thought of children going hungry touched the UK's national conscience.<sup>45</sup> Marcus Rashford, a professional footballer, started a campaign to ensure free school meal provision was continued during holidays.<sup>46</sup> Food businesses stepped in to offer children free meals, and religious organisations distributed food to

<sup>33</sup>See *Identoba and Others v Georgia* Application No 73235/12, Merits and Just Satisfaction, 12 May 2015.

<sup>34</sup>J Waldron 'Is dignity the foundation of human rights?' in R Cruft et al (eds) *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015) p 121.

<sup>35</sup>*Ibid*, pp 136–137.

<sup>36</sup>J Griffin *On Human Rights* (Oxford: Oxford University Press, 2008) pp 200–201.

<sup>37</sup>J Tasioulas 'On the foundation of human rights' in Cruft et al, above n 34, p 54.

<sup>38</sup>*Ibid*, p 55.

<sup>39</sup>The FAO defines hunger as: an uncomfortable or painful physical sensation caused by insufficient consumption of dietary energy: FAO 'Hunger and food insecurity', available at <http://www.fao.org/hunger/en/>.

<sup>40</sup>P Sorokin *Hunger as a Factor in Human Affairs* (Gainesville: University of Florida Press, 1975) p 102.

<sup>41</sup>*Ibid*, p 103.

<sup>42</sup>J Waldron *One Another's Equals. The Basis of Human Equality* (Cambridge: Belknap Press, 2017).

<sup>43</sup>See Mr Baroody, the Saudi Arabian delegate to the drafting of the ICESCR, who indicated Islam has provided for the 'sick, aged and those who for various reasons are unable to work' 728<sup>th</sup> Meeting A/C.3/SR.728 (11 January 1957) reproduced in B Saul *The International Covenant on Economic, Social and Cultural Rights. Travaux Préparatoires 1948–1966* (Oxford University Press, 2016) p 1828. For Christianity see J Vernon *Hunger: A Modern History* (Cambridge: Belknap Press, 2007).

<sup>44</sup>*Hansard* HC Deb, vol 682m, cols 1130–1177, 21 October 2020.

<sup>45</sup>H Siddique 'Marcus Rashford forces Boris Johnson into second U-turn on child food poverty' (*The Guardian*, 8 November 2020), available at <https://www.theguardian.com/education/2020/nov/08/marcus-rashford-forces-boris-johnson-into-second-u-turn-on-child-food-poverty>.

<sup>46</sup>*Ibid*.

the vulnerable.<sup>47</sup> This massive public response demonstrates the moral outrage that suffering due to hunger can cause. The Government responded to the media campaign and continued the provision of vouchers in place of school meals over the summer holidays.<sup>48</sup>

In international human rights law, hunger as an affront to human dignity was a consideration during the drafting of Article 11 of the ICESCR. Article 11(2) ‘recognises the fundamental right of everyone to be *free from hunger*’ and Article 11(1) also contains the ‘right of everyone to an adequate standard of living for himself and his family, including *adequate food*’ (emphases added).<sup>49</sup> The two terms, the right to adequate food, and the right to be free from hunger, have been suggested to be synonymous,<sup>50</sup> and UN Special Rapporteurs for the Right to Food have often used them interchangeably.<sup>51</sup>

However, during the drafting of Article 11, delegates discussed freedom from hunger as a fundamental principle. Freedom from hunger was expressly related to human dignity; its importance to enable other rights to be achieved was explicitly acknowledged.<sup>52</sup> Hunger is a much more emotive term than ‘adequate food’. It appeals to the ideas of discomfort and physical and moral suffering. As such, it is suggested that the use of the word hunger was deliberate. Several state representatives echoed this approach. For example, according to the Chilean representative ‘Man could not .... have a sense of his own dignity if he was suffering from hunger.’<sup>53</sup> The Colombian representative remarked that ‘hunger, together with disease and ignorance, was a cause of unhappiness and strife in the world’.<sup>54</sup>

Hunger appeals to our shared sense of what constitutes a moral wrong. Even a short period of hunger can cause physical discomfort, which most people will have briefly experienced. Not much imagination is required to understand why longstanding hunger causes severe distress and is an affront to human dignity and so a potential violation of Article 3 ECHR.

### 3. Lack of access to food as degrading treatment in the jurisprudence of the European Court of Human Rights

To demonstrate why Article 3 ECHR may be violated by food poverty, this section considers degrading treatment generally and then in relation to food. The section will then discuss why Article 3 ECHR is more appropriate than other provisions of the ECHR, such as Articles 2 and 8, which have been used to challenge situations of poverty including food poverty and inadequate food provision. Cases relating to Article 9 ECHR have also been used to challenge the failure to provide prisoners with religiously appropriate diets,<sup>55</sup> and state regulation and prohibition of religious slaughter.<sup>56</sup> However, as they

<sup>47</sup>A Maclure ‘The Leeds restaurants and businesses offering free meals for children during school half term’ (*Yorkshire Evening Post*, 23 October 2020), available at <https://www.yorkshireeveningpost.co.uk/news/politics/leeds-restaurants-and-businesses-offering-free-meals-children-during-school-half-term-3013790>; Trussell Trust ‘End of year stats’, available at <https://www.trusselltrust.org/news-and-blog/latest-stats/end-year-stats/>.

<sup>48</sup>R Syal et al ‘Johnson makes U-turn on free school meals after Rashford campaign’ (*The Guardian*, 16 June 2020), available at <https://www.theguardian.com/politics/2020/jun/16/boris-johnson-faces-tory-rebellion-over-marcus-rashfords-school-meals-call>.

<sup>49</sup>Art 11(1) ICESCR, above n 20.

<sup>50</sup>P Alston ‘International law and the human right to food’ in K Tomasevski and P Alston (eds) *The Right to Food* (Martinus Nihoff, 1984) pp 32–33.

<sup>51</sup>De Schutter and Elver, when working as Special Rapporteurs for the Right to Food, did not suggest that the right to be free from hunger was a specific norm distinct from the right to adequate food. UNGA ‘Right to Food Note by the Secretary General: Interim Report of the Special Rapporteur on the Right to Food’ (2013) UN Doc A/68/288 at [8] and UNHRC ‘Report of the Special Rapporteur on the Right to Food’ (2014) UN Doc A/HRC/28/65 at [2].

<sup>52</sup>Saul, above n 43, pp 83–84, 855, 2246 and 2309.

<sup>53</sup>*Ibid*, p 2247.

<sup>54</sup>*Ibid*, p 2255.

<sup>55</sup>See *Jakóbski v Poland* Application no1842/06, Merits and Just Satisfaction, 7 December 2010; *Vartic v Romania* (No 2) Application No 14150/08, Merits and Just Satisfaction, 17 December 2013.

<sup>56</sup>*Cha’are Shalom Ve Tsedek v France* Application no 27417/95, Merits, 27 June 2000; ECJ 17 December 2020, Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others*.

engage with aspects of religious freedom, they fall outside the scope of this paper. The cases considered in this section have been selected following a search of the ECtHR's jurisprudence to illustrate the Court's developing approach to food and degrading treatment.

### (a) Article 3 ECHR and degrading treatment

The prohibition of torture, inhuman and degrading treatment is absolute, so establishing the scope of the right is of central importance.<sup>57</sup> Such delineation provides legal certainty for states in terms of their obligations and could also guide state policy.<sup>58</sup> The ECtHR has found violations of Article 3 ECHR due to the provision of inadequate food. Such violations have primarily occurred in cases involving detention. Only in a very few cases outside the context of detention has a violation of Article 3 ECHR been found due to inadequate food. A violation of the right has never been found in relation to conditions caused by poverty alone. This restrictive approach to poor living conditions by ECtHR could be explained by the requirements for a violation of Article 3 ECHR, which have been found by the UK courts to require more than a failure to intervene when people are destitute.<sup>59</sup> However, for reasons discussed earlier, other possible routes of redress under international human rights law are not fully available to individuals in the UK. Thus, it is worth exploring the protection that Article 3 ECHR could provide to those living in food poverty in the UK.

To fall within the scope of Article 3 ECHR, treatment must reach 'a minimum level of severity'.<sup>60</sup> Severity of treatment also has a role in distinguishing torture from inhuman or degrading treatment.<sup>61</sup> In the case of *Selmouni*, the deliberate nature of the infliction of cruel and serious assaults, including the physical pain caused by many blows over a number of days and being repeatedly tripped up while running down a corridor, was considered by the ECtHR to be treatment that could only be described as torture.<sup>62</sup> In cases of ill-treatment the ECtHR considers, 'all the circumstances of the case, including the duration of the treatment, its physical or mental effects and in some cases, the sex, age and state of health of the victim'.<sup>63</sup>

This approach of the ECtHR has led to suggestions that the Court applies a quantitative sliding scale 'formula' to differentiate between torture, which is worse than inhuman treatment, which is worse than degrading treatment.<sup>64</sup> The ECtHR will typically apply the *Pretty* test to determine if Article 3 ECHR is engaged, considering the severity and intensity of the treatment.<sup>65</sup> However, the Court has indicated that degrading treatment 'humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity'.<sup>66</sup> These considerations are not just quantitative, as the Court also considers the qualitative effects of the treatment on the victim. In fact, the ECtHR has repeatedly held that the prohibition of degrading treatment aims to protect individuals from serious violations of human dignity.<sup>67</sup>

So, severity is not just a question of the level of pain or suffering inflicted. In the case of *Bouyid*, a single slap to the face by a police officer to a young man in custody was ill-treatment.<sup>68</sup> Slapping the

<sup>57</sup>N Mavronicola *Torture, Inhumanity and Degradation under Article 3 of the ECHR* (Hart Publishing, 2021) p 6.

<sup>58</sup>*Ibid*, p 21.

<sup>59</sup>*Limbuella*, above n 7, at [10].

<sup>60</sup>*Ireland v United Kingdom* Application No 5310/71, 18 January 1978, at [162].

<sup>61</sup>*Selmouni v France* (2000) 29 EHRR 403 at [38].

<sup>62</sup>*Ibid*, at [102].

<sup>63</sup>*Ireland v UK*, above n 60, at [162].

<sup>64</sup>B Rainey et al *Jacobs, White and Ovey: The European Convention on Human Rights* (Oxford: Oxford University Press, 7<sup>th</sup> edn, 2017) pp 187–191.

<sup>65</sup>*Pretty v UK* (2002) 35 EHRR 1 at [52].

<sup>66</sup>*Ibid*.

<sup>67</sup>I Trispiotis and C Purhouse "Conversion therapy" as degrading treatment' (2022) 42 *Oxford Journal of Legal Studies* 104 at 115.

<sup>68</sup>*Bouyid v Belgium* Application No 23380/09 Grand Chamber, Merits and Just Satisfaction, 28 September 2015.

face was considered a ‘serious attack on the individual’s dignity’.<sup>69</sup> Mavronicola suggests the minimum level of severity ‘involves grappling with the wrongs themselves and takes place in a context specific way’.<sup>70</sup> The qualitative nature of the assessment regarding whether treatment is degrading also requires determination and consideration of dynamics of power and control. This was significant in the case of *Bouyid*.<sup>71</sup> Power and control also appear in the cases where the ECtHR has found a violation of Article 3 ECHR in part due to inadequate provision of food, which are considered in the following section. Typically, these cases involve stark asymmetries of power: cases where the applicants were detained, or were asylum seekers, or were vulnerable children completely dependent on the state. These cases are where the following section will focus. However, before moving on it must first be acknowledged that in certain circumstances, such as force feeding of prisoners on hunger strike, provision of food itself can be degrading.<sup>72</sup> Force-feeding engages with issues of medical capacity and so is outside the scope of this paper, although it should still be noted that it is not always hunger itself that is degrading, but the lack of ability to feed oneself.

### **(b) Inadequate food as degrading treatment**

When discussing inadequate food provision, the ECtHR has considered adequacy of food in terms of nutritional content, not just supply of sufficient calories.<sup>73</sup> The ECtHR has considered lack of access to adequate food as degrading treatment in three main contexts. The first is confinement in psychiatric institutions.<sup>74</sup> The second, and most numerous, group of cases deals with food provided to prisoners.<sup>75</sup> The third concerns deprivation of food outside of detention for an asylum seeker in Greece and children under the supervision of the local authorities in the UK. These three distinct circumstances will be discussed in turn.<sup>76</sup>

First, in the case of *Stanev v Bulgaria*, the ECtHR concluded that receiving insufficient, poor-quality food was part of the degrading treatment the complainant was subjected to whilst living in a psychiatric institution.<sup>77</sup> Stanev’s living conditions were generally poor, with inadequate heating, a lack of bathroom facilities, outdoor toilets which were dangerous to access, and communal shared clothing. The Court also noted that the ‘food was insufficient and of poor quality’.<sup>78</sup> This amounted to treatment that:

was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance or driving them to act against their will or conscience.<sup>79</sup>

In his complaint, Stanev refers to the lack of choice in the food provided and not being able to aid in its preparation,<sup>80</sup> which indicates that, for him, food meant more than having an adequate intake in terms of sufficient calories and nutrients. However, the ECtHR did not elucidate what amounts to food of sufficient or good quality. Nutrition is likely to be a component of this, as the Court referred to a

<sup>69</sup>Ibid at [103].

<sup>70</sup>Mavronicola, above n 57, p 92.

<sup>71</sup>Ibid.

<sup>72</sup>See *Nevmerzhitsky v Ukraine* Application No 54825/00, Merits and Just Satisfaction, 5 April 2005.

<sup>73</sup>See *Stanev v Bulgaria*, above n 5 and *Korneykova and Korneykov v Ukraine* Application No 56660/12, Merits and Just Satisfaction, 24 March 2016.

<sup>74</sup>*Stanev v Bulgaria*, above n 5.

<sup>75</sup>*RR and Others v Hungary*, above n 5.

<sup>76</sup>*MSS v Belgium and Greece*, above n 4; *Z and Ithers v UK* Application No 29392/95 Merits and Just Satisfaction, 10 May 2001.

<sup>77</sup>*Stanev v Bulgaria*, above n 5.

<sup>78</sup>Ibid, at [209].

<sup>79</sup>Ibid, at [203]; *Jalloh v Germany*, Application No 54810/00, 11 July 2006.

<sup>80</sup>*Stanev v Bulgaria*, above n 5, at [22].



report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT). The CPT Committee visited the facility where Stanev lived and noted the lack of milk, eggs, fruit, and vegetables, as well as the failure to provide for special diets.<sup>81</sup> The inclusion of such considerations in the complaint shows how the ECtHR links insufficient food to human dignity: being provided with inadequate food and having no choice or involvement in its preparation, meant the applicant in *Stanev* was repeatedly treated as someone of inferior moral value, which was incompatible with his dignity.

Secondly, inadequacy of food has also been considered by the ECtHR in relation to prisoners. In the case of *Stepuleac v Moldova*, a violation of Article 3 ECHR was found due to the applicant being detained for ‘over three months with insufficient food’.<sup>82</sup> That was in addition to the overall poor conditions of his detention, which included lack of access to daylight, to a toilet and to tap water.<sup>83</sup> Similarly, in the case of *Dudchenko v Russia*, a lack of food provided to a prisoner before and during transit between detention facilities, along with overcrowding, was considered a violation of Article 3 ECHR.<sup>84</sup> In *Dudchenko*, the ECtHR referred to another case concerning detention in a prison, *Kadikis v Latvia (No 2)*, which states that ‘clear insufficiency of food given to an applicant may itself raise an issue under Article 3’.<sup>85</sup>

For certain applicants in detention, such as pregnant and breast-feeding mothers, as considered in *Korneykova and Korneykov v Ukraine*, the issue of inadequacy of food carries additional importance. The ‘cumulative effect of malnutrition’, along with other poor conditions of detention, was ‘of such an intensity as to induce in her physical suffering and mental anguish amounting to her and her child’s inhuman and degrading treatment’.<sup>86</sup> These decisions highlight that, where individuals depend on the state, the impact on their physical and mental health of not having access to adequate food amounts to a serious violation of their human dignity. In addition, the physiological impacts of hunger provide measurable medical evidence of the impact of this ill-treatment on the applicants, which is one of the factors taken into consideration by the ECtHR to establish whether the threshold of Article 3 has been crossed.<sup>87</sup>

Thirdly, inadequacy of food has led to violations of Article 3 in cases involving asylum seekers and other extremely vulnerable individuals dependent on the state. Detention of asylum seekers in camps is becoming widespread within Europe,<sup>88</sup> creating another population of vulnerable individuals who are detained unless they can return to their home state or the last country they travelled through. Such individuals are dependent on state authorities, or non-governmental organisations (NGOs), for their basic needs.

In the case of *RR v Hungary*, the ECtHR ruled that the state not supplying the applicant with sufficient food, whilst he was confined in the Rösztke transit zone at the Hungarian-Serbian border for four months, amounted to a violation of Article 3 ECHR.<sup>89</sup> RR had been separated from his family whilst fleeing Iran. He had applied for asylum in Hungary, withdrew the application and reunited with his family in Serbia and with them re-entered Hungary. As RR had previously applied for asylum in Hungary, he was housed, but not entitled to material assistance or food.<sup>90</sup> The Court found that the applicant’s hunger, which left him begging and taking food from dustbins, was ‘a situation incompatible with Article 3 ECHR’.<sup>91</sup>

<sup>81</sup>Ibid, at [79].

<sup>82</sup>*Stepuleac v Moldova* Application No 8207/06, Merits and Just Satisfaction, 6 November 2007.

<sup>83</sup>Ibid, at [65].

<sup>84</sup>*Dudchenko v Russia*, above n 5, at [130].

<sup>85</sup>Ibid.

<sup>86</sup>*Korneykova and Korneykov v Ukraine*, above n 73, at [141] and [147].

<sup>87</sup>*Ireland v UK*, above n 60, at [162].

<sup>88</sup>J Majcher et al *Immigration Detention in the European Union. In the Shadow of the ‘Crisis’* (Springer, 2020) p 451.

<sup>89</sup>*RR and Others v Hungary*, above n 5, at [1].

<sup>90</sup>Ibid, at [21].

<sup>91</sup>Ibid, at [57].

The decision of the ECtHR is not clear as to whether the ill-treatment in *RR* amounted to degrading or to inhuman treatment.<sup>92</sup> However, this case is significant, due to the description of the applicant as being forced to take food from dustbins and begging. The importance of that factor suggests that the ECtHR recognises the impact of having to beg or take waste food on the worth and dignity of the applicant. Subjecting an asylum seeker, whose is dependent on the state for their basic needs, to this plight is treating them as if they are morally inferior.

It is also important that *RR* was not detained in the same way as *Stanev* or a prisoner. He could leave the detention zone, albeit he *had* to stay in the zone to remain with his family in Hungary. As a result, like in *Stanev*, the ECtHR notes the applicant in *RR* was ‘wholly dependent’ on the state for food.<sup>93</sup> Moreover, in *RR*, it was the lack of food alone, rather than more extensive degrading living conditions, that triggered a violation of Article 3 ECHR. The ECtHR found that the Hungarian Government ‘failed to have due regard to the state of dependency in which he lived there’.<sup>94</sup> The Court also criticised the lack of formal agreement with NGOs working in the zone to ensure consistent food provision, the absence of safeguards, and the lack of proper assessment of *RR*’s situation.<sup>95</sup>

The last point could also be taken to suggest that in situations of food poverty, reliance on charities and other NGOs is not a substitute for government involvement, unless it is formalised with appropriate safeguards to ensure people are receiving adequate food. Such a principle would be significant for many European countries, where reliance on food banks is rising.<sup>96</sup> *RR* confirms a set of positive state obligations to ensure the provision of adequate food to those that, for a variety of reasons, are heavily dependent on the state for their nutritional needs.

So far, the discussion has focused on cases involving applicants in detention, which are a paradigm instance of individuals being almost wholly dependent on the state for their basic needs. However, Article 3 ECHR has also been triggered in cases of inadequate welfare support taking place outside the context of detention. In such cases, a violation of Article 3 depends on the vulnerability of the applicants at the time of the ill-treatment. In the case of *MSS v Belgium and Greece*, where the ECtHR stated that:

Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home. Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living.<sup>97</sup>

Even so, in *MSS* the ECtHR did find a violation of Article 3 ECHR because the applicant spent months homeless and in a state of extreme destitution.<sup>98</sup> The vulnerability of the applicant as an asylum seeker was not give due regard by the Greek Government,<sup>99</sup> and despite being aware of the limited places in accommodation for asylum seekers which would inevitably result in homeless asylum seekers,<sup>100</sup> it failed to address the applicant’s situation. The applicant lived in ‘extreme poverty, unable to cater for his basic needs: food, hygiene and a place to live’.<sup>101</sup> The living standards required for asylum seekers in Europe are reflected in EU Council Directive 2003/9/EC which lays down standards for reception of asylum seekers<sup>102</sup> – standards that the Greek authorities flagrantly violated in *MSS*.

Another case outside the context of detention is *Z and Others v UK*, where the ECtHR found a violation of Article 3 ECHR because the local authority failed to remove siblings from a household

<sup>92</sup>Ibid, at [48].

<sup>93</sup>Ibid, at [42].

<sup>94</sup>Ibid, at [57].

<sup>95</sup>Ibid, at [55] and [57].

<sup>96</sup>See Alston, above n 2.

<sup>97</sup>*MSS v Belgium and Greece*, above n 4, at [249].

<sup>98</sup>Ibid, at [254] and [264].

<sup>99</sup>Ibid, at [258].

<sup>100</sup>Ibid, at [258].

<sup>101</sup>Ibid, at [254].

<sup>102</sup>Ibid, at [250].

characterised by abuse and poor living conditions.<sup>103</sup> The children were stealing food at school and from bins, as well as losing and failing to gain weight.<sup>104</sup> Overall, the neglect and abuse reached the threshold of severity for both inhuman and degrading treatment.<sup>105</sup> The state has a positive obligation to ‘take measures designed to ensure that individuals within their jurisdiction are not subjected to torture, inhuman or degrading treatment, including such ill-treatment administered by private individuals’.<sup>106</sup> Because of this, the failure of the local authority to protect the children from these circumstances amounted to a violation of Article 3 ECHR. The Court reiterated the principle that states should provide effective protection for vulnerable people, and especially children. The state’s positive obligations in this context include ‘reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge’.<sup>107</sup> However, outside removal from the home, the ECtHR does not suggest whether alternative interventions would have been sufficient; given the level of abuse and neglect, it is presumed removal was considered the only appropriate step.

Apart from cases involving detainees or highly vulnerable individuals, such as asylum seekers (in *MSS*) or children (in *Z*), the ECtHR has found no violation of Article 3 in cases involving hunger or poor living conditions. Nevertheless, in *Budina v Russia*, a case concerning a welfare pension that was insufficient to meet the basic needs of the applicant, the Court stated that:

State responsibility could arise for ‘treatment’ where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity.<sup>108</sup>

The ECtHR did not find a violation of Article 3 in *Budina*. However, as Oette argues, the Court’s approach shows clear signs that in circumstances of ‘extreme poverty’, or ‘wholly insufficient’ welfare provision, a violation of Article 3 could be found depending on the context of the case.<sup>109</sup>

This section outlined the careful application of Article 3 by the ECtHR in cases involving hunger or inadequate food. In summary, a violation of the provision could occur in circumstances of very high individual dependence on state provision, such as detention or cases of highly vulnerable persons. These cases involve a combination of the physiological and psychological harms of malnutrition *and* a stark power asymmetry between the authorities and the individuals in question, who depend on the state for their most basic needs. It is this distinctive combination of harm and markedly asymmetrical power that makes having to beg for food or eating waste food an affront to human dignity in such cases. As an affront to human dignity, the treatment in these cases deserves its place within the architecture of Article 3 ECHR.

Article 3 ECHR is not the only provision that could apply in cases involving hunger or malnutrition. Articles 2 and 8 ECHR have also been considered by the UK Courts and ECtHR in cases concerning poverty resulting from the impact of welfare policy. Even so, the following section discusses why Article 3 ECHR, despite its limited application so far in this area, could result in better protection from food poverty.

### **(c) Food, poverty, and Articles 2 and 8 ECHR**

As well as Article 3 ECHR, applications concerning food poverty and poverty in general have also been considered by the ECtHR and the UK courts under Article 2 ECHR, which protects the right to life,

<sup>103</sup>*Z and Others v UK*, above n 76.

<sup>104</sup>*Ibid*, at [16], [24] and [27].

<sup>105</sup>*Ibid*, at [72].

<sup>106</sup>*Ibid*, at [73].

<sup>107</sup>*Ibid*, at [73].

<sup>108</sup>*Budina v Russia*, above n 4, p 6.

<sup>109</sup>Oette, above n 6, at 683.

and Article 8 ECHR, which protects the right to respect for private and family life.<sup>110</sup> Article 2 ECHR was engaged in the case of *Nencheva and Others v Bulgaria*, where the ECtHR considered insufficient food as one of the causes of the death of children in a home for disabled young people.<sup>111</sup> In the UK courts, Article 8 ECHR has been repeatedly used to challenge the benefits regime. For example, in the case of *R (DA and Others) v Secretary of State for Work and Pensions*, several aspects of the current welfare regime, including the benefit cap, were considered, and the Supreme Court indicated that deprivation caused by low levels of welfare benefits does fall within the ambit of Article 8 ECHR.<sup>112</sup>

In situations of detention or confinement with total dependence on the state, Article 2 ECHR is clearly engaged if people in those situations are not given enough food and subsequently die. However, in the case of those living in poverty outside of detention, although there is evidence of poverty's impact on lifespan,<sup>113</sup> it may be more difficult to demonstrate a causal link between the state's failure to provide adequate benefits and death.<sup>114</sup> It is more likely that the state would be aware of the impacts of reduced welfare benefits in terms of poverty and hunger, rather than a real risk of death. In such circumstances, Article 3 ECHR could be used to challenge governments before people reach the stage of life-threatening malnutrition due to lack of food.

Article 8 ECHR has been used in challenges to poverty caused by the welfare benefits regime in the UK, often in conjunction with Article 14 ECHR. This approach has not always been successful. As Lammasniemi points out, Article 8 ECHR is a qualified right, and the UK Supreme Court has confirmed that the state can justify proportional limitations on the right in pursuit of certain welfare and fiscal policies.<sup>115</sup> This limits the utility of Article 8 to challenge poverty caused by the benefits regime. In contrast, Article 3 ECHR is an absolute right, limitations on which cannot be justified.

Lieberman has suggested that Article 3 ECHR is the most appropriate 'gateway' to protect socio-economic rights in the UK,<sup>116</sup> as levels of provision of socioeconomic rights are closely associated to degrading treatment.<sup>117</sup> More recently, a potential legal challenge to the UK Government's decision not to extend free school meal provision over the summer holidays also based some of its arguments on a violation of Article 3 ECHR.<sup>118</sup> These arguments both indicate the potential utility of Article 3 ECHR for a potential claim in relation to food poverty. However, as Lieberman has indicated, the 'criteria threshold for using Article 3 is stringent'.<sup>119</sup>

The discussion above has demonstrated how these criteria have resulted in findings of a violation of Article 3 ECHR in the very limited circumstances of those detained by the state, asylum seekers and children subject to severe abuse in their home. It is clear that inadequate food and food poverty can result in mental anguish as well as physiological and psychological pain, even if someone is not detained or an asylum seeker. However, it is not clear whether destitution and food poverty, outside of the specific contexts of dependence discussed in the previous section, could result in a violation of

<sup>110</sup>L Lammasniemi 'The benefit cap an infliction of poverty' (2019) 41 *Journal of Social Welfare and Family Law* 368 at 369; K Boyle and A Flegg 'The right to food in the UK – an explainer', available at [https://dspace.stir.ac.uk/retrieve/67b40252-e5a0-420f-849e-2662d682f3da/05-Briefing4-food\\_18MAY22.pdf](https://dspace.stir.ac.uk/retrieve/67b40252-e5a0-420f-849e-2662d682f3da/05-Briefing4-food_18MAY22.pdf), pp 5–6.

<sup>111</sup>Boyle and Flegg, above n 110, p 6; *Nencheva and Others v Bulgaria* Application No 48609/06, 18 June 2013.

<sup>112</sup>*R (DA and Others) v Secretary of State for Work and Pensions* [2019] UKSC 21.

<sup>113</sup>B Holder 'Poverty link to early death scandalous' (BBC, 19 July 2018), available at <https://www.bbc.co.uk/news/uk-england-44853482>.

<sup>114</sup>The 'Osman test' indicates positive obligations for states to prevent violations of the right to life. It arises when the state 'knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals'. Outside of state detention this would be difficult to clearly establish. See *Osman v United Kingdom* Application No 23452/94 Grand Chamber, Merits and Just Satisfaction, 28 October 1998.

<sup>115</sup>Lammasniemi, above n 110, at 370.

<sup>116</sup>N Lieberman 'The justiciable right to food and adequate nutrition in the UK: a feasible proposition?' (2020) 7 *Birkbeck Law Review* 57 at 96.

<sup>117</sup>*Ibid.*

<sup>118</sup>K Shields 'Free school meals and governmental responsibility for food provision' (2021) 25 *The Edinburgh Law Review* 111 at 113.

<sup>119</sup>Lieberman, above n 116, at 96.

Article 3 ECHR.<sup>120</sup> To determine whether food poverty could potentially trigger a violation of Article 3, the following section will consider the specific hurdles that may prevent such a claim from falling within the scope of the provision. The section will pay particular attention to those subjected to benefit caps, limits, and sanctions in the UK, and whether *their* food poverty could amount to degrading treatment under Article 3.

#### 4. Food poverty as a potential violation of Article 3 ECHR

To consider whether certain components of the UK benefits regime could result in a violation of Article 3 ECHR, this section will consider in turn the thresholds and requirements for a violation to be found. The minimum level of severity of treatment, the requirement for ‘treatment’, state knowledge of the treatment and the claimant’s dependence on the state will be considered, prior to finally considering whether discrimination against certain benefits claimants could also be grounds for a complaint.

##### (a) *The minimum level of severity*

As was discussed at the start of section 3, reaching a minimum level of severity is the threshold test for the engagement of Article 3 ECHR.<sup>121</sup> As stated in *Ireland v UK*, ‘the assessment of this minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and in some cases, the sex, age, and state of health of the victim.’<sup>122</sup> Food poverty may involve some, if not all, of these factors. Duration of treatment can be considered in terms of the suffering caused.<sup>123</sup> In 2022, it was reported that 13% of the UK population were in persistent poverty after housing costs.<sup>124</sup> Persistent poverty in addition to the possible physiological effects of a long-term shortage of food, can result in malnutrition and obesity due to limited access to a nutritious diet.<sup>125</sup> Even short-term poverty can impact food choices and result in hunger, which could cause intense shame and suffering. However, long-standing poverty would exacerbate inadequate access to food and its grave psychological and physiological effects. For these reasons, although much will depend on the specific context of the case, both short-term acute hunger and a longer-term inability to access adequate food seem capable of reaching the severity threshold for degrading treatment under Article 3.

Sex is relevant in terms of dietary need. In the case of *Korneykova and Korneykov v Ukraine*, the lack of food provided for pregnant or breast-feeding prisoners was considered to have exacerbated their mental anguish because of their reproductive status.<sup>126</sup> In a similar way, age may exacerbate the harmfulness of inadequate food, which in childhood can have lifelong physical, educational, and mental effects.<sup>127</sup> The case of *Budina*, discussed above, specifically addresses pensions for the elderly, and the elderly may also be considered more vulnerable to nutritional deficiency and the effects of inadequate food.<sup>128</sup> Ill-health can also exacerbate the impacts of inadequate food as poor nutrition can

<sup>120</sup>Simpson et al, above n 6, p 480.

<sup>121</sup>*Ireland v UK*, above n 60, at [162].

<sup>122</sup>*Ibid.*

<sup>123</sup>*Soering v UK* Application No 14038/88 Merits and Just Satisfaction, 7 July 1989, at [111].

<sup>124</sup>B Frances-Devine *Poverty in the UK: Statistics* (House of Commons Library, 13 April 2022), available at <https://commonslibrary.parliament.uk/research-briefings/sn07096/>.

<sup>125</sup>W Żukiewicz-Sobczak et al ‘Obesity and poverty paradox in developed countries’ (2014) 21 *Annals of Agricultural and Environmental Medicine* 590; A Matthews-King ‘Huge increase in “Victorian diseases” Including rickets, scurvy and scarlet fever, NHS data reveals’ (*Independent*, 25 February 2019), available at <https://www.independent.co.uk/news/health/victorian-disease-gout-rickets-vitamin-d-mumps-scurvy-measles-malnutrition-nhs-hospital-admitted-a8795686.html>.

<sup>126</sup>*Korneykova and Korneykov v Ukraine*, above n 73, at [141] and [147].

<sup>127</sup>R Keith ‘Free school meals: the lifelong impact of childhood food poverty’ (*The Conversation*, 23 October 2020), available at <https://theconversation.com/free-school-meals-the-lifelong-impact-of-childhood-food-poverty-148660>.

<sup>128</sup>S Brownie ‘Why are elderly individuals at risk of nutritional deficiency?’ (2006) 12 *International Journal of Nursing Practice* 110.

complicate some health conditions.<sup>129</sup> The possible medical effects of poor nutrition on pre-existing medical conditions add to the physical and mental harm caused by inadequate food, which makes such cases of food poverty even more likely to fall within the ambit of Article 3. This is in line with the focus of the ECHR case law on vulnerability of asylum seekers and children and the dependence of those detained, which was discussed in Section 3 of this paper.

In addition, the ECtHR has also indicated that ‘the public nature of the treatment may be a relevant or aggravating factor in assessing whether it is “degrading” within the meaning of Article 3’.<sup>130</sup> Debates in the news and the UK Parliament relating to free school meals and welfare payments, can have a tone of ‘shirker vs striver’,<sup>131</sup> which adds to the individual shame associated with poverty and could be humiliating for those in that position. This political rhetoric is accompanied by a lack of action by UK authorities to deal with the widespread food poverty throughout the country. For example, the Government has not increased free school meal provision, as suggested in the National Food Strategy.<sup>132</sup> The Government has also removed the Covid-19 benefit uplift payments,<sup>133</sup> and has ignored calls to remove the benefit cap. In summary, the UK Government’s public unresponsiveness to a public, well-documented social problem could be a relevant or aggravating factor when the Courts consider whether cases of food poverty, especially those affecting children or highly vulnerable individuals, fall within the scope of Article 3 ECHR.

### (b) Treatment as part of violations of Article 3 ECHR

Against a background of the UK Supreme Court taking a cautious approach to intervening in matters of public expenditure, the term treatment has been interpreted in a limited way. In *Limbuela*, it was stated that ‘a failure to provide an individual within its jurisdiction with accommodation and the wherewithal to acquire food and the other necessities of life could not by itself constitute treatment for Article 3 purposes’.<sup>134</sup> This was reaffirmed in *R (W, A Child) v Secretary of State for the Home Department*,<sup>135</sup> which added that the expenditure of public funds to relieve destitution was an issue for Parliament, not the courts.<sup>136</sup> This interpretation, that low levels of benefits are not a specific ‘treatment’, makes a challenge to benefits policy, using the Human Rights Act 1998 and Article 3 ECHR, unlikely to succeed in the UK courts. However, this does not mean that a case then taken to the ECtHR would also fail.

As the ECtHR held in the case of *Budina*, and also discussed briefly in the previous section, ‘treatment’ could result from ‘official indifference’.<sup>137</sup> Using the example of *Akkum and Others v Turkey*, where the lack of concern of authorities was so low that it was considered to be degrading, Webster has suggested that ‘treatment’ can be related to official indifference.<sup>138</sup> Following this line of reasoning, official indifference towards the plight of many living in food poverty in the UK would likely amount to treatment. Even so, O’Cinneide has argued that the ECHR case law is not

<sup>129</sup>F Douglas et al ‘Health professionals’ experiences and perspectives on food insecurity and long-term conditions: a qualitative investigation’ (2019) 28 Health and Social Care in the Community 404.

<sup>130</sup>*East African Asians v UK* [1973] 3 EHRR 76 at [207].

<sup>131</sup>G Valentine and C Harris ‘Strivers vs skivers: class prejudice and the demonisation of dependency in everyday life’ (2014) 53 Geoforum 84.

<sup>132</sup>H Dimpleby ‘National food strategy. The Plan’ (July 2021), available at [https://www.nationalfoodstrategy.org/wp-content/uploads/2021/10/25585\\_1669\\_NFS\\_The\\_Plan\\_July21\\_S12\\_New-1.pdf](https://www.nationalfoodstrategy.org/wp-content/uploads/2021/10/25585_1669_NFS_The_Plan_July21_S12_New-1.pdf).

<sup>133</sup>Human Rights Watch ‘Letter from Human Rights Watch to UK parliamentarians regarding impending cut to social security support’ (2 September 2021), available at [https://www.hrw.org/sites/default/files/media\\_2021/09/Universal%20Credit%20-%20HRW%20Letter%20to%20MPs%20-%20September%202021.pdf](https://www.hrw.org/sites/default/files/media_2021/09/Universal%20Credit%20-%20HRW%20Letter%20to%20MPs%20-%20September%202021.pdf).

<sup>134</sup>*Limbuela*, above n 7, at [10].

<sup>135</sup>*R (W, A Child) v Secretary of State for the Home Department* [2020] EWHC 1299 (Admin) at [40].

<sup>136</sup>*Ibid*, at [34].

<sup>137</sup>*Budina v Russia*, above n 4, p 6.

<sup>138</sup>E Webster *Dignity Degrading Treatment and Torture in Human Rights Law* (Routledge, 2018) p 99.

yet at a point of indicating that there is a duty to provide for the destitute.<sup>139</sup> As a result, even if official indifference could amount to treatment for the purposes of the provision, the intransigence of the UK Government in response to food poverty would probably not be sufficient in itself to trigger a violation of Article 3 ECHR.

However, specific features of the UK benefits regime may be closer to treatment for the purposes of the ECHR. Sanctions are applied to the benefits of those who do not comply with certain requirements, such as attending training sessions or applying for jobs.<sup>140</sup> The two-child limit and the benefit cap also limit the benefits received by certain individuals. In *SG and Others v Secretary of State for Work and Pensions*, Lady Hale acknowledged that the benefit cap breaks the link between ‘benefit and need’, resulting in single parents being unable to provide for basic needs, including food for their children.<sup>141</sup> Although the line between omission and commission in the realm of state policy and destitution can be difficult to draw, the two-child limit, benefit caps, and benefit sanctions could be considered a positive act by the UK Government. Given that such measures are applied to specific individual claimants, they would likely be considered ‘treatment’ for the purposes of Article 3.

So, in summary, there are two components of the UK benefits regime that could be considered treatment under Article 3. First, the official indifference to the plight of many living in food poverty; and secondly, the positive actions involving benefit sanctions, benefit caps, and the two-child limit. Having established that these two components of the UK benefits regime could amount to ‘treatment’ for the purposes of the ECHR, a remaining question is whether the UK state is aware of this treatment. However, even if those two conditions are met, as we saw, a violation of Article 3 ECHR would also require establishing that those who live on benefits are highly dependent on the state. Only if all these conditions are met could a violation of Article 3 ECHR be found for those living in food poverty because of benefit sanctions, benefit caps, or the two-child limit.

### (c) State knowledge of degrading treatment

Positive obligations to prevent a risk in the case of the right to life arise when the state ‘knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals’.<sup>142</sup> This has been applied in relation to Article 3 ECHR, with a positive obligation arising when states knew of the existence of a ‘real and immediate risk of ill treatment’,<sup>143</sup> as indicated in *Z*, discussed above. However, it has been suggested that the *Osman* test may require a more specific causal chain of events, rather than the macro-level consequences of welfare policy.<sup>144</sup> *Z* also suggests a requirement for a special type of dependence on the state.<sup>145</sup>

The *Osman* test requires knowledge of an ‘immediate risk’ of ill-treatment, but the ECtHR has found violations of Article 3 ECHR in situations of cases with a chronic lack of access to resources, such as *Stanev*, *MSS*, *RR*, and *Z*. Given the high number of cases concerning the impact of the benefits regime that have been heard in the UK courts, as well as the numerous NGO reports about the impact of poverty on food access and hunger in the UK, the Government is fully aware that many of those on benefits are struggling financially. In addition, in *MSS* the ECtHR indicated that the Government had knowledge of the shortage of accommodation for asylum seekers and so knew or ought to have known of the risk of homelessness and destitution.<sup>146</sup>

<sup>139</sup>C O’Cinneide ‘A modest proposal: destitution, state responsibility and the European Convention on Human Rights’ (2008) *European Human Rights Law Review* 583 at 597.

<sup>140</sup>Adler, above n 6, p 40.

<sup>141</sup>*SG and Others v Secretary of State for Work and Pensions* [2015] UKSC 16 at [180].

<sup>142</sup>*Osman v UK*, above n 114.

<sup>143</sup>*Dorđević v Croatia*, Application No 41526/10, Merits and Just Satisfaction, 24 July 2012 at [139].

<sup>144</sup>Webster, above n 138, p 117.

<sup>145</sup>*Z and Others v UK*, above n 76, at [73].

<sup>146</sup>*MSS v Belgium and Greece*, above n 4, at [258].

The Government is aware generally of the food poverty caused by benefit sanctions, limits, and caps. O’Cinneide has argued that without a special relationship of dependence, as was the case in *Z*,<sup>147</sup> or a specific characteristic of the claimant, such as being an asylum seeker, the government cannot know of the risk of ill-treatment for a specific individual. However, government agencies will know who has been subjected to benefit caps and sanctions, and who may have characteristics, such as old age, disability or being a child that makes them more vulnerable to the impact of food poverty. Arguably the Government knows or should know that these individuals are at a real risk of ill-treatment.

**(d) State dependence and lack of food as a violation of Article 3 ECHR**

A person whose only income is derived from welfare benefits or a state pension, depends entirely on the state for their basic needs. O’Cinneide has suggested this alone is not enough to engage state responsibility under Article 3 ECHR, and that the case law of *Price v UK* and *Z* suggests the need for a ‘special relationship of dependency on the state’.<sup>148</sup> In those cases, the ‘special relationship’ resulted from a person who was disabled and in custody,<sup>149</sup> or children at particular risk of abuse.<sup>150</sup> For many of those in receipt of state benefits, there is unlikely to be a ‘special relationship’ and so dependency on the state may not be as easy to establish. In addition, the ECtHR has suggested that destitution can also engage issues of personal responsibility.<sup>151</sup> In the case of *O’Rourke v UK*, the applicant’s refusal of specific temporary accommodation was considered to indicate some personal responsibility for his state of destitution.<sup>152</sup>

It could be argued, of course, that those unable to work due to caring responsibilities, or disabilities or ill-health, who are in receipt of welfare benefits as their only source of income, are very highly dependent on the state. They are not refusing to work, and they have no alternative to the receipt of state benefits to meet their basic needs. In addition, children, whose parents receive benefits, are dependent entirely on their parents, and so by extension the state, for the food and other necessities required for an adequate standard of living. However, this relationship of dependence is less clear for those who are unemployed and able to work, but who have not found employment. This is a bar to using Article 3 to achieve redress for hunger caused by the inadequate levels of welfare benefits.

The ECtHR would address any such applications on a case-by-case analysis, as was indicated in *Budina*. There may be no suitable jobs in their local area, raising the possibility that to all intents and purposes these individuals are not able to work. In *O’Rourke* the applicant ‘indicated an unwillingness to accept temporary accommodation and refused two specific offers of accommodation’.<sup>153</sup> People dependent on benefits may not be refusing offers of jobs in the way O’Rourke refused offers of accommodation; there may simply be no suitable jobs available in that location, and so no jobs offered that could be refused. It is not clear if the ECtHR would expand the scope of the protection of Article 3 ECHR this far, but for those who cannot work due to disability or caring responsibilities, it can be argued they could be in a special relationship of dependence on the state, which could bring their food poverty within the scope of Article 3.

**(e) A discriminatory component of welfare regimes**

The discussion will now consider another aspect of violations of the ECHR in relation to food poverty, which is the discriminatory effects of cuts in social welfare in the UK. Such cuts affect

<sup>147</sup>O’Cinneide, above n 139.

<sup>148</sup>*Ibid*, at 597.

<sup>149</sup>*Price v UK* Application No 33394/96 Merits and Just Satisfaction, 10 July 2001.

<sup>150</sup>*Z and Others v UK*, above n 76.

<sup>151</sup>*O’Rourke v UK* Application No 39022/97 Admissibility, 26 June 2001.

<sup>152</sup>*Ibid*.

<sup>153</sup>*Ibid*, p 6.



disproportionately the elderly, the disabled, children, and women.<sup>154</sup> This is important because, according to well-established case law, discrimination is an aggravating factor whenever the ECtHR considers whether a particular form of ill-treatment falls within the scope of Article 3 ECHR.<sup>155</sup>

As discussed earlier, in the case of children, their additional vulnerability may be sufficient to tip the qualitative test over the threshold for degrading treatment. Mavronicola has argued that the vulnerability of children has led the ECtHR to finding violations of economic, social, and cultural rights.<sup>156</sup> It has been suggested that the failure of the Government in the UK to provide food vouchers over the summer holidays was a violation of Articles 3 and 14 ECHR.<sup>157</sup> Article 14 ECHR, the right to be free from discrimination, applies in cases of lack of free school meal provision. This is because race, being a child, and being a child in receipt of free school meals are all relevant statuses.<sup>158</sup> As a result, it has been argued that the combination of harm, vulnerability and discrimination in cases involving children's hunger due to poverty would trigger a violation of Article 14 in conjunction with Article 3 ECHR.<sup>159</sup>

Moreover, benefits policy in the UK indirectly discriminates against women.<sup>160</sup> In *SG and Others*, the claimants argued that the benefit cap affected many more women than men.<sup>161</sup> In addition, the two-child limit is more likely to impact women, as they are more likely to be single parents.<sup>162</sup> The UK Supreme Court has acknowledged that both of these policies are discriminatory, but then found that the negative impact on Article 8 ECHR due to the discriminatory low levels of benefits provision was justified.<sup>163</sup> The indirectly discriminatory effects of the benefit cap and two-child limit on women and single mothers in particular could be considered an aggravating factor, and could lead particular forms of ill-treatment to cross the threshold for a violation of Article 3 ECHR or grounds for a complaint of violation of Article 14 in conjunction with Article 3 ECHR.

#### (f) *Judicial restraint, policy, and politics*

A final potential bar to the success of food poverty claims under Article 3 ECHR concerns judicial restraint in social welfare cases. The UK Supreme Court has recently taken a firm line on its ability to make decisions in cases for which the outcome will have financial and policy implications in relation to benefits policy. In *SG v Others*, a claim that the benefit cap violated both Articles 8 and 14 ECHR, for single mothers the court stated such cases 'present a risk of undue interference by the courts in the sphere of political choices'.<sup>164</sup> They found that although the benefit cap does interfere with the rights protected by Article 8 ECHR, this was justified in the pursuit of benefits policy, even though affected households 'may struggle to adequately house, feed, clothe, and warm themselves'.<sup>165</sup> Unlike Article 8 ECHR, Article 3 is an absolute right, and no infringement is permitted. However, this approach of the Supreme Court may mean it is reluctant to find a violation of the ECHR in relation to the UK benefits regime, sticking to a restrictive interpretation of treatment as has been the case previously.<sup>166</sup>

<sup>154</sup>For example: A Byrnes 'Poverty, older persons and human rights', W Vandenhole 'Child impoverishment and the human rights of children' and M Campbell 'Capping motherhood', all in M Davis et al (eds) *Research Handbook on Human Rights and Poverty* (Cheltenham: Edward Elgar, 2021).

<sup>155</sup>See, for example, *Identoba and Others v Georgia*, above n 33, at [67]; Trispiotis and Purshouse, above n 67, at 119.

<sup>156</sup>Mavronicola, above n 57, p 135.

<sup>157</sup>Shields, above n 118, at 115.

<sup>158</sup>*Ibid*, at 116.

<sup>159</sup>*Ibid*.

<sup>160</sup>Campbell, above n 154, p 164; *SG and Others*, above n 141.

<sup>161</sup>*SG and Others*, above n 141.

<sup>162</sup>*SC and CB v Secretary of State of Work and Pensions and Others* [2019] EWCA Civ 615.

<sup>163</sup>*SG and Others*, above n 141.

<sup>164</sup>*Ibid*, at [162].

<sup>165</sup>*Ibid*, at [180].

<sup>166</sup>*Limbuella*, above n 7.

Given the policy and financial ramifications of finding a violation of Article 3 ECHR in welfare benefits related cases, the ECtHR may also be reluctant to expand state obligations for those living in destitution due to levels of welfare benefits. The ECtHR has indicated that positive obligations for states must not impose disproportionate burdens.<sup>167</sup> However, the UK, and other European countries are some of the richest in the world. States that have ratified the ICESCR are required to provide the minimum core of the right to food. If states cannot meet this requirement, they must demonstrate that every possible effort is being made to satisfy the minimum core.<sup>168</sup> Although the core legal obligations arising from the right to food under the ICESCR are separate from the ECHR, they provide useful guidance as to the expectations for developed nations in terms of access to adequate food for those in their jurisdiction. It is true that budgetary limits to the level of social benefits that can be provided are inevitable, even in rich nations like the UK. However, degrading treatment under Article 3 might arise independent of such considerations. A positive obligation to avoid or roll back austerity policies and welfare cuts that demonstrably lead some of the most vulnerable to hunger could hardly be considered a disproportionate burden on the state. Article 3 helps accentuate this point with the force it deserves.

## Conclusion

Policies of austerity have seen violations of socioeconomic rights across Europe. For many, including those who live in the UK, there are limited routes of redress for such violations. Food poverty and hunger are increasing in developed countries, and due to rising global food and fuel prices, this is only going to get worse. The ECtHR, although primarily focused on civil and political rights, has indicated that extreme poverty could result in a violation of Article 3 ECHR. However, no such violations of Article 3 ECHR have been found to date.

Hunger appeals to our shared sense of human dignity. The physical and psychological pain that hunger causes has been acknowledged throughout history and continues to elicit charitable responses, emotion, and debate. The shame and suffering inherent in hunger caused by extreme poverty debase and humiliate people. Article 3 ECHR aims to provide redress for and protect against such moral and physical harms. It is therefore unsurprising that the ECtHR has found violations of the provision in cases involving food deprivation in circumstances of detention or other state dependence. But the potential application of Article 3 beyond those realms remains relatively unexplored. As the circumstances facing many on welfare benefits are worsening, the effects of poverty on human dignity require another look at the scope of the ECHR.

This paper has argued that, under many circumstances, food poverty can reach the severity threshold required for degrading treatment. For those highly dependent on state provision, such as children whose parents do not work, asylum seekers, those in detention, and those in a highly vulnerable state due to health, age or other factors, hunger would very likely fall within the scope of Article 3 ECHR, especially when it is caused by specific state decisions, such as benefit sanctions and benefit caps. In the case of children, single mothers and the disabled – to name only a few groups disproportionately affected by food poverty – this claim is strengthened by the well-documented discriminatory effects of the benefits system in the UK. The UK Government cannot claim to be unaware of the prevalence of food poverty among specific groups and communities in this country. Yet precious little has been done in response. Article 3 ECHR offers a morally and legally powerful, albeit limited in scope, potential route of redress for some of those living in food poverty in the UK and elsewhere in Europe, if governments continue not to act.

<sup>167</sup>*Osman v UK*, above n 114.

<sup>168</sup>Boyle and Flegg, above n 110, p 5.