Neutral Citation Number: [2022] EWCA Civ 1

Case No: C3/2021/0196

IN THE COURT OF APPEAL
ON APPEAL FROM
THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
(Upper Tribunal Judge Ward)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 January 2022

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE SINGH
and
LADY JUSTICE ANDREWS

- -

Between :

MOC (by his litigation friend, MG)	**Appellant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Respondent**

- -
- -

Amanda Weston QC, Desmond Rutledge and Ollie Persey (instructed by **Merseyside Law Centre**) for the **Appellant**
Joanne Clement and Alice Richardson (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 2 December 2021

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10 a.m. on Tuesday, 11 January 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Lord Justice Singh:

Introduction

1. In regulations which govern entitlement to, and payment of, Disability Living Allowance ("DLA"), there is what has been described in these proceedings as the "Hospitalisation Rule". This rule provides that, if someone aged over 18 is admitted to an NHS hospital, payment of DLA is suspended after 28 days in hospital. The rationale for this is that payment would represent duplication of public funding to meet the same purpose. The issue on this appeal is whether the Hospitalisation Rule unlawfully discriminates against the Appellant, contrary to Article 14 of the European Convention on Human Rights ("ECHR"), read with Article 1 of the First Protocol ("A1P1"), which are among the Convention rights set out in Sch. 1 to the Human Rights Act 1998 ("HRA").

2. The Appellant in this case is MOC, who was born in 1961, and has complex medical conditions and disabilities. His sister, MG, has been appointed to act as his deputy by the Court of Protection. MOC has been awarded the highest rate of both the care component and the mobility component of DLA since 6 December 1993 and received similar predecessor benefits before that. On 29 June 2016 MOC was admitted to hospital, re-admitted on 23 July 2016 and has, since 26 August 2017, resided at a nursing home within a local hospital. In consequence the Hospitalisation Rule was applied to him and payment of both the care component and the mobility component of DLA were suspended after 28 days in hospital. Payment of the mobility component was reinstated on his transfer to the nursing home.

3. MOC's appeals to the First-tier Tribunal (Social Entitlement Chamber) ("FTT") and subsequently to the Upper Tribunal (Administrative Appeals Chamber) ("UT") were dismissed. He now appeals to this Court with the permission of the UT.

Factual background

4. MOC is a male who is now 60 years old. He has complex medical conditions and disabilities including cognitive, mental capacity and mental health issues, Down's Syndrome, deafness, blindness, dermatological issues, mobility issues, Hirschsprung Disease, double incontinence, dietary issues and severe learning disabilities.

5. On 6 April 1992 MOC started receiving DLA on account of his disability and, from 6 December 1993, at the highest rate of both components.

6. On 28 September 1996 MOC started residing with his sister MG in her home with around-the-clock care provided by MG and her family.

7. On 29 March 2010 the Court of Protection made an order appointing MG as MOC's welfare deputy under section 16 of the 2005 Act and authorised MG to make seven defined decisions on MOC's behalf if he is unable to make them himself when they need to be made. MG has also been MOC's appointee for benefit administration purposes for many years pursuant to the relevant social security regulations: see

regulation 33 of the Social Security (Claims and Payments) Regulations 1987 (SI 1987 No. 1968).

8. On 29 June 2016 MOC was admitted to hospital for an emergency operation and later discharged on 1 July 2016. He was re-admitted on 23 July 2016 and on 21 September 2016, was transferred to a specialist neuro-rehabilitation unit.

9. On 28 March 2017 MG first notified the Respondent by telephone of the hospitalisation periods. On 10 April 2017 the Respondent suspended MOC's DLA from 24 August 2016 to 11 April 2017 on the basis that he had been in hospital for over 28 days. On 30 April 2017, MG requested a Mandatory Reconsideration of this decision and, on 26 May 2017, the Respondent issued a Mandatory Reconsideration Notice maintaining the decision. On 15 June 2017 MG was served with a Notice of Overpayment requiring payment of £2,469 for the period 24 August 2016 to 21 March 2017 plus a £50 penalty. This was put on hold pending the outcome of the appeal.

10. On 26 August 2017, eleven months after transferring to the specialist unit, MOC was discharged to the nursing home, where he has resided since. At this point, the mobility component of DLA again became payable and was paid. The care component, however, is not payable under regulation 8 of the DLA Regulations.

Material legislation

DLA

11. DLA is a non-contributory, non-means-tested benefit which is intended to provide severely disabled people with a financial contribution towards the extra costs associated with their disability. It was introduced in 1992. It replaced two earlier benefits (Attendance Allowance and Mobility Allowance) with a single benefit with two components. Sections 71 to 76 of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act") contain the provisions governing DLA. Similar provisions were originally inserted into the Social Security Act 1975 (repealed in 1992) by the Disability Living Allowance and Disability Working Allowance Act 1991. DLA is a benefit for people under 66 with a care and mobility component. The test for entitlement is found in section 72 of the 1992 Act: persons satisfying the conditions of subsections 1(b) and 1(c) are entitled to the highest rate of the care component. Section 73 of the 1992 Act governs entitlement to the mobility component. DLA is being gradually replaced by Personal Independence Payment ("PIP") for people aged over 16 but under 66 years of age, under Part 4 of the Welfare Reform Ac 2012.

12. Section 73 of the Social Security Administration Act 1992 Act confers power on the Secretary of State to make regulations which may provide for adjusting benefits payable to a person undergoing medical or other treatment as an in-patient in a hospital. The relevant regulations are 8, 10, 12, 12A and 12B of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991 No. 2890) ("the DLA Regulations"). These regulations provide that, if someone aged over 18 is admitted to an NHS hospital, payment of DLA is suspended after 28 days. For convenience, this is referred to as the Hospitalisation Rule. Although this rule suspends payment, it does not remove the underlying entitlement to DLA.

13. On 9 May 2016, the Social Security (DLA and Personal Independence Payment) (Amendment) Regulations 2016 (SI 2016 No. 556) were laid before Parliament and came into force on 29 June 2016. Prior to this amendment, anyone under 16 would be paid DLA for the first 84 days of any hospitalisation but, following the decision of the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250, the regulations were amended so that anyone under 18 will continue to receive DLA payments while in hospital. The Hospitalisation Rule applies equally to those in receipt of PIP: see section 73(6) of the Social Security Administration Act 1992.

Mental Capacity Act 2005

14. By section 1(2) of the Mental Capacity Act 2005 ("the 2005 Act"), a person must be assumed to have capacity unless it is established that he lacks it. Section 2(1) provides that:

> "For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."

15. Section 2(2) provides that it does not matter whether the impairment or disturbance is permanent or temporary.

16. Section 3(1)(a)-(d) sets out the four circumstances in which a person is unable to make a decision for himself.

17. Under section 16 of the 2005 Act, the Court of Protection has powers to appoint a deputy if a person lacks capacity in relation to a matter or matters concerning that person's ("P's") personal welfare or property and affairs and in accordance with several principles, including the principle of P's best interests and the principle that the powers conferred should be limited. Guidance is provided in a Code of Practice issued under the 2005 Act.

18. Section 16(2) provides that the Court may either (a) by making an order, make a decision on behalf of P, or (b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the relevant matter. Subsection (1) makes it clear that section 16 applies if P lacks capacity in relation to a matter concerning either (a) P's personal welfare, or (b) P's property and affairs.

19. Section 19 of the 2005 Act relates to the appointment of deputies. In particular, subsection (6) provides that a deputy is to be treated as P's agent in relation to anything done or decided by him within the scope of his appointment.

Human Rights Act 1998

20. Section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. This is subject to exceptions which are not material for present purposes. The relevant Convention rights are set out in Sch. 1 and include Article 14 and A1P1.

21. Article 14 of the ECHR provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*." (Emphasis added)

22. A1P1 provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

It is well established that even non-contributory social security benefits can be "possessions" in this context. It was common ground before us that DLA falls within the ambit of A1P1.

Evidence for the Respondent

23. In the UT a witness statement was filed on behalf of the Respondent by Louise Phillips, the Head of Disability Living Allowance and Personal Independence Payment Policy. In her evidence she explains the origins of DLA in 1992: it is a non-contributory, non-means-tested tax-free benefit intended to provide severely disabled people with a financial contribution towards the extra costs associated with disability. It was never envisaged that DLA could possibly cover all care and mobility needs. It is only a contribution to the extra costs that a disabled person might incur. That said, it is not prescriptive and an individual may choose to spend the money in any way that they wish. She also explains that, when someone is admitted to a publicly funded hospital or care home, payment of some or all of their disability benefits is usually suspended on the basis that to continue paying would represent duplication of public funding to meet the same purposes. In its broadest sense, this prevention of duplication of funding stems back to principles endorsed and acted upon ever since the Beveridge Report of 1942, which led to the foundation of the welfare state after the Second World War and has been a fundamental principle of Government policy since.

24. Ms Phillips also explains that the 28-day Hospitalisation Rule originally only applied to the care component of DLA but was extended to include the mobility component in

1996, at a time when questions were being asked about the affordability of all social security benefits. The change, and the savings brought about, therefore represent a legitimate aim for Government and a proportionate response: to direct expenditure where it is most needed and ensure taxpayers' money is spent in the most effective way. This was explained in Parliament when the Government introduced the rule. She states, however, that the introduction of the Hospitalisation Rule was not only taken for financial reasons. It also reflected changes that were taking place in the patterns of hospital treatment: in particular the closure of long-stay hospitals and the discharge of patients into the community.

25. Ms Phillips explains that the NHS is expected to meet the basic needs of adults in hospital. It is not expected that a carer will meet those needs, although of course many members of a patient's family and others wish to help in various ways. The carer's role will generally be to provide support that any friend or relative would supply to an adult in hospital, for example by taking away laundry to be washed.

26. She also explains that, for sound administrative reasons, the entitlement conditions to DLA are widely drawn and work to ensure that the majority of severely disabled people are able to access the benefit on an equal and fair footing. The rules also ensure that, once entitlement has been established, administrative interventions are kept to a minimum and are only invoked where there has been, or is likely to be, a change in someone's circumstances for significant periods of time. This is one reason why the Hospitalisation Rule allows for the continued payment of both the care and mobility components of DLA for up to 28 days, so as to avoid the administrative cost of making frequent adjustments for short spells in hospital. Amending the rules to meet the needs of the very few people who might benefit would add an additional layer of administrative burdens at a time when the Government is seeking to simplify the rules.

The Decisions of the Tribunals

First-tier Tribunal

27. On 13 June 2017 MG submitted a first appeal form (SSCS1) to the FTT to appeal against the Respondent's decision to suspend DLA, relying on the Supreme Court's decision in *Mathieson*. On 21 June 2017, MG submitted a further appeal form (SSCS1) claiming discrimination against MOC on grounds of age and status as an 'uncapacitous [sic] person in hospital' contrary to Article 14 of the ECHR, read with Article 8 (the right to respect for private and family life) and A1P1.

28. The appeal was heard on 28 March 2018. MG acted in person as MOC's appointee. The Respondent did not attend but had filed a written response. The discrimination argument was not expanded on in the papers or during the hearing. On 28 March 2018 the FTT (FTT Judge Taylor) dismissed the appeal and, on 4 May 2018, provided a Statement of Reasons.

29. The FTT confirmed the Respondent's decision of 10 April 2017 to suspend DLA. In its Statement of Reasons dated 4 May 2018, it made findings of fact about MG's role in MOC's care at paras. 17-22, including that responsibility for the monitoring and care

of MOC lay clearly with the nursing staff, and not MG, but that care and supervision was provided by both staff at the hospital as well as MG and her family.

30. The FTT held that in the absence of more detailed argument, *Mathieson*, which concerned a child, did not mean that the relevant regulations, which had been amended to distinguish between those aged under or over 18 after that judgment, did not apply in MOC's case (para. 25). The FTT concluded that the wording of the relevant regulations was clear and clearly applied to MOC's situation (para. 28).

Upper Tribunal

31. After refusal of permission to appeal by the FTT, permission to appeal was granted by the UT. On 21 February 2020 the appeal was heard before UT Judge Ward. Both MG and the Respondent were represented by counsel. The appeal was dismissed by a decision dated 21 April 2020.

32. On the status issue, the Respondent had conceded that MOC had the status of a severely disabled adult in need of lengthy in-patient hospital treatment. The Judge rejected the argument that MOC had two further statuses as either an:

    (1) "incapacitous severely disabled adult in need of lengthy in-patient hospital treatment", or

    (2) "a severely disabled adult who lacks capacity to make decisions about care and medical treatment in need of lengthy in-patient treatment".

    The principal reason for rejecting this submission was that capacity was unsuitable as a key element in identifying a "status" for Article 14 and too "potentially evanescent" (para. 10). The Judge also observed that, if lack of capacity was a trigger for a finding that there had been a breach of a claimant's human rights, there was a risk of people moving in and out of being the subject of a breach on a "virtually daily basis" (para. 7).

33. The Judge then considered the issue of justification, in case his conclusion on the question of status was incorrect. The Judge evaluated a range of evidence from both parties (paras. 12-30).

34. At para. 22, the Judge said that he did not consider that it makes a material difference that a person is acting as a deputy. Whilst anyone acting as a deputy, or indeed under a welfare lasting power of attorney, would need to have an understanding of the patient's needs and wishes, it does not follow that it has to be acquired from a hands-on caring role. He said that there was no evidence permitting him to conclude that acting as a deputy carried with it responsibilities to provide care to the extent claimed in this case. The responsibilities of a deputy are cast in terms of taking decisions rather than the direct provision of care.

35. Turning to the issue of justification, the Judge directed himself to the "manifestly without reasonable foundation" test from *Humphreys v HMRC* [2012] UKSC 18; [2012] 1 WLR 1545. He concluded, at para. 31:

(1) that in the present case, there was no evidence that the NHS would require carer input in the care of a patient with severe learning disabilities to the extent claimed, or anything like it, including where a person has a deputy appointed;

(2) the rationale for the Hospitalisation Rule was the avoidance of double provision from public funds for the same contingency;

(3) in the present case, the needs of the patient are being met by the NHS and the Secretary of State is entitled to draw the line as she did; and

(4) even if MG and her family were required to provide care to the extent claimed, there is no indication that this is a frequent situation and that the case should be seen as a hard case falling on the wrong side of the "bright line".

36. The Judge also dismissed the arguments relating to the various comparators advanced by MOC and held at para. 32 that:

(1) the position is different from that of a severely disabled child because the evidence shows differing patterns of care for adults and children;

(2) the position is different from a severely disabled person not in receipt of lengthy hospital in-patient treatment, as that person is not receiving publicly funded care via the NHS; and

(3) the evidence failed to show that the consequences of MOC's lack of capacity made his situation different from a capacitous person in the same position, so *Thlimmenos* discrimination did not arise: cf *Thlimmenos v Greece* (2001) 31 EHRR 15, at para. 46. The *Thlimmenos* principle is that, just as like cases should be treated alike, so those cases which are not alike should not be treated in the same way.

37. The Judge considered the "factsheet", setting out the tasks which MG performed, which had been placed before the FTT and the UT: see para. 24. Contrary to the suggestion that was made before us, it cannot be said that the Judge did not take account of that evidence. He did, however, find that it was difficult to place heavy reliance upon it. Very importantly, at para. 25, he observed that the lawfulness of the Hospitalisation Rule cannot be determined by what may come to be done in an individual case, irrespective of what is objectively required. He also found, at para. 27 that the appointee had not succeeded via this material in demonstrating expenditure that could not be contained within the means-tested benefits remaining available to MOC, even allowing for the fact that they diminish over time.

38. Finally, the Judge concluded, at para. 34, that, while the FTT had erred in not engaging more fully with the human rights argument advanced by MG, this was not a material error and the matter had now been fully aired before the UT.

39. On 3 November 2020 UT Judge Ward granted permission to appeal to this Court. He considered that, as the appeal concerned the application of the law to a vulnerable group, it raised an important point of principle or practice.

Submissions for the Appellant

40. The Appellant was granted permission by UT Judge Ward to advance three grounds of appeal against the UT's decision.

41. In the original grounds, MOC adopted a formulation of the status that had been before the UT, that of "a severely disabled adult who lacks capacity to make decisions about care and medical treatment in need of lengthy in-patient hospital treatment".

42. There is before this Court an application to amend the grounds so as to read as follows:

    (1) Ground 1 (other status): UT Judge Ward erred in finding that "a severely disabled adult in need of lengthy in-patient hospital treatment who for the time being is being treated as unable to make decisions as to care or medical treatment" could not be a status for the purposes of Article 14;

    (2) Ground 2 (*Mathieson* analogy): he erred in finding that the case was not analogous to that of *Mathieson*; and

    (3) Ground 3 (relevant comparison to 16 and 17 year olds): he erred in finding that a relevant comparison could not be made between the situation of severely disabled adults in need of lengthy inpatient hospital treatment and 16- and 17-year olds, and in failing to consider whether any differential treatment on that basis was justified.

43. Ground 3 was abandoned before us. Ground 2 was not pursued with any vigour, if at all. The focus of the appeal was on Ground 1. I would grant the application to amend Ground 1, simply because I consider that the Appellant's representatives should have the opportunity to present the case as they think best in his interests. That said, as will become apparent later, the reformulation of the status relied upon has a consequence, which is that the way in which the evidence has been presented at an earlier stage of these proceedings could not take account of the way in which the case is now put.

44. On behalf of the Appellant Ms Amanda Weston QC, who did not appear below, submits that two main issues arise, one relating to MOC's status; and the second on the UT's conclusion on justification. Her fundamental submission is that the Judge erred on the status issue; and that this fundamental error then tainted his approach to the issue of justification.

45. Ms Weston submits that any approach to a capacity-based status must recognise the prejudice in the real world to a disabled person whose autonomy is so fundamentally compromised that a deputy has been appointed. The deputy must promote and protect his autonomy and identity; in particular by communicating with those delivering personal care and services at hospital.

46. She submits that lack of capacity should be treated as a protected status due to its practical effects rather than its legal definition. In concluding that MG's work was that of a family member or friend, the UT failed to recognise that in this case the law had recognised that the protective functions of a welfare deputy were necessary. Before us she submitted that the fact that the Court of Protection had thought fit to appoint a deputy to act as MOC's agent provides a powerful example of a situation where there

is a state-imposed representative to act for a person who cannot make relevant decisions for himself in relation to his care and treatment.

47. She submits that the Hospitalisation Rule disadvantages MOC because the suspension of the care component of DLA has an adverse impact on his deputy's ability to fulfil her functions on his behalf in relation to his care and treatment. If the person fulfilling the deputy role does not duplicate care provided by the NHS but acts to protect P's autonomy and agency, then the rationale of the Judge's justification at para. 31 based on non-duplication falls away. The role of the deputy, principally communicating effectively in the way P would wish, is not met by nursing care.

48. Finally, Ms Weston submits, if the Court agrees with her fundamental submissions, then the factual inquiry below was not directed to the key questions, especially concerning the deputy's role and functions; and the case should be remitted for relevant findings of fact to be made.

UN Convention on the Rights of Persons with Disabilities

49. In the written arguments on behalf of the Appellant, some reliance was placed on the 2006 UN Convention on the Rights of Persons with Disabilities, in particular Article 12. Article 12 relates to equal recognition of persons with disabilities before the law. For example, para. (2) provides that States parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. For my part, I cannot see anything that advances the case one way or the other in Article 12 of the Convention. In any event, as was acknowledged by the time of the hearing before this Court, the Appellant cannot directly rely on the Convention in domestic courts because that Convention has not been incorporated by Parliament into domestic law: see the effect of the decision of the Supreme Court in *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2021] 3 WLR 494, in particular at para. 61 (Lord Reed PSC).

Principles on Article 14

50. In *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428, at para. 37, Lord Reed PSC set out the general approach to be adopted in Article 14 cases as follows:

> "The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* (2010) 51 EHRR 13, para 61 ('*Carson'*). For the sake of clarity, it is worth breaking down that paragraph into four propositions:
>
> (1) 'The court has established in its case law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of article 14.'

> (2) 'Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.'
>
> (3) 'Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'
>
> (4) 'The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.'"

51. I will consider particular aspects of the analysis required by Article 14 in a little more detail.

Status

52. The question of what is a relevant status for the purposes of Article 14 has been the subject of a great deal of discussion in the House of Lords and the Supreme Court although it rarely troubles the European Court of Human Rights in practice. As Lord Wilson JSC said in *Mathieson*, at para. 22:

> "It is clear that, if the alleged discrimination falls within the scope of a Convention right, the Court of Human Rights is reluctant to conclude that nevertheless the applicant has no relevant status, with the result that the enquiry into discrimination cannot proceed."

53. That said, it is clear from recent decisions of the Supreme Court that the issue of "status" is not wholly redundant: see e.g. *R (A) v Criminal Injuries Compensation Authority* [2021] UKSC 27; [2021] 1 WLR 3746, at para. 61 (Lord Lloyd-Jones JSC). At para. 66, having cited the judgment of Lord Reed PSC in *SC*, at paras. 69-71, Lord Lloyd-Jones continued as follows:

> "Article 14 draws a distinction between relevant status and difference in treatment and the former cannot be defined solely by the latter. There must be a ground for the difference in treatment in terms of the characteristic which is something more than a mere description of the difference in treatment. … However, I agree with Lord Reed PSC that there is no requirement that the status should have legal or social

> significance for other purposes or in contexts other than the difference in treatment of which complaint is made."

Indirect discrimination

54. In principle Article 14 applies to both direct and indirect discrimination. An example of direct discrimination would be a rule which treats a person with disability differently from others. In the present case there is no suggestion that the Hospitalisation Rule discriminates directly against a person such as MOC. What is alleged is that it indirectly discriminates against him.

55. In *SC* Lord Reed explained that the concept of indirect discrimination in Article 14 has only gradually come to be recognised by the European Court of Human Rights. After referring to the relevant caselaw, including *DH v Czech Republic* (2007) 47 EHRR 3, which concerned indirect discrimination on the ground of ethnic origin, he said the following, at para. 53:

> "Following the approach laid down in these and other cases, it has to be shown by the claimant that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination, so as to give rise to a presumption of indirect discrimination. Once a *prima facie* case of indirect discrimination has been established, the burden shifts to the state to show that the indirect difference in treatment is not discriminatory. The state can discharge that burden by establishing that the difference in the impact of the measure in question is the result of objective factors unrelated to any discrimination on the ground alleged. This requires the state to demonstrate that the measure in question has an objective and reasonable justification: in other words, that it pursues a legitimate aim by proportionate means (see, in addition to the authorities already cited, the judgment of the Grand Chamber in *Biao v Denmark* (2015) 64 EHRR 1, paras. 91 and 114)."

Role of the appellate courts

56. It is also well established that appellate courts should be hesitant in interfering with the conclusion of a specialist Tribunal within the area of its expertise: see *AH (Sudan) v Secretary for the Home Department* [2007] UKHL 49; [2008] AC 678, at para. 30 (Baroness Hale of Richmond). This point was emphasised again in the social security field by Lord Wilson in *Mathieson*, at para. 45.

The test for justification

57. In the present case, UT Judge Ward referred to the approach adopted by the Supreme Court in *Humphreys*, namely whether a measure is "manifestly without reasonable foundation" in the context of welfare benefits. That was the correct approach at the time of the UT's decision in this case. Since then, however, the approach has been explained by the Supreme Court in *SC*, in particular at paras. 97-130.

58. The position was summarised by Andrews LJ in *R (Salvato) v Secretary of State for Work and Pensions* [2021] EWCA Civ 1482, at para. 34:

> "Lord Reed concluded that the 'manifestly without reasonable foundation; formulation still had a part to play, but that the approach which the Court had followed since *Humphreys* should be modified in order to reflect the nuanced nature of the judgment which is required. He stressed the importance of avoiding a mechanical approach based on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant. The courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security, but as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification."

59. This is similar to a point which I made in *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502; [2020] ELR 399, at para. 76:

> "… the crucial point is not so much whether the 'manifestly without reasonable foundation' test is the applicable test, it is rather how the conventional proportionality test, even if that is the applicable test, should be applied given that the context is one in which a public authority is required to allocate finite resources and to choose priorities when it comes to setting its budget; and is also a context in which the ground of discrimination is not one of the 'suspect' grounds. In this context, it seems to me that there is no material difference between application of the conventional proportionality test, giving appropriate weight and respect to the judgment of the executive or legislature, and the 'manifestly without reasonable foundation' test."

60. Although that case was decided before the recent judgment of the Supreme Court in *SC*, in my view, it is consistent with the spirit of that judgment.

Analysis of the present case

61. The first difficulty with this case is that the way in which it has been presented has changed at each level of the legal system. In particular, the fact-finding Tribunals were not presented with the legal arguments as they have been put before this Court. It is important in an Article 14 case, especially where what is alleged is indirect discrimination, to know precisely what is the alleged status that is relied on: this affects the nature of the evidence that must be adduced, not only by the claimant but also by the respondent.

62. In the present case the way in which the case has developed causes difficulty because relevant facts have not been found by those Tribunals. On behalf of the Appellant Ms Weston argues that this is a reason for remitting the case so that further findings of fact can be made. In my view, that is to put the cart before the horse. First, she needs to succeed in her appeal. If the only way she could succeed in her appeal is by requiring facts to be found which have not been found to date, that is not a reason for remitting the case. That is a reason for dismissing the appeal. It is only if this Court was satisfied that there has been an error of law by the Upper Tribunal that we would contemplate remitting the case.

63. The second difficulty which must be faced is that, for the appeal to succeed, the relevant legislation has to be successfully challenged as being unlawful under section 6 of the HRA. It is the rule itself which must be unlawful. If the rule is not unlawful, the Respondent was not only entitled to apply it to the facts of this case but had to do so as a matter of law. Accordingly, much of the evidence in this case, which concerns this particular Appellant and MG, is simply not to the point. Although any reasonable person would have sympathy and admiration for all that MG does for the Appellant, the only question for this Court is whether the legislation under challenge is unlawful. That question cannot turn on the facts of any individual case. It must be shown to be the case across the board.

Status

64. The first issue on this appeal is whether there is a relevant "status". Speaking for myself, I was attracted at one time during the hearing to the possibility that the relevant status is a severely disabled person who needs hospital treatment and has a deputy appointed by the Court of Protection. Ms Weston, however, was not prepared to accept that that was the relevant status.

65. I have reached the conclusion that the Judge cannot be criticised for reaching the conclusion which he did on the question of status. He was right to observe that the question of capacity as such is not a status. First, the scheme of the 2005 Act was designed to move away from a status-based approach to a functional approach, in other words to focus on particular decisions at a particular time. Secondly, there needs to be reasonable certainty: a person's capacity may change from time to time and may do so quickly. That is not a sound foundation for the "status" required by Article 14.

66. I should also observe that I can see no logical connection between the purpose of DLA and the role of a deputy appointed under the 2005 Act. There were times at the hearing

when it appeared to be suggested that what this case is really about is whether a deputy is entitled to claim expenses for performing her tasks as a deputy. Whether or not that would be a good idea as a matter of social and economic policy, in my view it has nothing to do with whether the rule under challenge is discriminatory.

67. Speaking for myself, I would be prepared to assume without deciding that the Appellant did have a relevant status but this is what the Judge did as well. I do not accept the criticism that the Judge's alleged error on the question of status went on to taint his approach to the question of justification.

Indirect discrimination

68. However, before one gets to the question of justification, there has to be discrimination. As I have said, this is not a case of alleged direct discrimination. So far as indirect discrimination is concerned, this had to be proved as a matter of fact on relevant evidence: see the summary of the legal principles in *SC*. As Lord Reed explained there, it has to be shown by the claimant that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination.

69. Such evidence was simply not placed before the Judge. The only evidence that was placed before him related only to this one case. The sort of data which has been placed before a court or tribunal in other cases was simply absent in this case. It follows that the Judge made a finding of fact which is fatal to this appeal. This Court does not usually entertain appeals on questions of fact. Furthermore, this is a second appeal and the criteria for a second appeal usually require there to be an important point of principle or practice. In any event, this issue was not in the grounds of appeal which were placed before the Judge and for which he granted permission to appeal to this Court.

Justification

70. I turn to the question of justification. In my view, the legislation under challenge does have an objective and reasonable basis so that it satisfies the principle of proportionality:

(1) This is a context which concerns public spending. Although the precise figures are not before this Court (the figure of £100 million was in evidence before the Judge), on any view the consequence of holding that the rule is unlawful would be to increase the amount of money which has to be spent on DLA.

(2) This is not a case of direct discrimination, which will often be more difficult to justify and may be impossible to justify in practice.

(3) The status, whatever it may be, is not one which has to date been recognised as being a "suspect ground" such as race, sex or disability as such.

(4) The rule has been in place for many decades and has been the subject of approval by Parliament using the affirmative resolution procedure.

(5) This is a context in which a "bright line" rule is appropriate and necessary. Ms Weston did not submit that there must be individual consideration of every case. Once that is accepted, it is very difficult to see how the rule could be changed. The fact that a particular case may fall on the wrong side of the line simply illustrates that there are sometimes hard cases but that does not mean that the rule itself is unjustified. As I have mentioned above, the evidence of Ms Phillips is that the DLA scheme is designed to operate in a general way, without the need for detailed consideration of the facts of an individual case. Once one departs from that principle, that would inevitably have consequences both for public administration and for the resources that would have to be allocated to the administration of the scheme.

Application to adduce fresh evidence

71. This Court will usually consider appeals on the basis of the evidence which was before the lower tribunals but it does have a discretion to admit fresh evidence under CPR 52.21(2). That discretion is to be exercised in accordance with the overriding objective but the Court will generally still look to the well-established principles in *Ladd v Marshall* [1954] 1 WLR 1489 as to the relevant factors:

(1) whether the evidence could have been obtained with reasonable diligence for use at trial;

(2) the evidence would probably have an important influence on the result of the case, although it need not be decisive; and

(3) the evidence must be credible, although it need not be incontrovertible.

72. Shortly before the hearing of this appeal, on 25 November 2021, an application was filed for permission to submit a witness statement on behalf of the Appellant by his sister MG. It was not in fact referred to at the hearing before us at all. In any event, I would refuse the application to adduce this fresh evidence on the basis that it does not satisfy the first two criteria in *Ladd v Marshall*. First, this evidence could have been adduced below. It does not contain anything which consists of evidence relating to subsequent developments. Secondly, it does not, with respect, bear on the issue before this Court on this appeal. As I have already mentioned, that issue concerns the lawfulness of the Hospitalisation Rule, which is a legislative measure of general application, and is not affected by the facts of this particular case.

Conclusion

73. For the reasons I have given I would dismiss this appeal. As I have mentioned, reasonable people can only have admiration for all that MG does on behalf of her brother, MOC, but the only issue in this case is whether the Hospitalisation Rule as such is unlawful. That issue cannot be affected by the facts of this particular case.

74. I would add this postscript. As I have explained above, this appeal cannot succeed because, on the evidence, the alleged disproportionate impact on a certain group was

not proved. This was never anything other than an indirect discrimination case, yet the argument based on indirect discrimination fails on its facts. In those circumstances it is difficult to see how the test for an appeal to this Court could be satisfied, let alone the test for a second appeal. With respect to the UT, this case provides a salutary reminder that, although it has the power to grant permission to appeal, it may be better to leave that question to this Court, which is very familiar with the type of case that will satisfy the second appeal test.

Lady Justice Andrews:

75. I agree with both judgments.

Lord Justice Peter Jackson:

76. I agree with Singh LJ. The appeal does not turn on the issue of status, but I particularly agree with what Judge Ward said at para. 22 (see para. 34 above). It is the function of a welfare deputy to make decisions on behalf of a person lacking capacity, not to provide care, or indeed to direct it. In reality, the devoted support provided to MOC by MG was provided as a family member and not as his welfare deputy. More fundamentally, I agree with Singh LJ (see para. 65) that there are good reasons of principle and practicality why decision-making capacity does not provide a sound foundation for an Article 14 status. In my view, status is likely to be found in the disability itself, and not in the separate matter of capacity, and that is the conclusion to be reached in the present case.