[2012] AACR 45

(SM v the Advocate General for Scotland [2010] CSOH 15)

CSOH (Lord Brodie)
16 February 2010

Human rights – lower age limit for entitlement to disability living allowance mobility component – whether discrimination contrary to Articles 8 and 14 of the Convention

Section 73 of the Social Security Contributions and Benefits Act 1992 (the Act) precludes a child under the age of three from entitlement to the mobility component of disability living allowance (DLA). In 2005, DLA had been claimed on behalf of a child suffering severe health problems as a result of a Prader-Willi-like syndrome. Although an award of the care component was made, a claim for the mobility component was refused because the child was aged under three. An appeal to an appeal tribunal was refused. An application for judicial review was made to the Court of Session on the basis that section 73 of the Act excluded a person under the age of three from entitlement to the mobility component irrespective of the degree of disability and the consequent needs. The applicant sought a declaration, under section 4 of the Human Rights Act 1998, that section 73, in so far as excluding a child under the age of three from the mobility component, was incompatible with Articles 8 and 14 of, and Article 1 of Protocol 1 to, the European Convention on Human Rights (ECHR) and discriminatory in such a way that contravenes Article 14.

Held, dismissing the petition, that:

1. for the purposes of section 7(4) of the Human Rights Act 1998, in proceedings by way of petition for judicial review in Scotland, the applicant shall be deemed to have title and interest (the equivalent of standing or *locus standi* in English law), to sue in relation to an unlawful act only if he is, or would be, a victim of that act. The approach taken by the European Court of Human Rights in *White v United Kingdom*, Application no 53134/99, 2001) was apposite. In that case, it was held that a person could be a victim from the time that he made clear his intention to apply for benefits to which, by reason of applicable criteria complained of, he was not entitled (paragraph 25);

2. Articles 8 and 14 of the ECHR were not engaged. If a difference of treatment amounted to discrimination as prohibited by Article 14 because it fell within the ambit of Article 8, it would be expected that there would be an adverse impact on the relationships which are the essence of family life or on the autonomy which is the essence of private life. No such adverse impact was evident in this case (*Moskal v Poland* (2001) EHRR 22 distinguished) (paragraph 28);

3. discrimination is not, of itself, prohibited by the ECHR. The difference in treatment of a three-year old child was capable of amounting to discrimination such as was prohibited by Article 14 if it could not be justified by the State. In relation to State justification, age was a "second category" and would not amount to discrimination if it could be justified on a utilitarian or rational basis. The dictum of Lord Hoffman in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 was cited with approval. Courts are well-placed to strike a balance as between competing rights but not well-placed to strike a balance as between competing policy considerations. Further, courts are ill-equipped to determine where the public interest lies and do not have a democratic mandate to do so. Thus discrimination in treatment between disabled children who are over three and those who are under three does not amount to discrimination if there is objective and reasonable justification. Such justification must be regarded as sufficient by the court unless it is manifestly without reasonable foundation. In this case, the policy adopted by the Secretary of State and reflected in section 73 was based on a number of considerations including the report of the Disability Living Allowance Advisory Board and it could not be said that the Government had failed to apply its mind to relevant factual material. There was nothing irrational or unfair in legislating by reference to rules of general application framed using objective criteria (paragraphs 35 and 36);

4. a difference in treatment falling within the ambit of a Convention right is required to be proportionate. To be disproportionate a difference in treatment had to be one which did not pursue a legitimate aim or which bore no reasonable relationship of proportionality between the means employed and the aim sought to be realised. The State was allowed a fairly wide margin of appreciation in assessing to what extent differences in otherwise similar situations justify a different treatment (*Stec v United Kingdom* (2005) 41 EHHR SE18) (paragraph 36);

5. the provisions of section 73 regarding the age of entitlement to the mobility component of DLA were consistent with the internal logic of the nature of the benefit, in the sense of its objectives. Defining the parameters of a social security benefit is a matter for Parliament. Where such parameters do not involve sensitive or suspect grounds, such as sex, race or colour, the role of the court in determining whether or not the statute is compatible

with the ECHR is to safeguard rights and does not extend to a review of what are essentially policy issues (paragraph 38).

OPINION OF THE COURT OF SESSION (OUTER HOUSE)

Mr Mungo Bovey QC and Mr Donald Davidson, instructed by Drummond Miller, appeared for the petitioner.

Mr Eugene Creally, instructed by the Office of the Solicitor to the Advocate General, appeared for the respondent.

Introduction

Procedural history

1. The petitioner is SM. He is married and has three children, two daughters and a son, J. The respondent is the Secretary of State for Work and Pensions, represented by the Advocate General for Scotland. The petitioner brings this application for judicial review of section 73 of the Social Security Contributions and Benefits Act 1992, as being incompatible with provisions of the European Convention on Human Rights, in his capacity as guardian of J who was born on 2 June 2004.

2. The respondent has lodged Answers to the petition. In addition to substantive pleas the respondent has tabled pleas to the competency (plea-in-law 1), to the absence of title and interest (plea-in-law 3) and to the relevancy (plea-in-law 4). The competency plea was discussed at a first hearing before Lord Woolman. At that stage the petitioner was insisting in two common law declarators, (a) and (b), as to the incompatibility of section 73 with the European Convention, in addition to two declarations, (c) and (d), in terms of section 4 of the Human Rights Act, the terms of which are reproduced later in this Opinion. Lord Woolman summarised the three arguments advanced on behalf of the respondent as follows:

> "First, a declaration of incompatibility cannot be made by way of a petition for judicial review, as it does not fall within the supervisory jurisdiction of the court. Secondly, a court cannot declare that primary UK legislation is incompatible with an international convention. Thirdly, a declaration of incompatibility cannot be made in a 'stand-alone' action. It can only be granted as an ancillary remedy in another action."

As appears from his Opinion of 25 June 2009, Lord Woolman upheld the second of these arguments and accordingly sustained the first plea-in-law for the respondent, but only to the extent of deleting the common law declarators. He rejected the first and third arguments and fixed a second hearing to deal with the substantive issue between the parties. The petition came before me for a second hearing "on the averments of the parties". No more specific order had been made in terms of Rule of Chapter 58.9 (2)(b)(ix). At that second hearing I heard the evidence of the following witnesses for the petitioner: the petitioner; Professor George Russell, retired consultant paediatrician; Dr Donna Corrigan, consultant paediatrician; Mr Derek Sinclair; and for the respondent: Dr Roger Thomas, Medical Policy Manager, Health and Benefits Division, Department for Work and Pensions; and Mr Christopher Booth, Policy Section Head, Disability and Carer Benefits Team, Department for Work and Pensions. Of these witnesses it appeared to me that Mr Sinclair was being tendered to speak to matters of law and, in particular,

social security law. He was no doubt well qualified to do so but I queried the relevance of such evidence and Mr Bovey QC, on behalf of the petitioner, did not persist in leading it. As to matters spoken to by the other witnesses, it did not appear to me that there was any material controversy (a point specifically confirmed by Mr Bovey) and therefore, while I would assess all the witnesses as fair, appropriately qualified to express opinions on questions asked of them, credible and reliable, there is no need for me to use that assessment in resolving issues of fact.

The application for disability living allowance and the refusal of the mobility component

3. J has suffered from severe health problems since he was born. He is significantly disabled and requires a high level of care as a result of these disabilities. On 18 April 2005 an application was made on behalf of J for the care and the mobility component of the disability living allowance (DLA) payable in terms of the Social Security Contributions and Benefits Act 1992. On 4 May 2005 the respondent made a restricted award in that, whereas the care component was awarded at the highest rate until 17 April 2007, there was no award of a mobility component. That restricted award was appealed to an appeal tribunal. At a (very brief) hearing held at Hamilton on 28 March 2006, the appeal tribunal refused the appeal and confirmed the award of the respondent. The tribunal's decision notice is number 6/2 of process. As was explained by an official of the respondent in her letter of 6 June 2006 the reason why no award of a mobility component was made and why the appeal was refused is that, in terms of section 73(1)(a) and (d) of the 1992 Act, the higher rate of the mobility component is for people aged three years and over (five years and over for any period prior to 9 April 2001) and who are so severely disabled that they satisfy the higher rate criteria, or aged five years and over where they satisfy the lower rate criteria. Thus, in terms of the statute the mobility component cannot be awarded to a child under the age of three years. The petitioner does not dispute that this is so, at least on an ordinary or natural reading of the statute. No other reading of the statute was suggested to me.

4. When asked in evidence for his reaction to the refusal of the appeal, the petitioner explained that he was "astonished to find when [he and his wife] asked for help for the first time it was refused". The petitioner's astonishment and his resolve to bring this application gets context when one considers the extent of J's disability and its consequences for the level of care that he has required from the time of his birth, as disclosed by the evidence of the petitioner and Dr Donna Corrigan, who is responsible for J's care. J has a Prader-Willi-like syndrome. By that is meant that he exhibits features which are similar to those with this syndrome but he has not been shown to have the chromosomal abnormality which is determinative of the condition. J has had respiratory and feeding problems from birth. He has required tube-feeding. He required administration of oxygen. He has had reduced muscle tone. One result of his reduced muscle tone is poor respiratory effort, hence the need for supplementary oxygen. He has a history of periods of acute illness and hospital admissions. The petitioner estimated that J had some 150 hospital appointments in his first year. A feature of children with Prader-Willi syndrome is that they have insatiable appetites leading to morbid obesity if their food intake is not rigorously controlled. J is, and at the time of the application for DLA was, large and heavy for his age. J has a learning disability. He is doubly incontinent. At his present age of five, he has no speech beyond perhaps 20 words. As a result of his oxygen dependency J must always have oxygen available, either contained in bottles or produced by a concentrator machine.

5. J has never been mobile. He was able to sit up at about ten months which falls within what is considered a normal rate of development for children but he has not materially progressed beyond this stage and in particular he has not achieved any of the other series of skills which are understood to be necessary if a child is to go on to walk independently. J will

never be able to walk and that is the assessment that would have been made by a clinician with the relevant skills who knew his history if the assessment was made once J had attained the age of 18 months. J is therefore wheelchair-bound. Particularly having regard to his need for oxygen, if he is to leave home J requires a significant amount of heavy equipment to be taken with him.

6. The lives of the petitioner and J's mother have become dominated by the requirements for J's care. They are clearly devoted parents. They have given up work and expended their savings in order to look after J. Transporting J has presented particular difficulty given his immobility, weight and the need to convey heavy equipment. The saloon car formerly owned by the petitioner was inadequate for the purpose. Since J reached the age of three this has been significantly mitigated by the acquisition of an adapted VW Transporter van under the "Motability Scheme". By letter dated 24 January 2007, 6/4 of process, the respondent advised of an award of disability living allowance for J with a care component payable from 18 April 2007 at the rate of £64.50 per week and a mobility component payable from 6 June 2007 (the Wednesday following J's third birthday) at the rate of £45.00 per week. Under the Motability Scheme, the petitioner has been able to lease the VW Transporter, using J's weekly mobility component to meet the lease payments. The petitioner said that he "could not fault" the Motability Scheme. Provision of the VW Transporter had given the family the freedom to take J out in a safe and properly maintained vehicle.

The application for judicial review

7. The application for judicial review proceeds upon the basis that section 73 of the 1992 Act, properly construed, excludes a person from a grant of the mobility component of DLA where that person is not over the age of three years, irrespective of that person's degree of disability and consequent needs. As the application is pled, it contends that the section is incompatible with Articles 8 of and Article 1 of Protocol 1 to the European Convention on Human Rights and that it is discriminatory in such a way that contravenes Article 14. The petitioner seeks the following orders:

> "(c) A declaration in terms of section 4 of the Human Rights Act 1998 that section 73 of the Social Security Contributions and Benefits Act 1992, insofar as it excludes from the mobility component of the disability living allowance solely by reason that he is not over the age of three years a person who is suffering from physical disablement such that he is either unable to walk or virtually unable to do so, is incompatible with article 8 of the European Convention on Human Rights, *et separatim* that article read in conjunction with article 14 thereof.
>
> (d) A declaration in terms of section 4 of the Human Rights Act 1998 that section 73 of the Social Security Contributions and Benefits Act 1992, insofar as it excludes from the mobility component of the disability living allowance solely by reason that he is not over the age of three years a person who is suffering from physical disablement such that he is either unable to walk or virtually unable to do so, is incompatible with article 1 of the First Protocol of the European Convention Human Rights, *et separatim* that article read in conjunction with article 14 thereof."

Disability living allowance

8. DLA was introduced by the Disability Living Allowance and Disability Working Allowance Act 1991, merging and replacing the former attendance and mobility allowances. The

1991 statute was consolidated in the Social Security Contributions and Benefits Act 1992 and the relevant provisions are now contained in sections 71 to 73 of that Act, as amended by the Welfare Reform and Pensions Act 1999, and in regulation 12 of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890). DLA consists of two components: the care component and the mobility component. The criteria for an award of these two components are different. Each is payable at different rates (three in relation to the care component, two in relation to the mobility component) depending upon the degree of disability suffered. In their discussion of the history of the mobility component of DLA, Wikeley, Ogus & Barendt note the criticism levelled at its predecessor, mobility allowance, that it was subject to age restrictions in that children under five and adults who only satisfied the mobility allowance criteria after age 65, were not eligible: *The Law of Social Security* (5th edition) page 684. This remained the case with DLA when it was first introduced. However, as was explained by the respondent's witness, Mr Booth, there was a campaign to reduce the age limit because of the additional mobility costs of certain children under the age of five. One of the supporters of the campaign was Mr Alistair Darling MP. Examples of papers putting forward the case for a reduction in the age limit are referred to by Mr Booth in his statement: *The Cost of Childhood Disability*, Joseph Rowntree Foundation, July 1998, 7/6 of process; and *Too Young to Count*, Disability Alliance, December 1994, 7/7 of process. In September 1998 the Secretary of State, through the Disability and Carer Benefits Policy Branch of the then Department of Social Security asked advice from the Disability Living Allowance Advisory Board (DLAAB) on three questions bearing on the issues as to whether and to what extent the age limit above which children might claim the mobility component of DLA should be reduced. DLAAB is a statutory body now established in terms of section 175 of the Social Security Administration Act 1992. It includes among its functions advising the Secretary of State on matters relating to DLA. The three questions were: (1) To describe in more detail the way in which children make the transition to independent walking (based on the physical aspects of walking), concentrating on the age at which a normal child will make this transition and describing the range of expectations in terms of the age at which this transition will be made; (2) To identify the age at which we would expect a child to be independently mobile without guidance and supervision outdoors, and describe the characteristics of children who fail to achieve this particular milestone (taking account of physical/mental problems; and (3) To describe the characteristics of children who will fail to make either of these transitions, describing in detail the prognosis for independent walking for those who fail to make the transition.

9. As Mr Bovey, who appeared for the petitioner, was to point out, the advice on these questions was sought within tight time constraints and apparently only the chairman and the two members of DLAAB with specialised expertise in childhood disability were involved in drafting the report which addressed the referred questions (*Childhood Disability and Disability Allowance*, 7/8 of process) but, as I have already indicated, I did not understand the petitioner's expert medical witnesses to dispute its accuracy and certainly when Mr Bovey came to address me his complaint was not that the paper was erroneous but rather that it had been misunderstood. I shall return to that criticism.

10. The campaign referred to by Mr Booth succeeded, to an extent, with the passing, on 11 November 1999 of the Welfare Reform and Pensions Act of that year. Section 67(3) of the 1999 Act amended section 73(1) by deleting "the age of 5" and substituting "the relevant age" and by inserting a new subsection (1A) which defined "the relevant age" for the purposes of paragraphs (a), (b) or (c) of subsection (1) as being the age of three. Thus, from the date of commencement of section 67 of the 1999 Act, which was 9 April 2001, a child who was over the age of three and suffering from physical disablement such that he was either unable to walk or

virtually unable to do so, became entitled to the mobility component of DLA. Equally, a child who was under the age of three and suffering from physical disablement such that he was either unable to walk or virtually unable to do so was not so entitled. As I again have already indicated, in the course of argument before me it was not suggested that what I have just stated is other than the correct or indeed the only possible construction of the amended section 73.

11. The bill which became the Welfare Reform and Pensions Act 1999 was introduced by the Government, in which Mr Alistair Darling had become Secretary of State for Social Security. A copy of his letter of 28 September 1999, addressed to Lorna Reith of the Disability Alliance, was lodged by the respondent as 7/1 of process and was referred to for a statement of the policy which had informed the retention of a lower age limit for an award of the mobility component of DLA and the fixing of that age limit at three years of age. In this letter the Secretary of State was responding to what he saw as the suggestion that the reason for not abolishing the age limit was one of cost and that there was no substantive evidence to back up the decision to set the limit at three years. He explained that on the question of age, the Government had made the decision to extend the higher rate mobility component based on the view of medical advisers. He referred to the DLAAB report and went on:

> "Both medical advisers and the DLAAB report agreed that, whilst age 2½ is the point at which most children are able to walk independently, many remain reliant on a pushchair until the age of four. Between those ages, development of walking ability will vary from child to child. The report noted that 80% of children who, for whatever reason, cannot walk at age 2½ can by the age of 4. In other words, if awards were made from age 2, entitlement would be invalidated by changes of circumstances within just a few months in the great majority of cases. Age 3 therefore seemed to be a generous compromise. It is important to realise that this decision was made in the context of the current criteria for the higher rate mobility component, which is primarily based on a person's inability or virtual inability to walk."

12. An explanation in similar terms was given to Mr Martin Caton MP by the then Parliamentary Under-Secretary of State at the Department for Work and Pensions (as the Department of Social Security had become) in her letter of 4 March 2004 (7/3 of process).

13. According to Mr Booth, an amendment had been tabled to the bill which became the 1999 Act during its passage through the House of Lords which would have had the result of giving rise to an entitlement to mobility component by reference to the need to carry heavy equipment for a disabled child. The amendment was however withdrawn in the face of a Government representation that this would involve additional cost in the order of £15 million and that provision to meet this particular problem was more appropriately met by the National Health Service.

Submissions of parties

Submissions for the petitioner

14. Mr Bovey explained that the petitioner's complaint was of discrimination in respect of J's enjoyment of his rights in terms of Article 8 of and Article 1 of Protocol 1 to the European Convention on Human Rights. A context was provided by three recent cases: *R (Carson)* v *Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173, *NT v SSWP* [2009] UKUT 37 (AAC), reported as R(DLA) 1/09, and *Stec* v *United Kingdom* (2005) 41

EHRR SE18. Mr Bovey advanced four propositions (informed, he explained, by the formulation adopted by Brooke LJ in *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271; [2003] 1 WLR 617 at 625, notwithstanding, as he also explained, the difficulties with that formulation which had been identified by Lord Hoffmann in *Carson supra* at [28] to [33]): (1) the rule that excludes a claimant from the higher mobility component of DLA solely by reason of his not being over the age of three years notwithstanding that he suffers from disablement such that he is unable to walk, or virtually unable to walk, falls within the scope of Article 8 of and Article 1 of Protocol 1 to the European Convention on Human Rights; (2) this rule imposes a difference of treatment as between a child who is under the age of three years albeit that his condition is the same as that of a child who is over the age of three years; (3) in the context of walking, children aged between two and three are in analogous circumstances to those who have reached the age of three; and (4) no objective or reasonable justification is available for this difference in treatment. Mr Bovey amplified proposition (4) by advancing four subordinate propositions: (a) the justification for the difference of treatment complained of appears to be the existence of a cohort of disabled late walkers as identified at paragraphs 4.1 and 4.2 of the DLAAB report; (b) the result of applying a lower age limit of three as an absolute bar to claiming the mobility component of the benefit is to exclude the cohort of whom it could be said at age two that they have no realistic prospects of walking in the foreseeable future; (c) such an absolute bar has a disproportionate effect on children such as J; and (d) alternative means exist for achieving the aim of government in relation to the cohort of disabled late walkers.

15. In developing proposition (1), Mr Bovey referred to the decision of the European Court of Human Rights in *Moskal* v *Poland*, Application no 10373/05, 15 September 2009, (2010) EHRR 22 as demonstrating that denial of a social security benefit falls within the scope of Article 8 and to the decision of the Court in *DH* v *The Czech Republic*, Application no 57325/00, 13 November 2007, (2010) 47 EHRR 3 for the principles to be applied in determining whether there has been discrimination for the purposes of Article 14. As far as proposition (2) was concerned, Mr Bovey submitted that a difference in treatment was apparent on the face of section 73. Turning to proposition (3), Mr Bovey submitted that the position of disabled children between the ages of two and three was analogous to that of children who had attained the age of three. He referred to the decisions of the Court of Human Rights in *Burden* v *UK* Application no 13378/05, 29 April 2008 and *Darby* v *Sweden*, Application no 11581/85, 23 October 1990 (1991) 13 EHRR 774. The onus fell on the State to justify the difference in treatment. As stated in his proposition (4), it was Mr Bovey's submission that there was no objective and reasonable justification which had been put forward by the respondent which supported the difference in treatment. The correspondence founded on by the respondent demonstrated that the government had misunderstood the terms of the DLAAB report which had been relied on when consideration was being given to reducing the age of a child in respect of whom a claim for the mobility component could be made. The correspondence, taken with the evidence of Mr Booth, indicated that the government had proceeded upon a mistaken view that most children do not walk independently until they have attained the age of 30 months. The rule adopted in the amended legislation excluded a cohort of disabled children who have no prospect of walking and in respect of whom that assessment could reliably be made once they attained the age of eighteen months. Mr Bovey accepted that any "bright line" rule will produce hard cases. Nevertheless, a measure required to be proportionate. Mr Bovey commended the test for proportionality found in *de Freitis* v *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] UKPC 30; [1999] 1 AC 69 at 80 which had been referred to, with emphasis on the need to balance the interests of society with those of individuals and groups, in *Huang* v *The Home Secretary* [2007] UKHL 11; [2007] 2 AC 167 at 187. He also referred to the decision of the

European Court of Human Rights in *Sahin* v *Germany* Application no 30943/96 [2003] 2 FLR 671. Mr Bovey accepted that the use of an age limit was rationally connected to the aim of avoiding short-term payments in respect of disabled children who are eventually able to walk, but adopting a cut-off as late as three years of age was more than was necessary. It was relevant to consider other methods of distinguishing between cases where an award should be made and those where it should not. Mr Bovey gave the instance of the criteria used to determine eligibility for the issue of a "blue badge" which allowed a car with a disabled passenger to park in an otherwise restricted area. These criteria included the need to use heavy equipment of the sort required by J. Mr Bovey submitted that it was misconceived to put forward by way of justification the consideration that a child between the age of two and three years could not be expected to walk safely in the sense that he might fall over, or independently in the sense that he would require supervision, or over long distances in the sense that he might require to use a pushchair when tired. What was in issue was being unable to walk or virtually unable to walk. As was demonstrated by a series of Commissioners' cases, a very high degree of disability was required before the statutory criteria for entitlement were met: R(M) 1/78, R(M) 1/91, CM/361/1992, and CM/964/1992.

16. Mr Bovey confirmed that the only remedy sought were declarations of incompatibility. The role of the court in relation to primary legislation under the Human Rights Act 1998 was as explained in *Wilson* v *First County Trust Ltd* (No 2) [2003] UKHL 40; [2004] 1 AC 816 at 842. An essential preliminary step was to arrive at a construction of, in this case, section 73(1) of the 1992 Act, having regard to the terms of section 3 of the Human Rights Act. Section 3(1) of the Human Rights Act, which required the court so far as possible to read and give effect to primary legislation in a way which was compatible with Convention rights, was the prime remedy. However, if this was not possible, the court required to make a declaration in terms of section 4(2), which is what he was inviting me to do. In the event of such declaration being made, it was open to a Minister of the Crown to amend the legislation in terms of section 10(2) of the 1998 Act and to make a remedial order in terms of Schedule 2. The respondent's plea of no title to sue should be repelled. Section 7(4) of the Human Rights Act provided that in proceedings by way of petition for judicial review in Scotland the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act. What was complained of here was the effect of the 1992 Act, in its amended terms. J fell to be regarded as a "victim". That term should be construed as it would in relation to an application to the European Court of Human Rights. A purpose of the enactment of the Human Rights Act was to avoid the necessity of victims, in terms of the Convention, seeking their remedy from the European Court of Human Rights rather than from a domestic court. The appeal against refusal of the application for a mobility component payable in respect of J had been refused some three months prior to J's second birthday. A care component was awarded and that has continued in payment. As was confirmed by the respondent's letter of 6 June 2006, the petitioner had enquired, on 4 May 2006, as to J's entitlement to the mobility component. By letter dated 24 January 2007, the petitioner's wife was advised that an award of the mobility component would be made to J with effect from his third birthday on 2 June 2007. This letter confirmed the petitioner's evidence that he had made a claim for mobility component in respect of J prior to J attaining the age of three years. The letter of 24 January 2007 included an award of a care component from 18 April 2007, that is a date prior to J attaining the age of three years. It was accordingly clear that had the relevant rule drawn the line at two years rather than three years, an award of mobility component would have been made to J prior to his third birthday (when an award was in fact made). He was therefore a victim in the sense of someone being directly adversely affected by the statutory rule in respect of which the complaint was made. It was nothing to the point that it might be said that the grant of the declarations sought would confer

no practical benefit on J. The Strasburg jurisprudence made clear that a declaration that a victim had suffered an infringement of his rights under the Convention might amount to appropriate just satisfaction.

Submissions for the respondent

17. On behalf of the respondent, Mr Creally submitted that there were four issues to be dealt with: First, did the application on behalf of J for higher rate mobility component under section 73 of the 1992 Act, as amended, fall within the ambit of either Article 8 of the Convention or of Article 1 of its First Protocol, for the purposes of Article 14? Second, if so, would section 73 of the 1992 Act, as interpreted according to section 3 of the Human Rights Act 1998, be incompatible with J's human rights? Third, if so, does section 3(1) of the 1998 Act operate to modify section 73 of the 1992 Act in such way as to make it compatible and, if not, what other remedies should be granted? And fourth, has Article 8 or Article 1 of the First Protocol been breached in the specific circumstances of this case, having regard to what is put forward by way of justification. Mr Creally reminded me that Article 14 of the Convention did not provide an independent right. It only came into play in the event of discrimination which came within the ambit of one of the other Articles to the Convention. What is prohibited is difference in treatment which does not pursue a legitimate aim or which bears no reasonable relationship of proportionality as between the means employed and the aim sought to be realised, the State being allowed a margin of appreciation in assessing to what extent differences in otherwise similar situations justify a different treatment: *Stec* v *UK supra*, paragraphs 18, 42 and 50 to 53. The expression "within the ambit" required to be applied in a flexible manner. Mr Creally accepted that that flexibility might give rise to quite a wide application of the prohibition on discrimination but the Strasburg jurisprudence did not support any link, however tenuous, to a substantive right as being sufficient. Rather, what was struck at by Article 14 was seriously and directly discriminatory conduct which impinged on the values underlying the substantive Articles of the Convention. This required a value judgment: *Wilson* v *First County Trust Ltd supra* at [62], *Secretary of State for Work and Pensions v M* [2006] UKHL 11; [2006] 2 AC 91, also reported as (CS) 4/06, [4] and [13] to [15]. Mr Creally accepted that the present complaint of discrimination came within the ambit of Article 1 of the First Protocol: *R (RJM)* v *Secretary of State for Work and Pensions* [2008] UKHL 63 at [16] and [28] to [34]. He did not accept that it fell within the ambit of Article 8. He referred to the discussion and summary of the relevant case law by Lord Walker of Gestingthorpe in *Secretary of State for Work and Pensions v M supra* at [62] to [84]. The factual context of the present case was the application of a formula for entitlement to payment of the higher rate of the mobility component of DLA. While it was of significance that payment of mobility component would add to the family's means, the mere fact that payment of the benefit would affect the family finances was not sufficient. Article 8 does not guarantee the full protection of family life. It is J's rights which are said to have been infringed. While he did not seek to underplay the substantial burden on J's parents consequent upon J's disabilities, there was no suggestion in the pleadings or the evidence that J's rights had in fact been interfered with by reason of him not being entitled to the mobility component between the ages of two and three. There was no suggestion that the rule complained of had in any way impaired the love, trust, mutual confidence and social intercourse which is of the essence of family life. The case of *NT v SSWP* (R(DLA) 1/09) had a very different factual basis from the present. It was concerned with the family life of an adult. An adult has an autonomous life. J does not have an autonomous life. He depends on the guidance and care of his parents. That is why they have received the care component from the time of J's birth. Article 8.1 was not engaged and therefore there was no need to put forward justification in respect of discrimination coming within its ambit.

18. It being accepted that Article 1 of the First Protocol was engaged and that age was a personal characteristic and a relevant criterion for the purposes of Article 14, in order to determine whether there had been prohibited discrimination, the approach to be followed was that set out in *Carson supra* at [2], [3], [28] and [64] and in *AL (Serbia)* v *Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 WLR 1434 at [24] to [31]. If there is difference in treatment which is relevant for the purposes of Article 14, it is then for the State to justify it. However what that involves will usually be a broad evaluation of competing private and public interests. It will rarely be necessary to make a detailed assessment of the credibility and cogency of factual evidence: *Carson supra* at [69]. The matter complained of falls to be assessed at the date when it arises and not when, for example, a statutory provision was enacted: *Wilson* v *First County Trust Ltd supra* at [62]. Mr Creally accepted that an otherwise discriminatory provision can be justified only if the provision has a legitimate aim and the way that it achieves that aim has a reasonably proportionate relationship between the means adopted and the aim. That said there can be no objection to a "bright line" rule as a matter of principle. Providing that the rule adopted is within the margin of appreciation and discretion allowed to the legislature it will not be found to be disproportionate on the ground that a different balance might have been struck or a less restrictive rule could have been devised: *James* v *UK* Application no 8795/79, (1986) 8 EHRR 123 at paragraph 68, *Blecic* v *Croatia*, European Court of Human Rights Application no 59532/00, 29 July 2004, 41 EHRR 13, *Evans* v *UK*, European Court of Human Rights Application no 6339/05, 7 March 2006, 43 EHRR 409, *Carson supra* at [91], *R (Wilson)* v *Wychavon District Council* [2007] EWCA Civ 52; [2007] QB 801; [2007] 2 WLR 798 at [59] to [62]. In considering the weight to be given to the availability of a less restrictive alternative, a distinction fell to be drawn between what Lord Hoffman in *Carson supra* at [16] referred to as "first category" cases where the personal characteristic used as a basis for drawing a distinction is one specifically referred to in Article 14 and the "second category" of case (such as the present) where another personal characteristic is employed as the criterion. There is a need for clear rules and the court must allow the State a margin of appreciation in the formulation of rules: *R (RJM) supra* at [48] to [57] and *Carson supra* at [86].

19. Against this background, Mr Creally submitted that the difference in treatment complained of here was justified. The Government was entitled to adopt the policy in issue and the court should be slow to substitute its view for that of the legislature. He submitted that the three-year threshold was not manifestly without reasonable justification. He accepted that the court must decide whether the means adopted, here the three-year rule, was not disproportionate having regard to its adverse affect. That involved a value judgment but the question of proportionality had to be looked at at the level of the collective and not at the individual level. Age was a second category criterion. It accordingly did not require particularly weighty reasons before its use could be justified. It had been accepted by Mr Bovey that the policy which the rule was intended to implement had a legitimate aim and that the use of an age limit was rationally related to that aim. Mr Creally submitted that, although not expressly stated in the correspondence relied on by the respondent, a corollary of excluding short-term claims is a policy that attempts to distinguish between children who are not disabled but who are late developers, and disabled children. The evidence was that the Secretary of State had relied on the DLAAB Report, the accuracy of which had been accepted by Dr Corrigan. The Secretary of State had not misunderstood its terms. There was, as Mr Booth had explained, a need for clear and easily applicable rules in this area. Mr Bovey had accepted that there will always be hard cases which fall on the wrong side of the line when a rule is applied. This was not a case where the justification of it was so weak that the court could conclude that there had been a breach of Article 14. Mr Creally did not suggest that this was a case where the provision complained about

could be read down in terms of section 3 of the Human Rights Act without crossing the line from construction to legislation.

20. Mr Creally insisted on his plea of no title to sue. Put simply, there was no evidence of an application having been made on J's behalf in relation to the period between his second and third birthday. The declaration of incompatibility could not be made on grounds which did not apply to the party seeking it: *Lancashire County Council* v *Taylor* [2005] EWCA Civ 284; [2005] 1 WLR 2668 at [37] *et seq*.

Discussion

The issues

21. Notwithstanding the precise terms of the declarations sought by the petitioner, Mr Bovey did not insist in the claim that section 73 of the Social Security Contributions and Benefits Act 1992, as amended, is incompatible with either Article 8 of the Convention or Article 1 of its First Protocol. He did, however, insist in the claim that the section is incompatible with these Articles when they are read with Article 14 and the prohibition of discrimination which is found in that Article. He recognised that the primary means provided by the Human Rights Act for giving effect to the rights and freedoms guaranteed under the Convention are to be found in section 3 of the Act; that section provides, as Mr Bovey put it, the "primary remedy" which is the obligation (on the courts and others) to read and give effect to primary and subordinate legislation in a way that is compatible with the Convention rights. It is because he maintained that it is not possible (or, at least, it was not suggested by Mr Bovey that it was possible) to read section 73 in a way that is compatible with Article 8 and Article 1 of the First Protocol, that the petitioner sought declarations in terms of section 4(2) of the Act: cf *Wilson* v *First County Trust Ltd supra* at [14].

22. For his part, Mr Creally, on behalf of the respondent, accepted that section 73 provides for a difference in treatment which is potentially discriminatory in a way that would offend against Article 14 and therefore, if it was not to amount to discrimination must be justified by the respondent. He did not accept that Article 8 is engaged but he does accept that a question of entitlement to a social security benefit engages Article 1 of the First Protocol which protects peaceful enjoyment of possessions, a concession which would seem to be well founded: *Carson supra* at [11] and [12], *R (RJM)* v *Secretary of State for Work and Pensions supra* at [16] and [28] to [34], *Stec* v *United Kingdom supra* at paragraphs 42 to 43 and 53, *Moskal* v *Poland supra*. As it is put in *Stec* at paragraph 53:

> " … Article 1 of Protocol No. 1 does not include a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention …"

23. However, while making that concession, Mr Creally disputed the petitioner's title and interest to make this application. Given the nature of the argument, it is convenient as well as logical to consider this point before going further.

Title and interest

24. The issue of title and interest was not argued before Lord Woolman, perhaps on the view that it was integral with the substantive issues, perhaps on the view that it depended on the resolution of matters of fact. Certainly, the submission for the respondent, when it was made by Mr Creally, related entirely to matters of fact: there was no evidence, he said, of an application having been made on J's behalf in relation to the period between his second and third birthday. Agreeing with Mr Bovey, I do not consider that to be correct and I will therefore repel the respondent's third plea-in-law. I would see the issue as being resolved in the petitioner's favour by the terms of the letter of 24 January 2007 from an officer of the respondent to the petitioner's wife who is addressed as the person who was "dealing with the claim for [J]". This letter is 6/4 of process. It contains a reference number specific to the claim and has a heading "Disability Living Allowance". It includes the information: "We are pleased to tell you are entitled to Disability Living Allowance". It continues to advise that an award is made for "help with personal care" (the care component) "from 18/04/2007 to 01/06/2007". Under "help with getting around" (the mobility component) it states: "You can only claim money for help with getting around for children who are 3 and over" and then advises that an award is made "from 02/06/2007 to 01/06/2012" which includes "help with personal care" and "help with getting around". The clear inferences from that letter, consistent with the evidence of the petitioner, were that the respondent had received a claim in respect of J for at least part of the year between his second and third birthdays or at least that the respondent proceeded on the basis that such claim had been made in respect of that period (due to having received the initial claim) and that but for the rule that "You can only claim money for help with getting around for children who are 3 and over" an award which included a mobility component would have been made from 18 April 2007, if not before. The incidence of the rule therefore has had an adverse affect on J in the sense that, were the rule to have been in terms that the petitioner contends would have been proportionate, he would have been awarded mobility component earlier than in fact occurred. I consider that sufficient to answer Mr Creally's point but, as Mr Bovey submitted, there was also the evidence of a challenge, made on behalf of J, to the effect of the rule, provided by the petitioner's wife having appealed against the earlier refusal of mobility component, as demonstrated by the appeal tribunal's decision of 28 March 2006, 6/2 of process, and her having looked for confirmation of the effect of the statutory rule, as demonstrated by the respondent's officer's letter of 6 June 2006, 6/1 of process.

25. As a matter of generality, I can see that questions of title and interest may give rise to difficulty in relation to applications for a declaration of incompatibility in terms of section 4 of the Human Rights Act. They will arise all the more sharply where, as here, the only remedy sought is a declaration. It is the difficulty, in relation to interest, that Lord Fraser, in *IRC* v *National Federation of Self-Employed and Small Businesses Ltd* [1981] UKHL 2; [1982] AC 617 at 646, identified as distinguishing "between the desire of the busybody to interfere in other people's affairs and the interest of the person affected by or having a reasonable concern with the matter to which the application relates". In *Lancashire County Council v Taylor supra* at 2679, in a passage to which I was referred by Mr Creally, Lord Woolf acknowledged that in the field of human rights, as in public law generally, the courts are not attracted to arguments based on a lack of standing (I take the issue of standing, or *locus standi*, to comprehend what in Scotland would be referred to as title and interest: Clyde and Edwards, *Judicial Review* at paragraph 10.01 *et seq*) if there is merit in the argument, but, at the same time, the court is not concerned with purely hypothetical or academic questions. As was observed in *R (Rusbridger) v Attorney General* [2003] UKHL 38; [2004] 1 AC 357: "It is not the function of the courts to keep the statute book up to date. That important responsibility lies with Parliament and the executive." As Mr Bovey submitted, and as appears from *Taylor* and *Rusbridger*, the starting point is section 7 of the Human Rights Act and the notion of "victim" as that expression is used

in Article 34 of the Convention. Section 7(4) of the Human Rights Act provides that in proceedings by way of petition for judicial review in Scotland the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act. A person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34: 1998 Act section 7(7). I agree with Mr Bovey that this provision, taken with section 2 of the Act, means that in identifying who is a victim for the purposes of determining title and interest in an application for judicial review in Scotland, the court should follow the approach taken by the European Court of Human Rights in determining who is a victim for the purposes of receipt of an application to that Court. The decision of the European Court of Human Rights as to admissibility in *White* v *United Kingdom*, Application no 53134/99, 7 June 2001 is therefore apposite. In that case, following its previous decision in *Cornwell* v *United Kingdom*, Application no 36578/97, 11 May 1999, the Court held that the applicant could be held to be a victim (in respect that, as a man, he could not claim widows' benefits) from the time that he made clear his intention to claim the benefits to which, by reason of applicable criteria that were complained of, he was not entitled. This, submitted Mr Bovey, was a stronger case for the petitioner than *White* had been for the applicant whose application was held to be admissible. I agree.

The engagement of Article 8

26. I turn now to the issue of the engagement of Article 8.

27. In *Secretary of State for Work and Pensions v M supra* M, the divorced mother of two children who spent the greater part of each week with their father, M's former husband, appealed against the assessment of her child support contributions. Pursuant to the Child Support Act 1991 M, as the non-resident parent, was required to contribute to the costs of maintaining the children incurred by their father as the parent with care. M lived with a partner of the same sex, and they jointly owned a house with a mortgage for which they were both responsible. In calculating the amount of her child support contribution, in terms of the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 (SI 1992/1815) made under the 1991 Act, her partner's contribution to their joint housing costs was treated as reducing M's deductible housing costs whereas if she had been living with a man, whether married to him or not, his contribution to the mortgage would have been treated as part of hers so that her weekly child support payment would have been smaller. M argued, *inter alia*, that the assessment of contributions engaged her rights to respect for her private and family life and her home under Article 8 and that she had suffered discrimination in her enjoyment of those rights contrary to Article 14 of the Convention. The child support appeal tribunal ruled that M's assessment was to be calculated on the basis that her same-sex partner was a member of her family and her partner for the purpose of the Regulations. The child support appeal tribunal upheld her complaint. The Child Support Commissioner and the Court of Appeal dismissed appeals by the Secretary of State. On a further appeal to the House of Lords, it was held that the application of the Regulations to M did not come within the ambit of Article 14 read with Article 8. Having discussed "ambit" generally at [56] to [61] of the judgment, at [62] to [84] Lord Walker of Gestingthorpe reviewed the case law of the European Court of Human Rights on the scope of Article 8 and, at [85] to [88] drew his conclusions on the issue as to whether the Regulations came within the ambit of the guarantee of respect for private and family life. I do not pretend to have found within these passages a sure touchstone by which to identify the wide and ill-defined ambit of Article 8 (at [4] Lord Bingham explains that there is no sharp line of demarcation), but some points emerge reasonably clearly from Lord Walker's consideration of the material. There must, as Mr Creally submitted, be more than a merely tenuous link between the difference in

treatment and the substantive right in question, here respect for private and family life and home. The link has to be direct. The right is to respect and therefore infringement of the right involves a failure to accord respect to, in the case of private life, the principles of personal autonomy and self-determination, and in the case of family life, to relationships as between family members. In *M* the claim failed, in Lord Walker's opinion, because nothing in the impugned Regulations impacted on the relationship between M and her children. There had been no improper intrusion on her private life. Lord Mance agreed with Lord Walker. The other members of the majority, Lord Bingham and Lord Nicholls, were to similar effect. In rejecting the proposition that the incidence of the Regulations came within the ambit of M's Article 8 rights, Lord Bingham observed:

> "No doubt Ms M has less money to spend than if she were required to contribute less … But this does not impair the love, trust, confidence, mutual dependence and unconstrained social intercourse which are the essence of family life, nor does it invade the sphere of personal and sexual autonomy which are the essence of private life."

28. Thus, and this was Mr Creally's approach, if a difference in treatment is to amount to discrimination as prohibited by Article 14 because it falls within the ambit of Article 8 one would expect to find an adverse impact of whatever is complained of on the relationships which are of the essence of family life or the personal or sexual autonomy which are of the essence of private life. Agreeing with Mr Creally, I can find no such adverse impact here. Although it may appear to be a stark way to put it, I consider that Mr Creally was correct to say, in the circumstances of this case, that J does not have personal autonomy which can be infringed. He is entirely dependant on his parents. Mr Bovey relied on *Moskal* v *Poland supra*. There, the Fourth Section of the European Court of Human Rights declared as admissible the applicant's complaint against a decision divesting her of an early-retirement or "EWK" pension. The applicant had been awarded the pension which was granted to enable parents to stop working in order to look after their seriously sick children. On the faith of the award, the applicant resigned from her job. It was her submission that by accepting the pension she was taken as having waived other social security benefits. That was disputed by the respondent government as a matter of fact but there was no question but that the pension had been paid for a period of time during which it had provided the family's main source of income before being withdrawn. In these circumstances, the Court accepted that divesting the applicant of the EWK pension must constitute an interference with the applicant's rights under Article 8, given the adverse impact on the quality and enjoyment of the applicant's family life and the way in which it had been organised in reliance on the applicant receiving the pension. In the opinion of the Court the application was therefore not manifestly ill-founded within the meaning of Article 35.3 of the Convention. With all due respect, I can entirely understand this decision but I see the facts in *Moskal* as being very different from those in the present case. Here what is under challenge is a rule which forms a threshold requirement for admission to a social security benefit. The complaint is that the applicant is suffering discrimination by not being awarded a benefit in order to augment the family's means. In *Moskal* what was complained about was the disruption of family life consequent on the withdrawal of a pension on receipt of which the applicant had been encouraged significantly to reorganise her whole financial circumstances. I can clearly see that as an example of failure to respect family life in a way that the discrimination complained of here is simply not. I do not consider that Article 8 is engaged in the present case.

Article 1 of the First Protocol read with Article 14

29. I turn now to the case insofar as based on Article 1 of the First Protocol, as read with Article 14. My task is made the easier by Mr Bovey and Mr Creally having identified a certain amount of common ground between their respective positions. It was agreed that the rule provided by section 73 of the Social Security Contributions and Benefits Act 1992 imposed a difference in treatment by reference to a status (age) which was a relevant ground for the purposes of Article 14. It was agreed that the difference in treatment related to a matter (entitlement to a social security benefit) which fell within the ambit of rights and freedoms set forth in the European Convention, namely the right to peaceful enjoyment of ones possessions as guaranteed by Article 1 of the First Protocol. It was agreed that therefore the difference in treatment was capable of amounting to discrimination such as was prohibited by Article 14 and that it should be held to amount to discrimination if not justified by the State. Again, there was agreement as to how the court should approach the question as to whether the State had justified difference in treatment in the present case: age was a "second category" ground and therefore difference in treatment would not amount to Article 14 discrimination if it could be justified on a utilitarian or rational basis.

30. In order to give some content to this common position as between counsel on what was the applicable law (including what is the significance of the "second category") it is convenient to mention some of things said in the authorities to which I was referred and, in particular, to the explanations given by Lords Hoffmann and Walker in *Carson*.

31. Discrimination is not, of itself, prohibited by the European Convention as thus far ratified by the United Kingdom. In *Secretary of State for Work and Pensions v M supra* at [11], Lord Nicholls notes that while Article 1 of the unratified Twelfth Protocol prohibits discrimination in the enjoyment of any right set forth by law, this general prohibition contrasts with what is found in Article 14 of the Convention. The effect of Article 14 is narrower. As appears from a literal reading of the text, Article 14 prohibits discrimination but only in relation to a restricted list of matters and on a restricted list of grounds. In addition, the Strasbourg jurisprudence has both extended (in respect of matters) and limited (in respect of grounds) what might otherwise have been the literal meaning of the article. By extension I have in mind that there may be Article 14 discrimination not simply in respect of the enjoyment of a substantive right but also in respect of a matter which falls within the ambit of the right, and by limitation I have in mind the conceded scope for justifying a difference in treatment. This is not something that appears *ex facie* the text of the Article. However, as interpreted by the European Court of Human Rights, Article 14 discrimination does not mean simply treating differently in respect of certain matters on certain grounds. Rather it means treating differently, in respect of certain matters on certain grounds, without an objective and reasonable justification, persons in relevantly similar situations: *DH and Others* v *The Czech Republic*, Application no 57325/00, 13 November 2007.

32. Now, discrimination will always be on some ground, and by reference to that ground it will always be possible to draw a distinction as between the more favourably treated group and the less favourably treated group: *Carson supra* Lord Walker at [50]. However, the prohibition against Article 14 discrimination reflects the principle that distinctions based on status grounds are either inevitably, or at least potentially, distinctions without real differences. As Lord Hoffmann puts it in *Carson*, discrimination means a failure to treat like cases alike; there is no discrimination when a distinction is made between cases that are indeed relevantly different. Determining whether there is a real or relevant difference requires a judgment to be made. Making that judgment is partly a matter of values and partly a matter of rationality. Whether values or rationality should predominate in this judgment-making process (and therefore the scope for justification) will depend on the ground of distinction. Certain characteristics – Lord

Hoffmann instances race, caste, noble birth, membership of a political party and gender – will seldom, if ever, be acceptable grounds for differences in treatment. In *Carson supra* at [55] to [58] Lord Walker equates them to the "suspect" grounds identified in the jurisprudence of the United States Supreme Court: *San Antonio School District v Rodriguez* (1973) 411 US 1 at 28. Lord Hoffmann groups these suspect grounds together into what he describes as "the first category". Difference in treatment based on a first category ground, he goes on, will seldom, if ever, be capable of justification simply on the basis of utilitarian or rational considerations. Thus, while it may be rational to prefer to employ men rather than women because more women than men give up employment to look after children, for the State to attempt to justify such a practice by reference to the costs associated with losing employees who apply themselves to child-care, would offend against the important value that everyone is entitled to be treated as an individual and not a statistical unit.

33. The focus with Lord Hoffmann's first category is on values and on rights. Courts are in the business of protecting rights or, as Lord Hoffmann puts it more elegantly, courts are the guardians of the right of the individual to equal respect. Scrutiny of instances of difference in treatment on first category grounds therefore falls within the particular competence of the courts and that scrutiny will be intensive: *Ghaidan* v *Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, Lord Nicholls of Birkenhead at [19]; *Carson supra*, Lord Walker at [57].

34. It is different with Lord Hoffmann's "second category". (He gives the examples of the grounds of ability, education, wealth, occupation.) He explains in *Carson* that distinctions made by reference to second category grounds usually depend upon considerations of the general public interest. In making a decision on what is or is not in the public interest, rationality rather than values predominate. Difference in treatment can accordingly be justified by rational or utilitarian considerations. Whereas courts, by their nature, are particularly well placed to strike a balance as between competing rights, they are not well placed to strike a balance as between competing policy considerations. Courts are ill equipped to determine where the general public interest lies and do not have a democratic mandate to do so. Identification of the public interest is a matter for the elected branches of government and for that reason a wide margin of appreciation or discretionary area of judgment is usually allowed in relation to matters of social or economic policy: eg *R (Wilson)* v *Wychavon District Council supra* 798 at [45] *et seq*; *R (RJM)* v *Secretary of State for Work and Pensions supra* at [54]. Lord Walker makes the same point in *Carson* as Lord Hoffmann, by quoting from the majority opinion of the United States Supreme Court in *Massachusetts Board of Retirement* v *Murgia* (1976) 427 US 307 (*Carson supra* at [56]) where, in the context of a challenge to a mandatory retirement age for uniformed police officers, the Court held that in the circumstances of the case the appropriate test for equal protection of the laws was not the strict scrutiny to be applied to a suspect ground. The majority opinion observed, at 314:

> "This inquiry employs a relatively relaxed standard reflecting the court's awareness that the drawing of lines which create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary."

One of the two claimants whose cases were considered in *Carson* was a recipient of income support which was paid at a lower rate because she was under the age of 25. She argued that this violated her rights under, *inter alia*, Article 14 and Article 1 of the First Protocol. The Secretary of State had accepted that the appropriateness of the demarcation was a subject on which views might reasonably differ but articulated five policy considerations as justifying it. Commenting on

the appropriateness of a detailed debate on these considerations, Wilson J, at first instance, said that he "sensed the incongruity that such a debate was proceeding in court instead of Parliament". While accepting that the onus was on the Secretary of State to establish justification for the age limit imposed by the relevant regulations, Wilson J rejected the claimant's complaint because the material put before the court demonstrated that the demarcation was not "manifestly without reasonable foundation". That approach, reflecting a disinclination to engage in anything like an intensive scrutiny of the policy considerations which had informed the formulation of the rules to determine entitlement to a social security benefit, was specifically approved, both by Laws LJ in the Court of Appeal and by Lord Walker in the House of Lords. In Lord Walker's opinion "Demarcation lines of this sort have to be reasonably bright lines, and the task of drawing them is (as the United States Supreme Court said in *Massachusetts Board of Retirement* v *Murgia* …) 'peculiarly a legislative task and an unavoidable one'": *Carson supra* at [91].

35. Thus, because the ground of distinction here is age, a second category ground, the difference in treatment as between those disabled children who are three or over and those who are younger than that does not amount to Article 14 discrimination as long as the respondent, as representing the State, can put forward an objective and reasonable justification. Where a justification is put forward, the court must regard it as sufficient unless it is manifestly without reasonable foundation. It was Mr Bovey's submission that no objective and reasonable justification had been put forward here. Adopting the very broad sort of evaluation referred to by Lord Walker in *Carson supra* at [69], and recognising, as the authorities require me to recognise, that this is primarily a decision for Parliament, I simply cannot agree. Mr Bovey had to accept that where entitlement to a benefit is made to depend on the absence of a learned physical ability (here the ability to walk) it is not only rational but inevitable that a lower age limit will have to be fixed in that infants only acquire such abilities as they get older. Moreover, Mr Bovey further accepted that the use of a lower age limit was rationally connected to the aim of avoiding short-term payments in respect of disabled children who are eventually able to walk and that any "bright line" rule will produce hard cases. As I understood it, it was these considerations that led him to propose the age of two as the rational lower cut-off for entitlement to DLA. That of course was to demonstrate what I did not take Mr Bovey to dispute, which is that there is nothing irrational and indeed much that is rational and fair in legislating by reference to rules of general application framed using objective criteria ("reasonably bright lines"). Given that the government had instructed and then apparently relied on the DLAAB report it could not be said that the legislature had failed to apply its collective mind to relevant factual material in determining how the 1992 Act should be amended. It was not disputed that the DLAAB was other than the appropriate source of advice. The petitioner's experts gave evidence to the effect that a lower age than three was justifiable because by then the great majority of children will have achieved the very modest level of walking ability which takes a person beyond the criterion of "unable to walk, or virtually unable to walk" and that it is possible to identify, with a high degree of probability, those, such as J, who will never be able to walk because of their disability, but I did not understand Professor Russell or Dr Corrigan to dispute the accuracy of what appeared in the DLAAB report. Dr Corrigan accepted as much in terms. This led Mr Bovey to argue, by reference to the correspondence founded on by the respondent, that the government had manifestly misunderstood the terms of the DLAAB report. Again, I disagree. It comes to a comparison of the texts. I simply did not see that the terms of the Secretary of State's letter indicated that he had misunderstood the DLAAB report.

36. Mr Bovey finally argued that the legislative decision to opt for three as the lower age for entitlement to DLA was to impose a disproportionate effect on children such as J who had no prospect of ever walking (while accepting that fixing the lower age limit at two years would not

have been disproportionate) and that alternative means of distinguishing those such as J from the cohort of later walkers exist. It was not clear to me from Mr Bovey's submissions just how I was to assess whether that was so. That the rules could be reformulated, perhaps bringing them closer to the "blue badge" criteria (the details of which were not explored), took me no distance. What Mr Bovey offered was a reference to *de Freitas* v *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing supra* where the Privy Council, drawing on South African, Canadian and Zimbabwean authority, identified the questions generally to be asked in deciding whether a measure is proportionate as:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

In *Huang* v *The Home Secretary supra*, Lord Bingham, speaking for a unanimous appellate committee, explained that this formulation has been widely cited and applied and I take that to be so. However, the "no more than is necessary" criterion, suggestive of a quite intensive review by the court, seems rather better suited to what was in issue in *de Freitas* than to a second category case such as the present. (In *de Freitas* what was challenged was a statutory prohibition of all civil servants, irrespective of their grade or function, taking part in any political controversy, in contravention of constitutionally guaranteed rights of freedom of expression and peaceful assembly.) Moreover, the other authority to which Mr Bovey drew my attention in this context, *Sahin* v *Germany supra*, is not supportive of an approach requiring intensive scrutiny of the proportionality of a statutory measure, irrespective of the nature of the right adversely impacted upon and irrespective of the reasons for the adverse impact. Paragraph 56 of the judgment of the European Court of Human Rights in *Sahin* contains the generally accepted definition of Article 14 discrimination and then continues: "… the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment." In the following paragraph the Court explains that according to its case law "very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention". That passage points to the importance of the ground of distinction said to be discriminatory, as reflected in Lord Hoffmann's first and second categories. Some grounds for difference in treatment will require very weighty reasons to justify them, others will not. It appeared to me that Mr Creally's approach was supported by the case law, including *Sahin* and *Stec*, and it is with that approach that I agree. Mr Creally did not dispute that a difference in treatment falling within the ambit of a Convention right required to be proportionate but to be disproportionate a difference in treatment had to be one which did not pursue a legitimate aim or which bore no reasonable relationship of proportionality as between the means employed and the aim sought to be realised, the State being allowed a fairly wide margin of appreciation in assessing to what extent differences in otherwise similar situations justify a different treatment. As it was put by the European Court of Human Rights in *Stec* v *United K supra* at paragraph 52:

> "… a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."

37. In applying my understanding of the correct approach I must remind myself that the onus is on the State to establish that a difference in treatment is proportionate or at least not disproportionate. It is clear from the evidence that between the ages of two and three (which is the period that Mr Bovey invited me to consider) J has required very considerable assistance in getting around. During this period he has not been entitled to receive the mobility component of DLA although a similarly disabled child who had attained the age of three would be entitled to the benefit. If entitlement depended on degree of need, it might well be that J would have qualified before reaching his third birthday but it does not follow from that that a rule fixing the threshold age for entitlement to a mobility component at three is disproportionate. As the authors of Reed and Murdoch *A Guide to Human Rights Law in Scotland* (2nd edition) observe at paragraph 3.69:

> "proportionality does not require the effects of a general measure to be precisely tailored to each individual case affected."

Mr Bovey did not argue that a bright line rule such as the three-year cut-off was by its nature disproportionate. He accepted that there could be such rules and that this particular rule pursued a legitimate aim. His complaint was simply in relation to the point at which the bright line was drawn. No doubt there may be cases where a bright line is drawn so far away from the point about which it is necessary to be drawn that the resulting rule can be said to be disproportionate. This is not such a case.

Conclusion

38. Here the internal logic of the nature of the benefit, in the sense of its objectives, requires that there be a lower age limit for entitlement to the mobility component of DLA. Certainly, Mr Bovey, on behalf of the petitioner did not seek to argue the contrary. No doubt that lower age could rationally be fixed at a point less than three years and perhaps as young as two, as Mr Bovey suggested. However, defining the parameters of a social security benefit by, for example, fixing age limits, is a matter for Parliament and where the criteria adopted to identify these parameters in the relevant statute do not involve sensitive or "suspect" grounds such as sex, race or colour, the court, in determining whether the statute is compatible with the European Convention on Human Rights, must recognise that while its role is to safeguard rights that role does not extend to review of what are essentially policy choices. Here Parliament, with the benefit of appropriate expert advice, has fixed the lower age limit for entitlement to the mobility component of DLA at three years. Having regard to what was advanced by the respondent in justification, I cannot say that that was an irrational decision or that it was in pursuit of an illegitimate aim or that it was disproportionate in its effect. I do not find it be incompatible with Article 14, or any other provision, of the Convention. I propose to dismiss the petition. I will reserve all questions of expenses.