[2018] AACR 17

(Stevenson v Secretary of State for Work and Pensions [2017] EWCA Civ 2123)

CA (Arden, Jackson and Henderson LJJ) **CIS/601/2012**
15 December 2017

Human rights – whether the upper loan limit for Support for Mortgage Interest discriminated against the disabled

The claimant had Down's syndrome and other health problems and had been in receipt of income support (IS) since 1999. Following an unsuccessful placement in a residential home it was decided, together with Social Services, that she would benefit from a degree of independent living provided she had 24 hour care and assistance. In December 2009 she bought a flat on a shared ownership basis with a mortgage loan of just over £128,000. It had two bedrooms and two bathrooms so as to accommodate both the claimant and her carers. She claimed Support for Mortgage Interest (SMI), a scheme providing homeowners receiving certain benefits, including IS, with financial help towards their mortgage. The upper loan limit for SMI was increased from £100,000 to £200,000 from 5 January 2009 under the Social Security (Housing Costs Special Arrangements) (Amendment and Modification) Regulations 2008 (SI 2008/3195) for those claiming IS for the first time. The DWP decided that the claimant was ineligible for benefit on the balance of the loan over £100,000 as she had claimed IS from 1999. Both the First-tier Tribunal and the Upper Tribunal upheld that decision. The claimant appealed to the Court of Appeal on new grounds which had not been considered by the Upper Tribunal. It was argued on her behalf that the £100,000 limit for SMI discriminated against her on two grounds both contrary to Article 14 to the European Convention of Human Rights (ECHR). First, there was a fundamental and permanent difference in treatment between those disabled persons who were subject to the £100,000 cap and those who were not that was manifestly without reasonable foundation. Second, that there was no cap on any loan required by a disabled person to adapt a property for their needs and that differential treatment also constituted unlawful discrimination.

Held, dismissing the appeal, that:

1. the 2008 Regulations were introduced to provide a targeted package of temporary measures for working people with larger than average mortgages who had lost their jobs in the financial crisis and whose homes were at risk of repossession. Given that purpose, it was in general an entirely rational policy decision to confine availability of the new £200,000 cap to people who had first claimed IS after 4 January 2009 (paragraphs 77 to 78);

2. the failure to provide a tailor-made exception from the cut-off date for disabled people who had not yet taken out a loan to purchase a property could not be characterised as "manifestly without reasonable foundation". The introduction of any cut-off date for the introduction of an enhanced social security benefit was bound to have a differential impact on those who do, or do not, fall on the right side of the line; but considerations of cost (at a time of general financial stringency in the public sector), administrative convenience, and the need to ration scarce resources, will usually provide a sufficient justification for "bright line" tests of that nature, or will at least fall within the broad margin of appreciation permitted to States in the field of social policy (paragraph 81);

3. the argument that there was an unjustifiable difference in treatment between those disabled persons who needed larger accommodation and those requiring adaptations was based on a false comparison. In terms of Article 14 the difference in treatment was not of people who were in analogous situations and in any event it was justified by the difference in circumstances between the two groups. (paragraphs 85 to 87).

DECISION OF THE COURT OF APPEAL

Mr Tim Buley, instructed by Irwin Mitchell LLP, appeared for the appellant

Ms Zoë Leventhal, instructed by The Government Legal Department, appeared for the respondent

Judgment

Lord Justice Henderson:

Introduction

1. The basic issue on this appeal from the Administrative Appeals Chamber of the Upper Tribunal is whether the appellant, Fiona Stevenson, who is disabled, has been unlawfully discriminated against by virtue of the fact that the support for mortgage interest ("SMI") which she receives as a component of her income support is capped by reference to a loan limit of £100,000, and her circumstances are such that she is not eligible to benefit from the higher limit of £200,000 which was introduced for certain categories of claimant with effect from 5 January 2009.

2. Fiona (as I hope she will forgive me for calling her) was born in 1979. She has Down's syndrome, insulin-dependent diabetes, osteoporosis and cataracts. She also has significantly impaired cognitive and learning abilities. She has received income support since about 1999 (now employment and support allowance), and also receives the middle rate of care component of disability living allowance.

3. The circumstances giving rise to the present case were succinctly described by Judge Lloyd-Davies in the Upper Tribunal, in his decision ("the UT Decision") released on 8 October 2015 (Case no. CIS/601/2012) dismissing Fiona's appeal from the decision of the First-tier Tribunal (Social Security and Child Support) dated 27 September 2011. Judge Lloyd-Davies said this:

> "3. The claimant had been living in a residential home in Wales, a considerable distance from her parents' home. The placement in the residential home did not prove to be a success and the claimant returned to her parents' home as a temporary measure. It was decided, in conjunction with the local Social Services Department, that the claimant would benefit from a degree of independent living, provided that she could have 24 hour care/assistance (to be provided out of the Social Services budget). To this end a flat was acquired: this flat had two bedrooms and two bathrooms so as to provide suitable accommodation, not only for the claimant, but also for the claimant's care assistants (the extra bedroom and bathroom were stipulated for by the local authority as a condition for its provision of the requisite 24 hour care/assistance. The flat was acquired through a housing association at a price of £227,000 on a shared ownership basis. The purchase element was funded by a mortgage loan of £128,100.00 and the remainder was subject to a rental agreement. The purchase was completed in or about December 2009.
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> 4. In December 2009 the claimant's mother as the claimant's appointee claimed that the interest on the mortgage loan should be borne by income support as housing costs; the rental element was and is being met by housing benefit. Interest on the loan up to £100,000.00 was allowed, but interest on the balance was not. The claimant appealed. The Tribunal disallowed the claimant's appeal."

4. The flat which was purchased for Fiona is in Hertford, the same town where her parents live. The property was located with help from Fiona's social worker, and Fiona's father has now given uncontradicted evidence in this court that they were unable to find any other properties that met Fiona's needs for a cheaper price. The housing association which

bought the flat on a shared ownership basis with Fiona is called Hightown Praetorian & Churches Housing Association Limited ("Hightown"). It is a specialist organisation, which at the material time operated the Government-sponsored "HOLD" scheme for disabled people in Hertfordshire.

5. The HOLD ("Home Ownership for People with Long-term Disabilities") scheme is a home ownership scheme which allows people with a long-term disability to buy a share of between 25 and 75% of a property, and then to pay rent on the remaining proportion, which is typically funded through housing benefit. The scheme is intended to help applicants obtain housing that fits their needs as disabled people. It is funded by the Homes and Communities Agency (a non-departmental public body sponsored by the Department for Communities and Local Government) and the Greater London Authority in London.

6. It is important to note that the flat was bought for Fiona after the new upper loan limit of £200,000 for SMI had come into force on 4 January 2009, and when it was clear from the regulations which introduced the change that Fiona could not benefit from it (because the change applied only to persons who claimed a relevant income-related benefit, including income support, on or after that date, whereas Fiona had been claiming income support since 1999). Furthermore, this had been made clear to those acting on Fiona's behalf in a letter dated 13 August 2009 from the DWP, which informed her that the Department was not in a position to guarantee that the whole of the interest on her proposed mortgage would be eligible for income support, and said: "You may not get the full amount of standard interest if … the loan taken out is more than £100,000." Despite this warning, however, the purchase proceeded with a mortgage-funded equity participation of £128,100.

7. The result is that SMI has never been available for Fiona's borrowing in excess of £100,000. According to the Upper Tribunal, the ongoing shortfall in her income support housing costs amounted to about £85 a month, and the current arrears in October 2015 were of the order of £6,000. It is the existence of this shortfall, and the resulting arrears, which place Fiona at potential risk of repossession proceedings being brought by the mortgagee, Kent Reliance Building Society, although there is no evidence before us that such proceedings have been threatened.

8. With this introduction, I will now describe the relevant legislative background, drawing for this purpose on the helpful skeleton arguments of counsel on both sides.

The legislative background

9. Income support is paid pursuant to the Income Support (General) Regulations 1987 ("the IS Regulations"), regulation 17(1) of which provides that a claimant's weekly "applicable amount" shall be the aggregate of such of the following amounts as may apply in his case, including:

> "(e) Any amounts determined in accordance with Schedule 3 (housing costs) which may be applicable to him in respect of mortgage interest payments or such other housing costs as are prescribed in that Schedule."

Broadly speaking, the "applicable amount", as with other income-related benefits within Part VII of the Social Security Contributions and Benefits Act 1992, is an amount prescribed by statute which represents what the claimant is taken to need to live on, and the amount of benefit payable depends on the relationship between that amount and the claimant's actual

income: see *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117 [2013] AACR 7 ("Burnip") at [33].

10. Paragraph 1(1) of Schedule 3 to the IS Regulations defines a claimant's "housing costs" as those costs which he is liable to meet in respect of the dwelling occupied as the home which he is treated as occupying, and which qualify under paragraphs 15 to 17. Paragraphs 15 and 16 are relevant to this case. Paragraph 15 is headed "Loans on residential property", and relates to loans taken out to acquire an interest in the dwelling occupied as the claimant's home or to pay off an earlier such loan. This is the paragraph which applies to Fiona. Paragraph 16, by contrast, is headed "Loans for repairs and improvements to the dwelling occupied as the home", and relates to loans taken out "for the purposes of … carrying out repairs and improvements to the dwelling occupied as the home" (paragraph 16(1)(a)), as well as certain service charges and replacement loans. Paragraph 16(2) then defines "repairs and improvements" as including:

> "(k) adapting a dwelling for the special needs of a disabled person; …"

This paragraph did not apply directly in Fiona's case, because the layout of her flat was already suited to her needs and there was no need for any significant works of adaptation to be carried out.

11. Accordingly, the costs of two kinds of loan can in principle qualify as housing costs: (a) loans taken out to acquire an interest in the claimant's home, and (b) those taken out for adapting a dwelling for the special needs of a disabled person.

12. Paragraph 4 then imposes certain limitations on the circumstances in which such loans can qualify as housing costs. Paragraph 4(2) relates only to loans for the acquisition of an interest under paragraph 15, and provides that where the loan in question was incurred after 1 October 1995 it will not qualify if it was incurred "during the relevant period", defined in sub-paragraph (4) as "any period during which the person to whom the loan was made – (a) is entitled to income support …", together with any "linked period", i.e. a period of specified duration falling between two periods of entitlement to income support. This rule is of general application to non-disabled persons, and has the effect that SMI is not available for loans taken out at a time when the person qualified for income support. The rationale for the exception appears to have been that it would not be appropriate to provide such support, in obtaining a potentially valuable and appreciating asset, at a time when the person in question was either on income support or between linked periods of income support. On the other hand, the exception looks only at the time when the loan was taken out. Supervening entitlement to income support does not disqualify a claimant from SMI in respect of a qualifying loan taken out before he or she was on income support. Indeed, it is during such later periods that the SMI will become payable.

13. If matters stopped here, Fiona would not have been entitled to SMI because the loan to acquire her flat was taken out during a period when she was entitled to income support. However, the general exception in paragraph 4(2) is then disapplied in specified circumstances, including where the condition specified in paragraph 4(9) is satisfied, namely:

> "… that the loan was taken out, or an existing loan increased, to acquire alternative accommodation more suited to the special needs of a disabled person than the accommodation which was occupied before the acquisition by the claimant."

It is common ground that Fiona satisfied this condition in December 2009, with the consequence that her loan qualified as housing costs.

14. Paragraph 10 of schedule 3 lays down how the weekly amount of housing costs in respect of a qualifying loan is to be calculated, by reference to a formula and a prescribed standard rate of interest.

15. Paragraph 11 of schedule 3 then specifies the upper limit, or cap, on the amount of a qualifying loan for which housing costs can be paid. The cap is imposed at the "appropriate amount" specified in sub-paragraph (5), namely £100,000. Accordingly, in the absence of any other provision, this is the upper limit which applied to the mortgage loan taken out by Fiona in December 2009.

16. The cap in paragraph 11(5), however, was itself made subject to the following provisions of the paragraph, and sub-paragraph (9) contained an exception for loans to which paragraph 16(2)(k) applied, that is to say loans taken out and used for the purpose of adapting a dwelling for the special needs of a disabled person: see [10] above. In relation to such loans, any excess over £100,000 is to be disregarded, with the result that there is no upper limit for the relevant housing costs which can qualify for SMI.

17. I now come to the modification of the £100,000 limit which was introduced with effect from 5 January 2009. Part 3 of The Social Security (Housing Costs Special Arrangements) (Amendment and Modification) Regulations 2008, SI 2008 No. 3195, ("the 2008 Regulations") applies to persons who claim (relevantly) income support after 4 January 2009. Regulation 10 then provides that schedule 3 to the IS Regulations applies in relation to such a person as if:

> "(f) in paragraph 11 (general provisions applying to new and existing housing costs) –
>
> …
>
> (iii) in sub-paragraph (5), the reference to "£100,000" were to "£200,000";
>
> …"

The amount of the cap was therefore doubled, but the only persons who could take advantage of it were those who first claimed a relevant benefit (including income support) after 4 January 2009. Since Fiona had already been on income support for approximately ten years before that date, it is common ground that the old cap of £100,000 continued to apply when she took out her mortgage in December 2009.

18. As well as increasing the loan limit from £100,000 to £200,000 for new benefits claimants, the 2008 Regulations also:

> (a) reduced the waiting period which normally applied before housing costs would be met from either 26 or 39 weeks to 13 weeks;
>
> (b) limited the period for which loan interest would be payable to a maximum of two years for those on jobseeker's allowance; and

(c) froze the standard interest rate used as a basis of the SMI calculation at 6.08% for six months, for all existing and new SMI claimants.

Although originally intended to be temporary, as a response to the financial crisis in 2008, these changes were in fact continued until 1 April 2016, when the increase from £100,000 to £200,000 was retained but the other changes were reversed. In effect, therefore, the doubling of the cap can now be seen to have been a permanent alteration to the SMI scheme from 4 January 2009.

19. Fiona's discrimination claim is brought under Article 14 of the European Convention on Human Rights ("the ECHR"), as incorporated in English law by the Human Rights Act 1998. Article 14, which is headed "Prohibition of Discrimination", states 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."

20. Article 1 of the First Protocol to the ECHR ("A1P1") is headed "Protection of property", and 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.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest …"

Procedural history

21. This case has had an unusual procedural history.

22. On 22 September 2011 the FTT dismissed Fiona's appeal against the decision of the Secretary of State dated 25 November 2010 to pay SMI only up to the limit of £100,000. The FTT made the following findings, which are helpfully summarised in the UT Decision at [9]:

> "[The FTT] found that one bed-roomed flats in the relevant development were on sale for between £165,000-£195,000 and that two bed-roomed flats with two bathrooms were on sale for between £225,000 and £250,000, that the purchase price of the claimant's flat was £227,000, that the claimant's purchase was "off plan", that the monies were advanced for the purchase of the flat and that no adaptations were made other than a reduction in the height of the kitchen units and the installation of a spy-hole in the front door at a lower than normal level – both adaptations being made to accommodate the claimant's short stature. The tribunal found that there was no evidence that any additional costs were incurred in respect of any adaptations or that any money was borrowed for the purpose of any adaptation. It therefore decided that paragraph 11(9) of Schedule 3 (relating to loans taken out and used for the purpose of adapting a dwelling for the special needs of a disabled person) did not apply."

23. Fiona then appealed to the Upper Tribunal, represented by her father as a litigant in person. He raised a number of arguments on her behalf challenging the application of the IS

Regulations, including that there was discrimination in favour of persons with physical rather than cognitive disabilities because the upper limit of £100,000 did not apply to loans for adaptations of a property. He submitted that the relevant adaptations in his daughter's case were the extra bedroom and bathroom for her personal assistants/carers, that this extra accommodation was necessary given the extent of her disabilities, and that literally construed the legislation discriminated in favour of those with physical, rather than cognitive, disabilities, because those who had physical disabilities were more likely to need adaptations such as stair lifts or ramps, while those with cognitive disabilities were more likely to need extra accommodation for carers or assistants. Accordingly, he argued, the borrowing over the £100,000 limit should be permitted on the footing that it should be treated as if it were for an adaptation within paragraphs 11(9), 16(1) and 16(2)(k) of the IS Regulations.

24. This argument was rejected by Judge Lloyd-Davies, who said at [14] of the UT Decision:

> "In my judgment:-
>
> (a) The income-support housing cost regime makes specific provision for loans taken out in relation to the accommodation costs of the disabled … This is not a case, such as Burnip, where the requirements of the disabled are not dealt with at all.
>
> (b) It is accepted that the claimant needs an extra bedroom and bathroom for her carers/assistants and that this necessity is occasioned by the claimant's disability. However there is no Article 14 discrimination against the disabled as a group; as indicated above the position of those who are disabled in relation to loans both for the purchase and for the adaptation of property are more favourable than for the able bodied.
>
> (c) Although it may be true that those with physical disabilities may be able more often to take advantage of the provisions relating to loans for adaptations than those with purely cognitive disabilities, and accepting that cognitive disability is a different "status" within Article 14 which can be compared with that of someone whose disability is purely physical …, it is not the case that those with cognitive disabilities are treated less favourably because they need an extra bedroom. There are many with physical disabilities who have the equivalent requirements for an extra bedroom for a carer/assistant to those of a person with cognitive disabilities.
>
> (d) Accordingly the provisions relating to loans taken out for the purposes of adaptations do not discriminate against those with cognitive disabilities.
>
> (e) There is therefore no reason to read down the provisions relating to loans taken out for adaptations. In any event, those provisions are written with such precision (only applying to the specified circumstances) that, in my judgment, it would be impossible to read them down in the manner suggested on behalf of the claimant."

25. The judge then added:

> "I suspect that the case on behalf of the claimant was put in the way that it was as a collateral attack on the purchase limit of £100,000. It is clearly a matter for Government to decide the level at which assistance for housing costs for purchase

> is provided to disabled income support claimants and it cannot be argued that such a limit is manifestly without reasonable foundation."

26. In the light of the UT Decision, legal representation for Fiona was obtained and permission to appeal was sought from this Court on new grounds which had not been considered below. The first ground was that the Upper Tribunal had erred in law in finding that the application of the £100,000 rule in Fiona's case did not breach Article 14 ECHR, read either with A1P1 or Article 8 ECHR. The second ground was that the £100,000 rule was irrational at common law and the Upper Tribunal erred in law in failing to make such a finding.

27. The Secretary of State then put in a written statement of reasons why permission to appeal should be refused, submitting that the proposed grounds of appeal had not been argued below and this Court would therefore not have the benefit of any reasoning from the Upper Tribunal. Further, the Court would need to receive fresh evidence from the Secretary of State on the issue of justification, which it had previously been unnecessary to address. A number of arguments were also briefly outlined with a view to showing that the appeal would in any event have no real prospect of success.

28. On 16 August 2016, Laws LJ granted permission to appeal on the first ground, but refused permission on the second ground, saying that it had plainly not been raised below, and he greatly doubted that it added anything. In relation to the first ground, Laws LJ commented:

> "The appellant may have a formidable hill to climb; quite apart from any difficulties as to how the case was put below, the discrimination points may well turn out to be bad for the kind of reasons shortly expressed in the respondent's Statement of Reasons. But I have concluded that the Court of Appeal should consider the bite of ECHR Art.14 in this particular context."

29. It thus came about that Fiona now appeals to this Court on discrimination grounds which have not been considered at any earlier stage in the tribunal system, and the Secretary of State now relies on evidence on justification which has been adduced for the first time in this Court. The evidence for the Secretary of State consists of three witness statements of Timothy Roscamp, who is a civil servant employed by the DWP and has primary responsibility for the policy relating to mortgage interest payments in the income-related benefits, including income support. Mr Roscamp's first statement was dated 6 December 2016. Fiona's father, Andrew Stevenson, replied to part of it in April 2017, setting out his account of the background to the purchase of the flat and the way in which the rules were understood by him and those acting for Fiona at the time. Mr Roscamp then made a shorter second statement, dated 9 June 2017, dealing with various points arising from Mr Stevenson's evidence. The Secretary of State was granted permission to rely on this second statement by an order of Hickinbottom LJ dated 21 August 2017. Mr Roscamp's third statement was filed a few days before the present hearing, for the purpose of correcting factual errors in two paragraphs of his first statement. No objection was made to it on Fiona's behalf, but by a letter to the Civil Appeals office dated 24 October 2017, the eve of the hearing, her solicitors sought to challenge the accuracy of Mr Roscamp's evidence in a number of respects.

30. We were initially concerned that these last-minute challenges to parts of Mr Roscamp's evidence might necessitate an adjournment, but after discussing the matter with counsel at the start of the hearing it became clear that the areas of possible factual dispute

were limited and would probably be of no more than peripheral significance to the issue of justification. We therefore proceeded to hear the appeal.

The issues

31. Two grounds of appeal are now pursued on Fiona's behalf.

32. Ground 1: This ground relates to the timing of Fiona's benefits claim. It is said that the £100,000 loan limit for SMI directly discriminates against Fiona on grounds of "other status", namely the length of time she has been a claimant for income support. The £100,000 limit applies only to longer-standing claimants for income support, such as her, whereas those claiming for the first time after 4 January 2009 are subject to the new loan limit of £200,000. Moreover, the old limit continues to apply to earlier claimants for income support, even if (as in Fiona's case) the loan in question is taken out after 4 January 2009. This gives rise to a fundamental and permanent difference in treatment between those disabled persons who happened to claim income support before 5 January 2009 and those who did not. The justification put forward by the Secretary of State does not address, or even face up to, this fundamental anomaly. The justification is therefore manifestly without reasonable foundation, and the difference in treatment between different groups of disabled persons is unlawful under Article 14.

33. Ground 2: This ground focuses on the difference of treatment between disabled persons who need a loan to obtain larger accommodation and those who need a loan to pay for physical adaptations to their accommodation. The SMI legislation imposes no upper limits on the size of loan for which support may be obtained where a disabled person needs the loan in order to adapt a property for his or her needs. On the other hand, the £100,000 limit applies where the disabled person's need is for additional space or an additional room, and a larger property is purchased for that purpose. Both types of need are capable of objective verification as needs arising from disability. That being so, there is no justification for the differential treatment of these different groups of disabled person and the £100,000 loan limit constitutes unlawful indirect discrimination.

34. At the request of the Court, counsel produced a helpful agreed list of issues. This identified the overall issue under ground 1 as being the compatibility with Article 14 of the "temporal limit" on a claimant's ability to access the new cap of £200,000, and the overall issue under what I have termed ground 2 as being the compatibility with Article 14 of the difference in treatment which I have identified. Under each ground, there are two sub-issues. The first sub-issue is whether the appellant can point to a "status" within Article 14 which permits her to complain of the relevant differential treatment. The second sub-issue, if there is a difference in treatment referable to an Article 14 status, is whether the Secretary of State can justify that difference in treatment.

Article 14: general considerations

(a) The ambit of Article 14

35. Any allegation of breach of Article 14 must relate to the "enjoyment of the rights and freedoms set forth in" the ECHR. This has been interpreted to mean that the complaint must fall within the subject matter, or "ambit", of another Convention right. It is not necessary to show a breach of some other Convention right, because in that case Article 14 would add nothing. It is enough that the complaint relates to some interest protected by another such

right. Since it is now well established that entitlement to a social security benefit is a "possession" within A1P1, complaints about discrimination in the provision of such benefits fall within the ambit of A1P1: see *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311. It is therefore common ground that the provisions of Article 14 are potentially engaged in the present case.

(b) Status

36. The complaint must be of discrimination on some ground or "status" recognised by Article 14. The question needs to be examined separately under each ground of appeal, but it is now clear that a wide and generous approach to the question must be adopted: see the RJM case at [42] and [43] per Lord Neuberger of Abbotsbury, with whom the other members of the court agreed. At [43], Lord Neuberger gave as examples of "other status" falling within Article 14, derived from decisions of the European Court of Human Rights, (i) "military rank, as against civilian", (ii) "residence or domicile" and (iii) "previous employment with the KGB".

37. More recently, the Strasbourg and domestic case law on status was helpfully reviewed by Lord Wilson JSC in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250, at [19] to [23]. Three other members of the Court (Baroness Hale of Richmond DPSC, Lord Clarke of Stone-cum-Ebony and Lord Reed JJSC) agreed with Lord Wilson, while Lord Mance gave a concurring judgment in which he analysed the issue slightly differently. The question was whether the claimant, a severely disabled child who needed lengthy in-patient hospital treatment, had a status falling within the grounds of discrimination prohibited by Article 14. Lord Wilson reached the "confident conclusion", at [23], that he did.

38. In the course of his review, Lord Wilson referred at [21] to *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434, where Baroness Hale had suggested that "[*in*] general, the list concentrates on personal characteristics which the complainant did not choose and either cannot or should not be expected to change". He pointed out that by its decision in the RJM case, holding that the appellant's homelessness was a status within Article 14, the House of Lords had demonstrated "that the prohibited grounds extended well beyond innate characteristics". He then referred to the simile of concentric circles offered by Lord Walker of Gestingthorpe in the same case, commenting that the value of the simile lay in Lord Walker's added comment ([2009] AC 311, at para 5):

> "The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."

39. Lord Wilson then referred to the decision of the Strasbourg court in *Clift v United Kingdom* (Application No. 7205/07), The Times, 21 July 2010) where the issue was whether a prisoner had a "status" arising from his sentence to a term of at least 15 years imprisonment. This contention had failed before the domestic courts, including the House of Lords (see *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484), but prevailed before the Court of Human Rights, which said at paragraph 60 of its judgment, with emphasis supplied by Lord Wilson:

> "The question whether there is a difference of treatment based on a personal or identifiable characteristic … is … to be assessed taking into consideration all of the

> circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective …"

Lord Wilson continued, at the end of [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."

40. In paragraph 60 of its judgment in Clift, the Strasbourg court added immediately after the passage quoted by Lord Wilson in Mathieson:

> "It should be recalled in this regard that the general purpose of Article 14 is to ensure that where a State provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified."

41. With apparent reference to this sentence, Lord Mance and Lord Hughes JJSC, delivering the judgment of the Supreme Court in *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344, said at [52] that the European court here expressed itself "in terms which might, literally read, eliminate any consideration of status". This comment was made *obiter*, and Mr Buley for Fiona did not argue that this point had yet been reached in the jurisprudence of the Strasbourg court. Nevertheless, it seems to me to provide a realistic recognition of the direction in which the Strasbourg court's jurisprudence is moving, and to reinforce Lord Wilson's conclusion that if the alleged discrimination falls within the scope of a Convention right, the question of status will normally be answered in the claimant's favour on the basis that he or she possesses either a personal or an identifiable characteristic assessed in the light of all the circumstances of the case. In the majority of cases, it is probably now safe to say that the need to establish status as a separate requirement has diminished almost to vanishing point.

(c) Justification

42. Baroness Hale set out the test for justification in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820, at [33], as follows:

> "It is now well-established in a series of cases at this level, beginning with Huang v Secretary of State for the Home Department [2007] 2 AC 167, and continuing with *R (Aguilar Quila) v Secretary of State for the Home Department* (*AIRE Centre Intervening*) [2012] 1 AC 621, and *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700, that the test for justification is fourfold: (i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?"

43. It is common ground that, in answering these questions, the court must accord a wide margin of appreciation to policy choices made by the legislature in the field of social welfare. In accordance with this principle, it is now well established that the court will only interfere with such a policy choice if it is "manifestly without reasonable foundation": see the judgment of Baroness Hale, with which the other members of the court agreed, in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545, at [15] to [19], re-affirmed by the Supreme Court in *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550, at [38] per Lord Toulson JSC with whom the majority of the court agreed.

44. In the MA case, Lord Toulson pointed out at [32] that:

> "The fundamental reason for applying the manifestly without reasonable foundation test in cases about inequality in welfare systems was given by the Grand Chamber of the European Court of Human Rights in *Stec*, para 52. Cases about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities."

45. Lord Toulson went on to reject the submission that a less stringent test should be applied in cases where the complaint was not about the broader policy itself, but "simply that the manner of implementation of the policy discriminates against a vulnerable group, and that it is right to require weighty reasons to justify the discrimination": see [33]. Lord Toulson continued:

> "34. Rejecting that argument, Lord Dyson MR said ([2014] PTSR 584, paras 54-55) that although the precise detail and scope of the Regulations may not be matters of high policy in themselves, they formed an integral part of a high policy decision and could not be dismissed as technical details; that the law in this area would suffer from undesirable uncertainty if the test were to vary according to whether the challenge were to high level policy or lower level policy; and that there was no hint of such a distinction in the European or domestic case law."

46. The appeals before the Supreme Court in MA concerned the impact of a cap on housing benefit, in cases of deemed under-occupation of social sector housing, on those with disabilities and on women living in "sanctuary scheme" accommodation: see the judgment of Lord Toulson at [1]. In the judgment which I gave on the issue of justification in an earlier case in the Court of Appeal dealing with similar issues (Burnip, loc.cit.), with which Maurice Kay and Hooper LJJ agreed, I pointed out at [26] that what has to be justified is not the scheme of the relevant social security benefit as a whole, but rather "the difference in treatment resulting from the application of [*the relevant*] criteria which has been held to infringe Article 14". In other words, as Baroness Hale put it more concisely in AL (Serbia) at [38], it is "the discriminatory effect of the measure which must be justified, not the measure itself".

Ground 1: the temporal limit which prevents Fiona from accessing the £200,000 cap

(1) Status

47. There is clearly a difference in treatment between disabled persons who claimed income support before 5 January 2009, and those who first claimed it on or after that date. The former are subject to the £100,000 limit on the value of the loan for which interest can be

paid under the SMI scheme, whereas the latter have the benefit of the £200,000 cap. If Fiona had claimed income support for the first time after 4 January 2009, she would have been entitled to SMI on the full value of the loan which she took out in December of that year, namely £128,100. The only difference between her position and that of another disabled person who can take advantage of the £200,000 cap is the date of her claim for income support.

48. Against this background, Mr Buley submits that the date on which a claim for income support is made is plainly a characteristic "by which … groups of persons are distinguishable from each other" (AL (Serbia) at [9], per Lord Hope of Craighead). The cut off date was deliberately chosen by Parliament as the criterion for differentiating between different groups, which is precisely why justification is required. Accordingly, he submits, differential treatment by reference to the date on which a claim for income support was made is discrimination on grounds of a "status" under Article 14.

49. Mr Buley further submits that income support is paid to meet a person's subsistence needs, and the date on which a person first claims it will reflect the date on which the need for such support arose. Once such a claim has been made, it cannot later be undone, in the sense that the making of the claim is a matter of historical fact. Furthermore, although an able bodied claimant is unable to make a claim for SMI in respect of a loan taken out while on income support, the SMI scheme deliberately permits disabled claimants to take out a qualifying loan after they claim income support. Apart from the temporal limit in the 2008 Regulations, the date of the claim for income support has no relevance for a disabled claimant. The temporal limit thus creates a characteristic separating two identifiable groups among the disabled: those whose claim for income support was made before 5 January 2009, and those who first claimed income support on or after that date. The date of claim is therefore a personal characteristic by which groups of persons are distinguishable from each other.

50. In my view, these submissions are well founded, and Ms Leventhal on behalf of the Secretary of State wisely spent little time arguing the contrary, although she did not concede the point. She argued that the date when a benefits claim is first made is objective, and not referable to disability as such, or to any innate characteristic of a disabled person. She said there was no existing reported case where a time limit of this nature had been treated as determinative of status. Those submissions may be true as far as they go, but they do not meet the point that the test applied by the European court now extends to a difference of treatment based on an identifiable characteristic, as well as purely personal characteristics. I have already described the recent trend in the jurisprudence of the Strasbourg court, which was recognised by the Supreme Court in Mathieson and has greatly reduced, if not almost eliminated, the need to establish status as a separate requirement once a difference in treatment falling within the potential scope of Article 14 has been alleged. Applying this broader test, I see no reason to doubt that Fiona has a relevant status for Article 14 purposes in her capacity as a disabled person who first claimed income support before 5 January 2009, and was thereby prevented from taking advantage of the new £200,000 cap.

51. This conclusion makes it unnecessary to consider the alternative grounds upon which Mr Buley argued that the test of status was satisfied, namely disability and age. It is enough to say that both disability and age are accepted to be a status under Article 14 by the Secretary of State, but there are considerable difficulties in saying that Fiona has been discriminated against because of either characteristic. Put shortly, Fiona is not being treated differently on grounds related to her disability, nor is she being treated less favourably than non-disabled

people. On the contrary, the SMI scheme deliberately treats disabled claimants more favourably than the non-disabled, in permitting access to the scheme at a time when a disabled claimant is in receipt of income support. As to age, this is a doubly new point, in the sense that it did not even feature in the grounds of appeal, and there is anyway no empirical evidence to support the argument that older claimants on income support are disproportionately affected by the temporal limit in the 2008 Regulations.

(2) Justification

52. I now turn to the issue of justification, which lies at the heart of the case.

53. That which needs to be justified by the Secretary of State, if Fiona's claim is to fail, is the difference of treatment of disabled persons in relation to the £200,000 cap depending on whether they claimed income support before or after 5 January 2009. For Fiona, and other disabled people who first claimed income support before that date, the cut-off operates as a permanent disqualification from access to SMI on a loan in excess of £100,000. Conversely, a disabled person who first claims income support on or after 5 January 2009 is able to obtain SMI on a loan of up to £200,000.

54. The policy background to the package of changes to the SMI scheme introduced by the 2008 Regulations was described in an explanatory memorandum prepared by the DWP and laid before Parliament. Paragraph 7.1 of the memorandum stated that:

> "The changes introduced by this instrument are intended to provide help more quickly to nearly 5,000 home owners, at a time when many of them are experiencing great financial pressure. The current economic outlook is uncertain and household repossessions are rising. There has been a fall in both the number of people in employment and the employment rate. The number of inactive people of working age has increased, but the inactivity rate is unchanged. The number of vacancies has fallen while growth in average earnings, both including and excluding bonuses, has decreased."

55. Paragraphs 7.2 and 7.3 of the memorandum then gave details of recent increases in the unemployment rate, and of the incidence of household repossessions throughout 2008 which had "informed the introduction of these changes". Statistics published by the Council of Mortgage Lenders in November 2008 showed that there were 11,300 repossessions in the third quarter of 2008, up 12% from the figure in the second quarter. Further substantial increases in the number of repossessions were expected by the Council, and it forecast that there would be 170,000 mortgages in arrears of more than three months by the end of the year.

56. Paragraph 7.4 then stated that the changes introduced by the instrument would apply to claimants in the following categories, the first being "those making a claim on or after 5 January 2009 who have never claimed benefit before". Paragraph 8.1 recorded that there had been no formal consultation, but the Secretary of State had decided "that because of rising unemployment and increasing household repossessions, the matter is sufficiently urgent that it would be inexpedient to refer proposals for legislation to the Social Security Advisory Committee". An undertaking was, however, given to refer the instrument to the Committee ("the SSAC") as soon as practicable after it had been made, and to consider any advice or recommendations made by the SSAC. Paragraph 12.2 then said:

> "The Department will monitor the effectiveness of these changes, which are designed as short-term measures, through performance data and customer feedback. The changes to the rules on payment of mortgage interest and interest on other qualifying loans are to be reviewed when the housing market recovers. The Department intends to review the standard interest rate within six months."

57. After setting out paragraphs 7.1 to 7.3 of the explanatory memorandum in paragraph 39 of his first statement, Mr Roscamp said in paragraph 40 that the rationale for introduction of the temporary charges was therefore two-fold:

> "(a) First, to focus assistance on those most likely to be in difficulty as a result of the economic downturn; that is, those people of working age who were most vulnerable to possible future changes in the labour market and who had taken out relatively large mortgages, and were thus more likely to be vulnerable to repossession; for this purpose, the waiting times were also reduced to enable assistance to be provided more quickly, as opposed to after arrears had already been incurred;
>
> (b) Secondly, to limit assistance to those on income-based Jobseeker's Allowance (who were considered to be closest to the labour market because they had recently left employment) so that it is available for the maximum of two years. That was in the context of a substantial additional investment in other policy measures such as employment programmes including the New Deals to help those on out-of-work benefits get back to work and, accordingly, a reasonable expectation that they should find work within two years. The two-year limit on payment of SMI did not and does not apply to claimants receiving benefits based on their disability, so this is another respect in which disabled claimants are treated more favourably."

58. Mr Roscamp then confirmed that a formal referral of the 2008 Regulations to the SSAC took place on 9 March 2009. This consultation, and the Department's response to it, were published as an Act Paper in December 2009. None of the public responses received had specifically mentioned the position of disabled claimants who took out mortgages while in receipt of benefits, but in its summary of comments from the consultation on the regulations the SSAC expressed some concerns:

> "50. The Committee recognises that a quick and relatively straightforward way of making necessary changes to SMI was needed, they are not comfortable with the consequences of setting a fixed date for transition from the old scheme to the new one. In the cause of consistency, they would also have welcomed consideration being given, for example, to introducing the new capital limits to all claimants, rather than only new claimants of the relevant benefits."

The Government's response to this was to acknowledge that any change introduced from a specific date, which was "usually the most straightforward approach", would be likely to have different consequences for individuals depending on their circumstances, but the Government had "decided to focus help on working age customers".

59. Further concerns were voiced by the SSAC in the summary of responses to the consultation contained in its report to the Secretary of State dated 13 May 2009. In particular, it was pointed out that:

> "The new measures have created a situation in which claimants in identical positions are now treated differently depending upon the date they claimed and whether or not they are (or were) receiving a relevant benefit during their waiting period, and in which some claimants who will continue to be subject to the £100,000 limit may fall further into arrears."

60. As Mr Roscamp explains, the Government did not accept the SSAC's recommendation that consideration be given to extending the higher £200,000 limit to all claimants, because the intention was to focus on those people who had lost employment in the recession, and there was a need "to set a relatively straightforward, workable point at which the £200,000 limit would apply". Transitional provision was also made to mitigate the impact on those with pending claims at the time of entry into force of the new limit. To extend the new limit to all existing claimants of income support would obviously have had very significant financial implications, and was rejected partly because of the Government's limited resources, but also because the average amount of all outstanding mortgages at the time was below £100,000. Mr Roscamp then gave some figures in paragraph 51 of his first statement, which he corrected in his third statement. According to estimates by the Department, there were around 700,000 sick and disabled income support claimants who rented their homes. Had the new £200,000 upper limit been introduced for all those existing claimants, and had they all taken full advantage of it, the cost of SMI would have been £12,160 per claimant over the first year, costing in the region of £8 billion in total per annum.

61. I will say at once that the assumptions on which this example was predicated appear to me wholly unrealistic, and Ms Leventhal did not attempt to defend them. They are also open to the further objection, as Irwin Mitchell correctly pointed out in their letter to the court on the eve of the hearing, that the claimants who currently rented their homes would probably already be eligible for housing benefit, and if they were to take out loans eligible for SMI instead, there would then be a substantial saving in housing benefit to set against the new entitlement to SMI.

62. Mr Roscamp explained that the suitability of the temporary measures introduced in 2008 was then kept under regular review, both on an informal and formal basis, and this process led to a number of extensions until 31 March 2016. The decision was then taken to change SMI from a benefit into a repayable interest-bearing loan, secured by a charge on claimants' properties, for all existing and new claimants. This fundamental change would be introduced with effect from April 2018, with the £200,000 upper limit being extended for a final period of two years in the meantime.

63. Further points made by Mr Roscamp include the following:

(a) in 2009 the Department estimated that around 90% of the current working age SMI caseload had less than £100,000 capital outstanding on their mortgages;

(b) the Secretary of State was aware of the HOLD scheme, which was a common route to owner occupation for disabled claimants, and because it permitted purchase of between 25 and 75% of the equity of a property, was able to take account of regional variations in property prices by allowing a claimant to purchase a smaller share in more expensive areas; and

(c) the fact that no particular concerns about the existing £100,000 limit were raised as part of a call for evidence held in 2011, which was intended to seek views on the proposal to convert SMI from a benefit into a loan.

64. In his second statement, Mr Roscamp returned to the HOLD scheme. On the basis of records kept by the Department for Communities and Local Government, he was able to show that only a handful of mortgages over £100,000 had been obtained through that scheme in the five years from 2011 to 2016, although there had been a temporary spike of 28 such mortgages in 2010/2011. The total number of HOLD scheme mortgages taken out since January 2009 was 131, 49 of which were for amounts over £100,000. The additional cost of paying SMI to those claimants for the portion of their mortgage between £100,000 and £200,000, at the standard interest rate of 6.08%, would have been £25,000 per annum. And even if those claimants would have taken out higher mortgages if the cap applicable to them had been £200,000, the additional annual cost would have been around £300,000.

65. Against this background, Ms Leventhal submits that the temporal limit for the application of the new £200,000 cap clearly satisfies the test for justification of not being manifestly without reasonable foundation. The introduction of the new cap, and the transitional arrangements which would determine to whom it was to apply, were quintessentially matters of legislative judgment: see the speech of Lord Hoffmann in *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681, at [37], where he said of Parliament's decision in 1999 to abolish widow's pension from 9 April 2001:

> "… in my opinion the courts are not in a position to say that the 1999 decision was inescapably right or that a different decision, whether earlier or later, would have been inescapably wrong. It was a matter for legislative judgment."

Similarly, she submits, the Strasbourg court in *Stec v UK* (2006) 43 E.H.R.R. 47 held that use of the state pension age as a cut-off date for benefits, based on administrative ease and clarity, fell within the UK's margin of appreciation. Any transitional provision based on a cut-off date is likely to create advantages and disadvantages for those on either side of the line, but unavoidable consequences of this nature do not affect the general need for, and legitimacy of, such provisions.

66. Ms Leventhal places her submissions in context by emphasising what she says are three important points. First, the £200,000 cap was introduced as a temporary measure in 2008 as a response to the financial crisis. It was specifically intended to provide help to existing home owners with relatively large mortgages who had suddenly become unemployed during the recession, and whose homes were at increased risk of repossession. The decision was not motivated, as the appellant suggests, by a recognition that the £100,000 limit had become generally outdated. The temporary measure was then subject to successive extensions on grounds of continued economic uncertainty, and has now been made permanent (for new claims from 5 January 2009) only in the context of legislation by which SMI will become a repayable loan from April 2018, and will therefore no longer be a welfare benefit.

67. Secondly, the £100,000 limit remains a reasonable one, in excess of the average outstanding mortgage debt of £89,000, and it still applies to a majority (60%) of the current SMI caseload. The Government has kept the issue under effective review since 2009, and has not considered it necessary or justifiable to extend the £200,000 cap to all claimants of income support. An important factor in this connection is the availability of the HOLD

scheme. Overall, Mr Roscamp's evidence shows that mortgages obtained under the HOLD scheme have in recent years generally tended to be for less than £100,000, despite the introduction of the new upper limit in 2009. The main organisation involved, MySafeHome, through which Fiona's mortgage was arranged, continues to have a policy of only helping to arrange mortgages to a maximum value of £100,000, and Fiona's mortgage was an exception to this policy with her father as guarantor for the difference. The available evidence therefore does not suggest that the £100,000 limit, or the HOLD scheme as operated by MySafeHome, are insufficient to meet the needs of disabled people generally. Consistently with this, Mr Stevenson's evidence on the HOLD scheme's operation in Hertfordshire at the time when Fiona took out her loan reveals that out of a total of 13 disabled people assisted under the scheme, only two (including Fiona) took out mortgages for more than £100,000.

68. Thirdly, the fact that disabled people can take out a mortgage on a valuable, and probably appreciating, capital asset while in receipt of income benefits in order to buy accommodation more suited for their needs (as opposed to renting a suitable property with the rent paid by housing benefit), and to have a contribution paid by the State towards their interest payments on an ongoing basis, amounts to *more favourable* treatment for disabled people taking account of their different and additional needs. Non-disabled people do not have this opportunity. The Secretary of State was therefore entitled to place reasonable limits on the extent of this additional and more favourable provision when introducing the new increased cap.

69. In these circumstances, Ms Leventhal submits that the introduction of the new cap clearly had legitimate aims, which she summarises as follows:

(a) to take steps to minimise the impact of the financial crisis on those most affected by it, by reducing the incidence of repossessions for working-age home owners with larger mortgages at risk of repossession after losing their job in the economic downturn;

(b) to expend only limited resources on a measure which increases welfare costs at a time of general austerity, by focusing on those most affected; and

(c) to create a clear and administratively workable scheme by setting one date from which the new limit will apply, and so that only new claimants for benefits may qualify.

In short, she says, the cut-off date was a legitimate "bright line" which distinguishes broadly between different groups of benefit claimant by reference to the date of their claim. It was a rational means of introducing the higher cap while keeping to a limited budget.

70. On Fiona's behalf, Mr Buley counters these submissions with a number of arguments. He begins by emphasising that what has to be justified is not the impact of the cut-off date on the majority of SMI claimants who are not disabled, but its impact on disabled claimants such as Fiona who had already claimed income support before 5 January 2009. They comprise the cohort whose treatment needs to be compared with that of disabled claimants who first claimed income support after the cut-off date. For Fiona's cohort, access to the £200,000 cap is permanently denied, even for loans taken out after 4 January 2009, whereas disabled people who first claim income support after that date are free to take advantage of the new cap. This difference in treatment, submits Mr Buley, turns upon a mere accident of historical circumstance, i.e. when the disabled claimant first happened to claim income support. That

will in turn depend on circumstances such as age (a person cannot claim benefits under the age of 18) and the time at which their needs justified them in making such a claim. For claimants in Fiona's position, the difference in treatment is not in any meaningful sense transitional. On the contrary, it is both permanent and arbitrary.

71. It is telling, says Mr Buley, that the Secretary of State does not suggest that the difference in treatment can be justified by some difference in the needs of those who claimed income support before or after the critical date. Furthermore, the Secretary of State has not attempted to explain why the new cap was not made available at least for new loans taken out by disabled persons after 4 January 2009, regardless of the date of claim for income support. A limited exception of this nature would not have had a significant financial impact, and would have accorded proper recognition to the fact that disabled people are already subject to a different regime from the non-disabled in relation to SMI.

72. Mr Buley also refers to the equality impact assessment provided by the Department in respect of the 2008 Regulations. Under the heading "Increasing the Capital Limit", the document says:

> "6.15 This element of the reform is to increase the capital limit on loans for which DWP can allow SMI from £100,000 to £200,000 for all new working age customers and some repeat and existing claimants.
>
> 6.16 The existing £100,000 limit has remained unchanged since 1995 when average house prices were significantly lower than they are today. In 1995 average house prices were around £70,000 but are now over £200,000.
>
> *[A table then sets out average house prices from 1995 to 2008]*
>
> 6.17 An outdated capital limit implies that fewer new home owners will be receiving adequate protection from SMI, and so will be more at risk of repossession action. Raising the capital limit will help to ensure that more interest for customers with eligible loans over £100,000 will be met by payment of SMI … and this will ease the number of repossessions.
>
> 6.18 Regional variations on the capital limit were also considered. Although these would be attractive in allowing SMI to reflect regional variations in housing costs, regional limits would add complexity to the benefit system and would not be achievable in the immediate term, while the housing market is under strain.
>
> 6.19 The choice of a capital limit of £200,000 for SMI is based on protection for customers with medium sized properties and a 95% loan to value ratio; and also recognising that property prices will be higher in London than the national average."

73. Mr Buley submits that this passage expressly states that the main reason for the increase in the cap was the increase in house prices since 1995. On that basis, one would expect the higher cap to be available for all new loans, provided that they were otherwise eligible under the SMI scheme. With regard to this particular submission, I would comment that paragraphs 6.15 to 6.19 must be read in the context of the equality impact assessment as a whole. The introduction to it bears out Mr Roscamp's evidence, supported by other material to which I have already referred, that the changes introduced by the 2008 Regulations were

intended to be a temporary measure targeted at providing support to home owners who were out of work and at risk of repossessions.

74. In his oral submissions to us, Mr Buley added some further points. He warned us to beware of arguments commending the need for "bright lines", and reminded us of what Lord Hoffmann said in *R (Carson) v Secretary of* State *for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, at [41] in relation to an age limit of 25 used to differentiate between rates of jobseeker's allowance:

> "Mr Gill emphasised that the twenty-fifth birthday was a very arbitrary line. There could be no relevant difference between a person the day before and the day after his or her birthday. That is true, but a line must be drawn somewhere. All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line. If one wants to analyse the question pedantically, a person one day under twenty-five is in an analogous, indeed virtually identical, situation to a person aged twenty-five but there is an objective justification for such discrimination, namely the need for legal certainty and a workable rule."

In the present case, says Mr Buley, there is no relevant difference between the majority of disabled people on either side of the cut off date, apart from the arbitrary distinction based on the date of claim of income support.

75. Mr Buley was also justifiably critical of some of Mr Roscamp's detailed evidence on the financial implications of permitting access to the new cap for pre-2009 disabled income support claimants. I have already rehearsed the general nature of some of these criticisms, and it is unnecessary to go into more detail. In my judgment, it is clear from the evidence before the court that no specific consideration was given before the 2008 Regulations were promulgated to their probable impact on disabled claimants for income support, or to the probable uptake of loans over £100,000 if existing disabled claimants were allowed access to the new cap. Nor was any effort made to calculate the likely net cost in such circumstances, after the corresponding saving in housing benefit had been set off. If anything, says Mr Buley, the evidence suggests that the likely net cost would have been minimal. In paragraph 11 of his second statement, Mr Roscamp estimated the additional cost of paying SMI to the 49 claimants who had taken out HOLD scheme mortgages above the £100,000 limit as no more than £25,000 per annum.

Conclusion on justification

76. I have not found this an easy question, but on balance I am satisfied that the Secretary of State's case on justification should succeed. My reasons are briefly as follows.

77. In the first place, the question must in my view be answered by looking at the position before and at the time when the 2008 Regulations were laid before Parliament on 15 December 2008. It is clear on the evidence that the Government's purpose in introducing the 2008 Regulations was to provide a targeted package of temporary measures, intended to alleviate the predicament of working-age people with larger than average mortgages who had lost their jobs in the financial crisis and whose homes were therefore at risk of repossession.

78. Given that purpose, it was in general an entirely rational policy decision to confine availability of the new £200,000 cap to people who had not been on income support before, and who first claimed income support after 4 January 2009. This policy was evidently

formulated and implemented without express consideration being given to its impact on disabled SMI claimants, including in particular those with existing mortgages taken out at a time when they were already in receipt of income support. This factor means that the impact of the 2008 Regulations on existing disabled SMI claimants needs to be scrutinised with some care. It is, however, important to remember that Fiona was not herself a member of that class. Her mortgage was taken out after 4 January 2009, at a time when her advisers should have been aware that the £100,000 limit still applied to her.

79. Nevertheless, it remains necessary to consider whether Fiona was unfairly discriminated against because she was denied access to the new £200,000 cap merely because of the historical accident that she first claimed income support before 5 January 2009. What justification could there be for confining the class of disabled income support claimants eligible to obtain SMI on loans of up to £200,000 to those who happened to make their first claim for income support after that date, while leaving similarly disabled claimants who first claimed income support before that date permanently disqualified from taking advantage of the higher loan limit? There is no evidence of any objective difference in the housing needs of disabled people depending on whether they first claimed income support before or after that date, nor is there anything to indicate that this difference in treatment was consciously considered by the Secretary of State before the 2008 Regulations were promulgated. On the contrary, it seems possible to infer that the question was simply overlooked, perhaps because of the complex way in which the housing needs of disabled people are dealt with in the IS Regulations, and the referential manner in which the relevant parts of the 2008 Regulations were drafted.

80. The question which confronts us may therefore be posed in a stark form: was it objectively justifiable to introduce this difference in treatment of disabled income support claimants as the possibly unintended consequence, or by-product, of a cut-off date which was manifestly reasonable with regard to the intended primary beneficiaries of the 2008 Regulations, and which also (if it matters) operated perfectly reasonably in relation to those disabled claimants who had already taken out mortgages before the cut-off date?

81. With some hesitation, I would answer this question in the affirmative. In a situation where disabled people already enjoyed more favourable treatment under the SMI scheme than the non-disabled, and where the clear policy objective of the 2008 Regulations had nothing to do with the special needs of the disabled, I do not think that the failure to provide a tailor-made exception from the cut-off date, in favour of disabled people who had not yet taken out a loan to purchase a property, should be characterised as "manifestly without reasonable foundation". The introduction of any cut-off date for the introduction of an enhanced social security benefit is bound to have a differential impact on those who do, or do not, fall on the right side of the line; but considerations of cost (at a time of general financial stringency in the public sector), administrative convenience, and the need to ration scarce resources, will usually provide a sufficient justification for "bright line" tests of that nature, or will at least fall within the broad margin of appreciation permitted to States in the field of social policy.

82. I am fortified in reaching this conclusion by the absence of evidence of any real hardship caused by the continued application of the old £100,000 cap to disabled persons who first claimed income support before 4 January 2009. In this regard, I accept the submissions of Ms Leventhal summarised in paragraph [67] above. Furthermore, I do not think that Fiona's own position can be taken as reliable evidence of hardship caused by the non-availability of the £200,000 cap, given the deliberate decision that was taken to proceed with the purchase of her flat in circumstances where the old limit clearly continued to apply.

83. For these reasons, I would hold that the Secretary of State's defence of justification succeeds, and the first ground of appeal must be dismissed.

Ground 2: the alleged difference of treatment between disabled persons who need a loan to obtain larger accommodation and those who need a loan to pay for physical adaptations to their property

84. I will deal with this ground of appeal briefly, because Mr Buley devoted very little time to it in oral argument, and there is in my judgment a simple reason why it cannot succeed.

85. The essence of Fiona's case under this ground is that there is an unjustifiable difference in treatment between (a) a disabled person who has already purchased a property to live in, and who takes out a loan for the purpose of adapting it for his or her needs, in which case the loan may exceed the £100,000 limit and still qualify for SMI, and (b) a disabled person whose need is for larger accommodation, typically with a second bedroom and bathroom for a carer, who is subject to the £100,000 limit when taking out a loan to purchase the property. This difference in treatment is said to discriminate indirectly against those disabled persons whose need is for larger accommodation rather than physical adaptations.

86. The short answer to this argument, as Ms Leventhal submits, is that it is based on a false comparison. There is no relevant analogy between a disabled person who exceeds the £100,000 limit by reason of the need to pay for an adaptation, and a disabled person who exceeds it by reason of needing larger accommodation. A disabled person in the former category, if entitled to SMI at all, must already have taken out a loan subject to the £100,000 limit in order to purchase the property in the first place, either because it was acquired to suit his or her special needs or because the loan was taken out before he or she was on benefits. In either case, the need for adaptation will reflect a subsequent change of circumstances, for example the onset or worsening of a particular health condition. The disabled person is then free to take out a further loan above the £100,000 limit and to claim SMI on the interest payments, in just the same way as anyone else. By contrast, disabled persons in the latter category are people like Fiona who have accommodation needs which must be met at the time of purchase of a property. They are subject to the £100,000 limit, but if any supervening need for adaptation arises, they too will be able to take advantage of the facility to obtain SMI on any increased loan needed for that purpose. It is worth emphasising the point that the adaptations exception is not exclusively available to those with physical disabilities.

87. Thus, in terms of Article 14 the difference in treatment is not of people who are in analogous situations, and in any event it is justified by the difference in circumstances between the two groups. As Mr Roscamp explains in his evidence, the underlying policy in relation to loans for adaptations is that it is generally more cost effective, and better for disabled people's welfare, if they are able to adapt an existing property rather than have to move to different accommodation. It is therefore reasonable that they should be able to qualify for SMI in respect of any excess over the £100,000 limit in the loan taken out to pay for the adaptation. This does not mean, however, that there is anything wrong with the basic £100,000 limit for loans taken out to acquire suitable accommodation in the first place.

88. For these reasons, I am satisfied that the second ground of appeal must also be dismissed.

Conclusion

89. If the other members of the court agree, this appeal will therefore be dismissed.

Lord Justice Rupert Jackson:

90. I agree.

Lady Justice Arden:

91. As Mr Buley emphasises, the difference in treatment that has to be justified is the fact that the 2008 Regulations did not replicate the "carve out" for disabled claimants in the 1987 Regulations so that new claims by disabled claimants would be able to take advantage of the increased cap even though they had received income support before that date. The Secretary of State has produced no contemporaneous evidence that the position of the disabled claimants was in fact actively considered, but Mr Roscamp explains that an assessment of needs before the 2008 Regulations were enacted showed that average loans before that date were less than £100,000, the amount of the old cap. Moreover, there were systems in place which, if there had been any evidence of need (which was the basis on which the cap was being increased for the target group), were apt to produce evidence of any need. They included the informal consultation prior to the enactment of the 2008 Regulations and the regular reviews of the operation of the cap conducted subsequently, when further data appears to have been available. Can the Secretary of State discharge the burden of showing justification if there was no active consideration of the position of disabled claimants at the time of the Regulations? Did the presence of the earlier carve out create a presumption in favour of its continuance which had to be displaced? In my judgment, the answers to these questions, while not easy, are 'yes' to the first question and 'no' to the second question in the circumstances of this case. All that the Secretary of State has to show is that it was not manifestly unreasonable to formulate the 2008 Regulations as they were enacted. In my judgment, this threshold is met in the circumstances described by Henderson LJ for the reasons he gives and additionally because of the systems (described above) which were in place to provide a safety net for claimants. In the global financial crisis of 2008, continuing increases in house prices (a matter relied upon as showing need) were not necessarily bound to occur. In my judgment, for these additional reasons as well as those given by Henderson LJ, the appeal should be dismissed.