Bulletin 174
[Short]

PLH *Commissioner's File: CDLA 1338/02*

# SOCIAL SECURITY ACTS 1992-1998

## APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

## DECISION OF THE SOCIAL SECURITY COMMISSIONER

*Introduction*

1. This appeal by the claimant, who suffers from multiple sclerosis and lives in a nursing home, succeeds. The decision of the Bedford appeal tribunal on 18 October 2001 confirming the suspension of his disability living allowance mobility component is conceded by the Secretary of State to be defective in law because they omitted to make sufficient findings of fact of their own on whether he was "undergoing medical or other treatment as an in-patient in a hospital or similar institution" so as to justify the suspension, and on that ground I set it aside. In accordance with section 14(8)(b) **Social Security Act 1998** I accordingly remit the case for rehearing and redetermination by a differently constituted tribunal. However the further grounds of appeal put forward on the claimant's behalf based on the **Human Rights Act 1998** are not in my judgment well-founded, and I so direct the new tribunal which will now rehear the case.

2. The claimant is a man now aged 56, who has suffered from multiple sclerosis for many years. He has at all material times been so severely physically disabled by this condition as to be virtually unable to walk, and to require both frequent attention throughout the day and prolonged or repeated attention at night in connection with his bodily functions. His disablement thus satisfies the statutory medical conditions for the maximum possible awards of disability living allowance for both mobility and care under sections 72, 73 **Social Security Contributions and Benefits Act 1992,** and he has (and at all material times has had, from the introduction of disability living allowance on 6 April 1992) awards of the maximum entitlement on that basis. Those awards of benefit entitlement continue, and are in no way in dispute. The documents recording them were not in evidence before the tribunal, but there is no doubt that they were made either indefinitely or for life: though like all benefit awards made on a future or continuing basis, subject to the condition of the claimant continuing to meet the requirements for entitlement: regulation 17 **Social Security Claims and Payments Regulations** 1987 SI No. 1968.

3. Because of the claimant's condition he has to live in a nursing home, where the 24-hour care he needs can be provided for him: see his own explicit evidence about this in the letter dated 9 January 1998 at page 26 of the appeal file, which formed part of the evidence before the tribunal. Other undisputed documentary evidence shows that throughout the period at issue the claimant has been being cared for as a full-time nursing home resident, free of charge to himself, under arrangements made in accordance with the National Health Service Acts: from 20 April 1996 to 1 November 1997 at the Meppershall Nursing Home, and from 2 November 1997 onwards at the Old Village School Nursing Home. In each case, according to the information provided by the matron or other person responsible for his care, this was under contractual arrangements funded by the relevant health authority and he was in accommodation where medical treatment and care was provided for him by qualified and professionally trained nurses: see pages 3 to 21.

*The suspending provisions in domestic law*

4. The effect of those arrangements on the claimant's right to actual *receipt* of the disability living allowance to which his condition otherwise entitles him was the question at issue in his appeal. It depended on the correct application of subordinate legislation made by the Secretary of State under section 113(2) **Social Security Contributions and Benefits Act 1992**, by which:

> **"(2) Regulations may provide for suspending payment of [benefit, including disability living allowance] to a person during any period in which he is undergoing medical or other treatment as an in-patient in a hospital or similar institution."**

5. The point of Parliament having enacted such a power is of course that the need for provision for such a person's care and/or mobility requirements may well be less than, or at least different from, that for a person living on their own in the community outside institutional care: see ***R v Secretary of State ex parte Perry and McGillivray***, CA 30 June 1998, considering the purpose of the provision and confirming the validity in United Kingdom law of the regulations made under it, including the specific one applied in this present case to suspend the claimant's benefit.

6. Those regulations originally provided only for the *care* component to be suspended while a disabled person was receiving in-patient treatment, but were later amended from 31 July 1996 so as to apply the suspension (in otherwise exactly similar terms) to the *mobility* component as well. See regulation 8(1) **Social Security (Disability Living Allowance) Regulations** 1991 S.I. No. 2890, which is accepted as having applied to the claimant's care component at all material times; and regulation

12A of the same regulations (inserted by 1996 S.I. No. 1436) making corresponding provision for the mobility component from 31 July 1996 onwards, as follows:

> **"12A(1)...it shall be a condition for the receipt of a disability living allowance which is attributable to entitlement to the mobility component for any period in respect of any person that during that period he is not maintained free of charge while undergoing medical treatment as an in-patient...in a hospital or similar institution ..."**

under the National Health Service legislation there referred to: there is no dispute that this includes the legislation used in this case to fund the claimant's nursing home places.

7. The validity of that regulation was sought to be challenged on judicial review, but the challenge was rejected by the Court of Appeal in ***ex parte Perry and MacGillivray***, supra. Consequently there can be no doubt that as a matter of domestic law the suspension of the mobility part of the claimant's allowance, as well as that for care, was effective if he counted as an "in-patient" within its terms. That depended on whether he counted as "undergoing medical or other treatment as an in-patient in a hospital or similar institution" while in his nursing homes, his care in each being provided for him free of charge. Under the adjudication officer's decisions the care component under his continuing award was suspended from the expiry of an initial 28-day waiver period after he first went into Meppershall Nursing Home, and the mobility component from 31 July 1996, when the amended regulation came into effect. Apart from the different starting dates the conditions for suspension, and thus the relevant factual questions, affecting the two components are identical.

*Suspension and tribunal decisions*

8. The actual decisions made in this claimant's case were not all in evidence, but their effect was clearly described in the Secretary of State's written submission to the tribunal, and it does not seem open to dispute that they were follows:

(1) He had, and retains, an award or awards of *entitlement* to the highest rate care and higher rate mobility components of disability living allowance, from the introduction of that allowance on 6 April 1992 (probably under the transitional provisions for converting previous awards of attendance and mobility allowance, which he also had), continuing indefinitely or for life (page 1A);

(2) On 10 June 1996 the question of whether this entitlement should continue to be paid to him in full after he went into Meppershall Nursing Home on 20 April 1996 was considered by an adjudication officer on review, and a decision given that the care component was not payable to him from and including 19 May 1996, because by that date he had been receiving free in-patient treatment in a hospital or similar

institution for a period or periods totalling more than 28 days (see the references to this decision in the later ones given in 1997 and 1998: pages 23, 30-34). This decision, and the factual basis for it, was undisputed by the claimant, who accepts as appropriate the loss of his care component while in the nursing home: see his letter on page 29. The decision thus became final, though it seems it may have mistakenly referred to him as in residential rather than nursing accommodation (pages 23, 33);

(3) On 1 December 1997 the question of payment of the claimant's allowance was looked at again, by an adjudication officer carrying out a further review of the decision of 10 June 1996 in (rather belated) recognition of the new regulation for suspending in-patients' mobility components. Now it was determined that by reason of the change in the regulations that earlier decision must be revised with effect from 31 July 1996 so that the mobility component was no longer payable to the claimant from that date, the earlier suspension of care component from 19 May 1996 being expressly confirmed. The reason given for both suspensions was that he was receiving free in-patient treatment in a hospital or similar institution, the initial 28-day waiver period having expired (see pages 22 to 23);

(4) Under the provisions of the **Social Security Administration Act 1992** then in force, a further adjudication officer carried out what was at that time called a "second-tier review" of that suspending decision, and confirmed it on 10 February 1998, in the very careful and clearly reasoned review decision under section 30(1) of that Act which was the one that eventually came under appeal to the tribunal: pages 30-34.

9. As noted above the claimant himself has only ever taken issue with the suspension of his *mobility* component. He has never sought to challenge the original and continuing suspension of his *care* component, or the factual basis for it, namely that the care provided for him in his nursing homes free of charge amounted to "treatment as an in-patient in hospital or similar institution" for the purposes of regulation 8. His challenge was, and has always been, to the principle of regulation 12A itself. He considers this altogether wrong since to a person in his position the mobility allowance, and the consequent ability to get a car under the motability scheme, makes a very great deal of difference in terms of the quality of life he is able to enjoy and the voluntary work in the community it enables him to do: in particular in helping other disabled people. The loss which its suspension represents can in no way be replaced by the care provided for him in the nursing home, however good that is. Hence the rationale for suspending the mobility, as distinct from the care, component of the allowance in a case such as his is simply non-existent.

10. That these are substantial arguments against having such a regulation as regulation 12A is not open to doubt; but the rejection by the Court of Appeal, in ***ex parte Perry and MacGillivray*** supra, of the same or closely similar arguments as reasons for holding the regulation invalid meant the end of any challenge in principle to it on such lines under domestic law. A subsequent attempt to take those cases on to the European Court of Human Rights was not, in the end, pursued, though the tribunal proceedings in this case were stayed for a lengthy period in the expectation that it might be. Consequently it was not until 18 October 2001 that this claimant's appeal to the tribunal (recorded as originally lodged on 21 August 1998: pages 35-36) against the adjudication officer's decision of 10 February 1998 actually came on for hearing.

11. By the time the appeal had been lodged, the provisions of the **Social Security Act 1998** had come into force, beginning on the passing of that Act on 21 May 1998; and by the time of the tribunal hearing on 18 October 2001, the new procedural provisions under that Act were fully applicable. So also, by that time, were the provisions of the **Human Rights Act 1998,** for direct application of the Convention on Fundamental Rights and Freedoms in UK domestic law from 2 October 2000 onwards.

12. In view of that last development and the failure of the earlier domestic law challenge to regulation 12A, the main argument for the claimant in a detailed and skilfully drawn written submission to the tribunal from the National Association of Citizens Advice Bureaux on his behalf (pages 39-44) was that:

> **"...the removal of a life award of mobility component contravenes the European Convention of Human Rights in relation to Article 14 (Discrimination) and Article 1 of the First Protocol (right to enjoyment of possessions)."**

However the written submission did also expressly contend that

> **"Also the Adjudication Officer at the time of the review has not shown sufficient grounds to carry out the review",**

and pursued a subsidiary argument that, consistently with the detailed approach adopted by the Commissioner in decision **CDLA 3578/98**, neither the consideration given to the relevant factual issues, nor the factual material put before the tribunal, had been sufficient to determine satisfactorily the question of whether the claimant was or was not an in-patient undergoing treatment in a hospital or similar institution.

13. It is, as I have said, conceded by the Secretary of State on this appeal that, given that clear challenge to the factual basis on which the suspension had been imposed, the tribunal erred in not making their own express findings on it but merely recording in their statement of reasons issued to the parties on 3 January 2002 (page 77) that

**"...On review it was found that [the claimant] was being maintained free of charge and undergoing medical or other treatment in a hospital or similar institution as an in-patient and receiving free in-patient treatment. [The claimant] has not challenged the facts in this respect and accordingly...[he] was not entitled to disability living allowance."**

14. I consider it right to accept that concession (for the detailed reasons given in the very helpful written submission of Mr N Martin on behalf of the Secretary of State dated 18 June 2002, at pages 82-87) and to direct the rehearing of the factual issues which it is agreed should be the consequence of setting aside the tribunal's decision. In so remitting the case I am not, however, to be taken as implying that the facts of the present case are anywhere near those of **CDLA 3578/98** referred to. That appears to have been a case of *residential* care, whereas all the evidence in the papers in this case is to the effect that the accommodation provided for the claimant in his nursing homes has been professional nursing care on a 24-hour basis, of the kind apt to fall within the accepted definitions of "treatment" and "in-patient in a hospital or similar institution" in this context: see **R(IS)7/92** para 10; **R(IS)18/94** ***CAO v White***, **R(IS)10/96** ***Botchett v CAO***, per Evans LJ at page 507. Given the apparent acceptance by and on behalf of the claimant that the factual basis for suspending his care component under the exactly similar wording in regulation 8 did apply, a tribunal could hardly be criticised for thinking it unnecessary to go into the detail apparently envisaged in that other case: how far it is necessary to do so must be a matter for judgment in each individual case, not universal prescription. The course I am taking will however enable all factual issues to be reconsidered afresh on the claimant's behalf, in case further evidence or argument on them may assist him at the rehearing.

*Human rights issues*

15. That leaves the major issue of principle raised on the claimant's behalf before the tribunal and also before me, which is that in any event the tribunal ought not to have sanctioned the suspension of the claimant's mobility component, at least from 2 October 2000 when his rights under the Convention became directly enforceable under United Kingdom law. This is said to be because to do so involves a deprivation of a possession contrary to Article 1 of the First Protocol, and further or alternatively an infringement of Article 14 of the Convention itself in that the suspension of mobility component for those disabled people who happen to be in hospital amounts to discrimination against them compared with those outside, whose actual mobility needs may be no greater but who still get the benefit. Alternatively, a similar discriminatory effect contrary to Article 14 is now relied on in relation to the family life of the disabled people affected,

involving Article 8 of the Convention if Art. 1 First Protocol does not for any reason apply: see the reply observations of the claimant's representative at pages 102-103.

16. I have considered all the arguments put forward on behalf of the claimant under this head but in my judgment Mr Martin is right in saying on behalf of the Secretary of State that they cannot assist the claimant in this case. Accordingly I direct the fresh tribunal that on the rehearing they need not be concerned with any argument that the decision to suspend payment of mobility component from 1 December 1997 is invalid under the **Human Rights Act 1998**. The reasons for this are (as with all human rights points, but especially those on the transitional application of the Act) a little complicated, but I will attempt to explain them as simply as I can.

17. The starting point in my judgment is that an appeal to an appeal tribunal constituted under the **Social Security Act 1998** is, in common with an appeal to a social security or disability appeal tribunal under the **Social Security Administration Act 1992** which the 1998 Act machinery replaced, a civil legal proceeding in the United Kingdom arising out of the administrative act or decision of an officer acting in the name or on the behalf of the Secretary of State. The appeal is a complete reconsideration and redetermination of all relevant factual and legal issues arising on the claim or question which gave rise to it. It is the first of the various processes under the Act to amount to a "legal proceeding", since although the Secretary of State's officers are of course required to make their decisions in accordance with the law and in the vast majority of cases do so with a care and objectivity to which the Commissioners have many times paid tribute, those decisions remain administrative: they are not themselves legal proceedings in the same sense as those before a court or tribunal. It follows that in considering the application of the **Human Rights Act 1998** to legal proceedings taking place after it comes into force by way of an appeal to a tribunal under the **Social Security Act 1998**, their "instigator" is always the individual claimant or other person entitled to appeal under section 12, who starts the process when he lodges his notice of appeal: never the Secretary of State, who cannot appeal to the tribunal against his own decision.

18. The way in which the **Human Rights Act 1998** has to be applied in relation to orders made or decisions given in civil legal proceedings, not brought by or at the instigation of a public authority, which take place after the coming into force of that Act on 2 October 2000 but relate to acts or events before that date, is not in my judgment now open to doubt. It has been explained with the utmost clarity in the judgment of the Court of Appeal given by Sir Andrew Morritt VC in ***Wilson v First County Trust Limited (No. 2)*** [2002] QB 74, [2001] EWCA Civ 633, cited with approval in ***R v***

*Lambert* [2001] 3 WLR 206, [2001] UKHL 37, and not doubted in ***R v Kansal (No 2)*** [2002] 2 AC 69, [2001] UKHL 62. For present purposes it is only necessary to quote paragraphs 10-11 and 15-18 of the Vice-Chancellor's judgment as follows:

> **"10 Section 6(1) of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. In that context "public authority" includes a court or tribunal: see section 6(3)(a) of the Act. But section 6(2)(b) excludes the application of section 6(1) where, in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the court is acting so as to give effect to or enforce those provisions. That provision must be read in conjunction with section 3(1) of the Act, which requires that, so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the Convention rights. The position, therefore, is that, where a court is faced with a provision in primary legislation which appears to require it to make an order which would be incompatible with a Convention right, the court must consider whether it is possible to read and give effect to that provision in a way which does not lead to that result. If it is possible to do so, then the court must take that course. The court will make an order which is not incompatible with the Convention right. But if it is not possible to read and give effect to the primary legislation in a way which is compatible with the Convention right, then the court must make the order which the primary legislation requires. It will not, then, be acting unlawfully: see section 6(2)(b) of the 1998 Act.**
>
> **11 It follows that, in any case where the court makes an order which is incompatible with a Convention right, it must, necessarily, first address the question whether it is required to do so by some provision in primary legislation. ...**
>
> ***Whether the relevant provisions of the 1998 Act have any application in this case***
>
> **15 It was submitted on behalf of the Secretary of State that the court has no power, under section 4(2) of the Human Rights Act 1998, to make a declaration of incompatibility in a case, such as the present, where what is said to be the relevant event—the making of the regulated agreement on 22 January 1999—took place before that section was brought into force (on 2 October 2000) by an order made under section 22(3) of that Act. The Secretary of State does not shrink from the necessary conclusion that, if that submission were well founded, it would follow that, in a case where the relevant event took place before 2 October 2000, a court is not required by section 3(1) of the Act to read and give effect to legislation (so far as it is possible to do so) in a way which is compatible with Convention rights; nor would a court be acting unlawfully under section 6(1) of the Act if (having failed to give effect to section 3(1) of the Act) it were to make an order which is incompatible with a Convention right. We have explained, already, that sections 3, 4 and 6 of the 1998 Act must be read together.**
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> **16 In our view the submission that sections 3, 4 and 6 have no application in the present case is misconceived.**
>
> **17 The Human Rights Act 1998 was enacted, as appears from its long title, "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights". The Convention rights to which the Act gives "further effect" are not, themselves, new rights introduced by the Act; they are existing rights set out in the Convention and its Protocols, to which the United Kingdom is party: see section 1(1) of the Act. The object of the Act is to incorporate those rights into domestic law and to give an effective domestic remedy. Section 6 must be read with that object in mind. Section 6(1)—in conjunction with section 6(3)(a)—requires a court to refrain from acting in a way which is incompatible with a Convention right. If the court is to comply with that requirement it must ask itself—in any case which comes before it after 2 October 2000—whether the order which it is about to make is or is not compatible with Convention rights. The relevant event, in the present case, is not the making of**

**the agreement on 22 January 1999; the relevant event is the making of an order on this appeal.**

**18 To put the point in another way, the relevant question, in the present case, is not whether some Convention right of First County Trust was infringed when it made a loan to Mrs Wilson upon the terms of the agreement dated 22 January 1999; nor whether, before 2 October 2000, there was any domestic remedy in respect of any such infringement. The relevant question is whether ... in making an order after 2 October 2000 which gives effect to a decision to allow the appeal—this court would be acting in a way which is incompatible with an existing Convention right. That is a question which has to be answered on the basis of the facts as they are at the time when the order is made in this court."**

19. The unrestricted application of the **Human Rights Act** provisions to the order of a court or tribunal made in civil legal proceedings taking place after, but relating to acts or events which took place before, its commencement thus depends, on the Court of Appeal's analysis in ***Wilson (No 2)***, on the provisions of section 6(1) normally making it unlawful for any court or tribunal to make an order after 1 October 2000 which infringes a person's Convention rights. But that analysis is expressly made subject to the exception noted by the Court of Appeal in paragraphs 10-11 quoted above, that section 6 does *not* make an order or decision of a court or tribunal unlawful if it was required to be made by or under a provision of primary legislation which cannot be read or given effect in any different way: see section 6(2) of the 1998 Act.

20. In my judgment, that has the consequence that when an appeal to a tribunal to which the **Social Security Act 1998** applies was initiated after the passing of that Act on 21 May 1998 (as this present one was) the tribunal is necessarily confined by the primary legislation in that Act to determining the case in accordance with the state of the facts and the law as they respectively stood at the time of the decision under appeal to it. This is required of it by section 12(8)(b) and para 3 of schedule 6. Those provisions are in my judgment impossible to read in any other way than as requiring what they expressly say: that changes in circumstances which took place after the date of the administrative decision under appeal must be excluded from the tribunal's consideration. It is well established that in this context "circumstances" include alterations in the law itself: cf. **R(I) 2/94** ***CAO v McKiernon***, CA 8 July 1993.

21. It must in my view follow that any decision given by the tribunal in accordance with that unambiguous requirement of the primary legislation on the appeal in this case, even if arguably involving an infringement of some Convention right, is necessarily excluded from being made unlawful under section 6 of the **Human Rights Act 1998**, because the adjudication officer's decision under appeal was given on 10 February 1998 and the tribunal is confined to the state of the facts and United Kingdom law at that time.

22. Further and in any event, I am not for my part satisfied that any arguable infringement of a Convention right arises from the suspension of mobility component for an in-patient under regulation 12A of the **Disability Allowance Regulations**. As has been explained by another Commissioner in case **CDLA 3908/2001**, the disability living allowance is a non-contributory benefit, provided by the State for general social reasons. It can thus be distinguished from the kind of "paid-for" benefits where an entitlement to benefits already built up on an accrual basis by contributions paid has been held in the European Human Rights jurisprudence to be a "possession" for the purposes of the Convention, Art. 1 First Protocol. I agree with the Commissioner's conclusion in that case that even a continuing award of this allowance, expressed to be for an indefinite period or for life, cannot be said to invest a claimant with a possessory *right* to have the same level, or any level, of such non-contributory income maintained indefinitely into the future. Such awards are always subject, as regards the future, to the conditions as to entitlement and payment in the legislation in force from time to time. It must in my judgment follow that future changes in those conditions can be made without amounting to any "deprivation of a possession" for this purpose.

23. No other claimed infringement of a Convention right is relied on apart from the suggestion of discrimination contrary to Article 14, in relation to either the claimant's enjoyment of his possessions within Art. 1 First Protocol or his family life within Article 8. Assuming in favour of the claimant that either of those primary rights is in point, the suggestion is in my judgment answered in the negative by the admissibility decision given by the Commission in application 27537/95 ***Carlin v United Kingdom,*** 3 December 1997 (pages 69-74 of the appeal file). Rejecting a similar argument under Article 14 in relation to the provisions in section 113(1) **Social Security Contributions and Benefits Act 1992** excluding the right to payment of disablement benefit for an industrial injury while a claimant is in prison, they commented that

> **"it is not every difference in treatment that constitutes discrimination within the meaning of Article 14 of the Convention"**

and held that the position of a disabled benefit claimant in prison was for this purpose not comparable with that of one outside so that no question of discrimination on a like-for-like comparison arose.

24. The regulation at issue in the present case was, as noted above, made under subsection (2) of the same section; and by the same token there are in my judgment plainly relevant factual differences between those disabled persons who are in-patients and those managing for themselves on their own in the community, which take the differences in treatment between them for both care and mobility components of

disability living allowance outside the field of discrmination for the purposes of Art. 14. The reasons are in substance the same as those referred to by the Court of Appeal in ***ex parte Perry and McGillivray***, supra, in rejecting the argument that the Secretary of State had acted irrationally by introducing regulation 12A of the regulations to make different provision between the two groups.

25. Consequently, in my judgment, no arguable infringement of a Convention right is involved in this case in any event.

*Conclusion*

26. For the sake of completeness, as the validity of the review carried out in 1997 was put in question at an earlier stage, I direct the tribunal that the adjudication officer's decisions of 1 December 1997 and 10 February 1998 were entirely correct to proceed on the basis that the introduction of regulation 12A from 31 July 1996 constituted a material change in circumstances such as to justify a review from that date of the decision given on 10 June 1996 and a reconsideration of how much, if any, of the claimant's continuing award remained payable to him while maintained free of charge in his nursing home.

27. The appeal is thus allowed and the case remitted for reconsideration by a freshly constituted tribunal in accordance with the directions given above.

*(Signed)*

**P L Howell**
**Commissioner**
**16 October 2002**