HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 63

on appeal from: [2007] EWCA Civ 614

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

R (on the application of RJM) (FC) (Appellant) *v* Secretary of State for Work and Pensions (Respondent)

Appellate Committee

Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Mance
Lord Neuberger of Abbotsbury

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Respondent:
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Intervener (Equality and Human Rights Commission)
Written submissions only
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LORD HOPE OF CRAIGHEAD

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Neuberger of Abbotsbury. I agree with it, and for the reasons he gives I would dismiss the appeal. I also agree with the additional observations by my noble and learned friend Lord Walker of Gestingthorpe.

LORD RODGER OF EARLSFERRY

My Lords,

2. I have had the advantage of considering the speech to be delivered by my noble and learned friend, Lord Neuberger of Abbotsbury in draft. I agree with it and, for the reasons he gives, I too would dismiss the appeal. I also agree with the additional observations of my noble and learned friend, Lord Walker of Gestingthorpe.

LORD WALKER OF GESTINGTHORPE

My Lords,

3. I have had the great advantage of reading in draft the opinion of my noble and learned friend Lord Neuberger of Abbotsbury. I agree with it and for the reasons given by Lord Neuberger I would dismiss this appeal. I venture to add only two brief comments, both based on the very helpful written submissions placed before the House by the intervener, the Equality and Human Rights Commission.

4. The first is to emphasise that for an individual to be "without accommodation" does not mean simply that he or she is homeless for the purposes of the Housing Acts (a legal classification which can include persons living in overcrowded or unsanitary accommodation). It means sleeping rough in doorways or on benches, often in a sleeping-bag or a large cardboard box, in the sort of conditions described by Baroness Hale of Richmond in *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396, para 78. Official statistics put the number of rough sleepers in England and Wales at a surprisingly low level (459 according to the Office of the Deputy Prime Minister in 2005, of whom about a quarter were in London). The amount of money saved by depriving some of these people of the disability premium is therefore relatively tiny, and the official justification for depriving them of it may seem callous. But statistics given by the intervener, in general conformity with the witness statements put in by both sides, indicate that most rough sleepers (90% of whom are men) have major health and social problems: 70% misuse drugs; 50% misuse alcohol; 39% have been in prison; 12% have been in care as children; 40% of young homeless women experienced sexual abuse as children or adolescents. These unfortunate people are unlikely to be much assisted by receiving cash-in-hand while they continue sleeping rough. Callous though it may seem, the Government is entitled to form the view that assistance should be given to them by other means. It is devoutly to be hoped that those other means are proving effective.

5. The other point on which I would comment is the expression "personal characteristics" used by the European Court of Human Rights in *Kjeldsen, Busk, Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, and repeated in some later cases. "Personal characteristics" is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric

circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). 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. There is an illuminating discussion of these points (contrasting Strasbourg jurisprudence with the American approach to the Fourteenth Amendment) in the speech of Baroness Hale of Richmond in *A L (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434, paras 20-35.

LORD MANCE

My Lords,

6. I have had the benefit of reading in draft the speeches of my noble and learned friends, Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury. There is nothing that I would wish to add to their speeches on any of the issues on this appeal except justification.

7. I have found the issue of justification difficult. In view of the conclusions reached on the other prior issues, it is for the Secretary of State to justify the discrimination which (by virtue of regulation 21 of and para 6 of Schedule 7 to of the Income Support (General) Regulations 1987 (SI 1987/1967), as amended, exists against those without accommodation ("rough sleepers") who otherwise satisfy the

requirements for receipt of a disability premium contained in paras 11(a) and 12(1)((b) to Schedule 2 of the Regulations.

8. Such requirements are, in brief, that the claimant was entitled to statutory sick pay or was, or was to be treated as, incapable of work and was so either for 196 days in the case of a terminally ill claimant or for 364 days in any other case. In the case of the present claimant, the effect of the exclusion of rough sleepers is to reduce the sum that he would otherwise receive from £77.95 to the basic personal allowance of £54.65 a week payable under regulation 17(1)(a) and Schedule 2, para 1. On the face of it, to deny someone a benefit on account of his or her disability simply because he or she is without accommodation seems to involve a callous connection between two unconnected factors.

9. Similarly discriminatory treatment, in the form of an exclusion contained in regulations 12(4)(c) and 13(7)(f) of The Supplementary Benefit (Claims and Payments) Regulations 1981 (SI 1981/1525), existed under the previous supplementary benefit scheme and appears to have been simply carried over into the present income support scheme. The exclusion was condemned in categorical terms in pp 24 and 37-38 of the 1983 and 1986 editions of a CHAR (Housing Campaign for Single People) Guide to Housing and Supplementary Benefits:

> "This exclusion is grossly unfair. There is no reason why a single person sleeping rough should not receive additions for old age, baths, blindness, special diet, hospital fares, laundry, special wear and tear on clothing, or indeed any of the additional requirements which do not directly depend on the claimant having a home. There is a strong case that they require such additional payments precisely because they do not have the amenities of a home."

10. The evidence put before the court by the Secretary of State from Mr Damien Johnson, a senior executive officer employed by the Department for Work and Pensions, suggests that the discrimination was the result of a policy decision taken when the present income support scheme was introduced under the Social Security Act 1986. That appears incorrect. No fresh consideration appears to have been given in 1986 to the point, or to the objections which had been raised by CHAR, and nothing has been produced to explain the original basis upon which discrimination was thought appropriate under the previous supplementary benefit scheme. But the Secretary of State has through

Mr Johnson put forward a rationale for the current approach, and it is for the court to consider whether and how far this can be said to have justified the discrimination occurring in this case in the second half of 2004.

11. The rationale is essentially two-pronged. First, the basic personal allowance is intended to cover most personal expenses. The disability premium is intended to cover additional expenses incurred by the disabled, such as additional heating costs, which, the Secretary of State considers, are less likely to be incurred by those without accommodation. Second, the Secretary of State does not wish to provide money to keep disabled people in their vulnerable position, albeit that it would potentially make that vulnerable position slightly more manageable. He prefers to target resources and assistance towards getting them out of that position, and he points to initiatives aimed at doing this.

12. In relation to the first point, the appellant correctly observes that disabled people with accommodation may not themselves incur any additional or abnormal expenses - they may for example live with family or friends or indeed squat – while disabled people without accommodation may have additional needs – eg for blankets, extra clothing, laundry, washing facilities or eating out or buying pre-made food – which those with accommodation do not. In relation to the second point, the appellant submits that steps taken to move disabled people into accommodation are no reason for not looking after their needs properly while they are without accommodation, and that the resource implications cannot be significant when estimates give the total number of all rough sleepers in the whole country as no more than 2000 to 4000.

13. The evidence is that 90% of rough sleepers are male, 75% of them over 25, 50% of them alcohol reliant, around 70% of them drug mis-users and 30-50% of them suffering from mental problems. Any idea that shortage of funds will incentive many if any disabled rough sleepers to move into accommodation seems unrealistic. On the other hand, there is force in the point made by the Secretary of State, in the light of the statistics, that further monies given to rough sleepers would be quite likely to be spent on purposes which were detrimental, rather that in satisfying such additional needs as they may be identified as having by reason of their disability. This point was taken up by the Master of the Rolls in the Court of Appeal ([2007] EWCA Civ 614; [2007] 1 WLR 3067, para. 57) when he gave, as his reason for holding that a policy of

discrimination was justified, that "The executive was to my mind entitled to form the view that there are better ways of assisting disabled homeless people than by providing money, which may be spent in ways which may do them more harm than good".

14. Although the present discrimination against a category of disabled may on its face appear callous, it was not discrimination on one of the core-protected (or "suspect") grounds identified by Lord Hoffmann in *R (Carson) v. Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173, paras 15-17. Further, the justification advanced does involve an assessment of the needs of and of social policy towards disabled rough sleepers. Under the Human Rights Convention, it is for the Secretary of State to justify the discrimination as pursuing a legitimate aim and as bearing a reasonable relationship of proportionality to that aim. But the courts' scrutiny of the justification advanced will not have the same intensity as when a core ground of discrimination is in issue.

15. With, I confess, some residual doubt, I have come to the conclusion that the rationale advanced by the Secretary of State for the policy of discrimination enshrined in the Regulations has been shown to have legitimate aims and to be, in its potential impact, sufficiently proportionate in its relationship to those aims to be regarded as justified. In common with the other members of the House, I would for these reasons therefore dismiss this appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

16. The Income Support (General) Regulations 1987 as amended ("the 1987 Regulations") entitle disabled persons to a disability premium, except if they are "without accommodation". By this appeal, the appellant, RJM, seeks to establish that the exclusion from disability benefit of disabled persons without accommodation is contrary to article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Introductory

17. The relevant facts and legal framework are lucidly set out in paras 4 to 16 of the judgment of Sir Anthony Clarke MR in the Court of Appeal, [2007] EWCA Civ 614, [2007] 1 WLR 3067, so I can summarise the basic features relatively briefly. Because of his mental health problems, RJM was incapable of working, and received income support, which initially included disability premium. In August 2004, payment of disability premium ceased to be made to RJM, on the ground that he had become homeless, although he continued to be paid his personal allowance, ie what may be seen as basic income support. The withdrawal of disability premium was effected pursuant to para 6 of Schedule 7 to the 1987 Regulations.

18. Income support is a means-tested benefit payable in circumstances set out in the Social Security Contributions and Benefits Act 1992. The effect of sections 124 and 135 of that Act is to entitle certain categories of people (including those with a disability) with no or low income to "such amount or the aggregate of such amounts as may be prescribed". For present purposes, the amounts in issue are those prescribed by the 1987 Regulations.

19. Regulation 17(1) of the 1987 Regulations prescribes three main amounts. Para (a) provides for the personal allowance under Part I of Schedule 2 to the regulations, para (d) for any premium under Parts III and IV of Schedule 2, and para (e) for housing costs under Schedule 3. The effect of paras 11 and 12 of Part III of Schedule 2 is that a person incapable of work for a specified period is entitled to the payment of a "disability premium". Para 6 of schedule 7, however, states that "a claimant who is without accommodation" is only entitled to benefit under regulation 17(1)(a). Hence, such a person cannot claim a disability premium, as it is payable under regulation 17(1)(d), even though he would be entitled to it if he were not "without accommodation".

20. RJM's contention is that para 6 of Schedule 7 to the 1987 Regulations is incompatible with article 14 of the Convention, which provides:

> "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."

It is clear from the opening words that some right under the Convention must be involved before article 14 can be relied on – see, for instance, *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434, para 21. It is also clear that, even where there is a difference in treatment which appears to fall within article 14, there will be no discrimination which infringes the article unless the difference has "no objective and reasonable justification" – see for instance *AL (Serbia)*, para 22.

21. In the instant case, the Convention right said by RJM to be involved is that contained in article 1 of the First Protocol to the Convention ("A1P1"), which states:

> "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".

22. There is no doubt that the effect of para 6 of Schedule 7 to the 1987 Regulations discriminates against disabled persons who qualify for income support and are without accommodation, as against disabled persons who qualify for income support and have accommodation: unlike the latter, the former are not entitled to disability premium. However, the Secretary of State for Work and Pensions contends that RJM's case must fail for three separate reasons. First, it is said that the claim is not within the scope or ambit of A1P1, as RJM has no inherent or other right to disability premium. Secondly, it is said that, even if the claim is within the ambit of A1P1, there is no discrimination on the basis of any "status" within article 14. Finally, it is said that, even if article 14 applies, the discrimination can be justified. I shall take these three arguments in turn, and will then deal with a point concerning the effect of decisions of the European Court of Human Rights ("the ECtHR") on domestic rules of precedent

Is the claim within the ambit of article 1 of the First Protocol?

23. It is (plainly rightly) common ground that disability benefit is capable of being "property" for the purposes of A1P1. However, the basic point made by Mr John Howell QC, on behalf of the Secretary of State, is that the consistent jurisprudence of the ECtHR is to the effect that a claim, whether made under A1P1 or under article 14 relying on A1P1, cannot succeed if the claimant has no right or legitimate expectation to the possession in respect of which his claim is made. As RJM has neither a right nor a legitimate expectation to a disability premium (indeed, the absence of any such right is the basis of his complaint), runs the argument, his claim cannot be brought within the ambit of A1P1, and hence his article 14 claim must fail.

24. Were it not for the decision of the Grand Chamber of the ECtHR in the judgment on admissibility in *Stec v United Kingdom* (2005) 41 EHRR SE295, I would have probably accepted Mr Howell's submission, which appears to be supported by a number of decisions of the ECtHR. In that connection, I would refer to two recent judgments of the Grand Chamber, but there are many other decisions which support the submission. Examples include *Gratzinger v Czech Republic* (2002) 35 EHRR CD 202, paras 69 to 74, *Polacek v Czech Republic* (Application No 38645/97) (unreported) 10 July 2002, paras 61-68, and *Maurice v France* (2006) 42 EHRR 855, paras 63-70.

25. In *Kopecky v Slovakia* (2005) 41 EHRR 944, the ECtHR said at para 35(b) that A1P1 "does not guarantee the right to acquire property", so that a claim could not be brought within A1P1 unless the claimant owned, or at least enjoyed a legitimate expectation to, property. The court then explained at para 49 that there could be no legitimate expectation unless there was a "currently enforceable claim that was sufficiently established".

26. In *von Maltzan v Germany* (2006) 42 EHRR SE92, the point may be made by quoting two conclusions reached by the ECtHR in paras 113 and 117 of its judgment:

> "The court concludes that the applicants have not shown that they had claims that were sufficiently established to be enforceable, and they therefore cannot argue that they had "possessions" within [A1P1]. …

> Having regard to the finding that [A1P1] is inapplicable, the court holds that art 14 … cannot be taken into account in the present case."

27. In the earlier case of *Gaygusuz v Austria* (1996) 23 EHRR 364, the applicant claimed that the denial of emergency assistance under an Austrian state scheme, on the ground that he was not an Austrian national, constituted discrimination contrary to article 14. Not surprisingly, Austria argued that the claim must fail because it was not within the scope of A1P1, as there was no right or legitimate expectation to emergency assistance. This argument was rejected by the ECtHR on the ground that "[e]ntitlement to this social benefit [was]… linked to the payment of contributions to the unemployment insurance fund" (para 39) and that, therefore, "the right to emergency assistance … is a pecuniary right for the purposes of [A1P1]" (para 41). Accordingly, the claim succeeded. "Most of the decisions after *Gaygusuz*", observed the court in para 34 of *Stec* (2005) 41 EHRR SE295, "stated that non-contributory benefits were not 'possessions'", although, as pointed out in para 45, there were decisions that went the other way.

28. The problem faced by the Secretary of State arises, as I have indicated, from the reasoning and decision in *Stec* (2005) 41 EHRR SE295. In that case, the various applicants contended that they had been the subject of discrimination in relation to reduced earnings allowance ("REA") under article 14 on grounds of sex. As the court explained in para 15, REA is "an earnings-related additional benefit under the statutory occupational accident and disease scheme which was put in place in 1948", which was recast and renamed in subsequent legislation. Importantly, it was a non-contributory benefit. The UK's "main submission", as recorded in para 33, was that:

> "the applications were incompatible ratione materiae with the provisions of the Convention in that non-contributory benefits, like REA …, could not be considered to fall within the scope of [A1P1]. The Convention and [A1P1] did not confer a right to receive benefits from the state. It was a matter for the state's discretion what provision to make, since there was no right under the Convention to acquire possessions."

29. This argument was rejected by the ECtHR. The court's reasoning, in summary terms, was as follows. First, it would be sufficient for a claim under article 14 to succeed if discrimination occurs not only in relation to the rights which the Convention guarantees, but "also to those additional rights …which the state has voluntarily decided to provide", and accordingly it was necessary to decide "whether the interests of the applicants … fell within the 'ambit' or 'scope'" of A1P1 (paras 39-40). Secondly, the court had already decided in *Gaygusuz* 23 EHRR 364 that a discrimination claim based on A1P1 could succeed under article 14 where the benefit was linked to contributions (para 43), although it was unclear from the reasoning whether the link to contributions was regarded as essential (para 45). Thirdly, in the light of that uncertainty and of the inconsistent decisions on the question, it was "necessary to examine afresh the question whether a claim to a non-contributory welfare benefit should attract the protection of [A1P1]" (para 46). Fourthly, because of policy considerations (including consistency with the court's interpretation of article 6 in connection with welfare benefits, and the artificiality of distinguishing between contributory and non-contributory benefits) the correct conclusion was that the applicants' claims were within the scope of A1P1.

30. Under the heading "The approach to be applied henceforth", the ECtHR set out its reasoning on the issue. The whole of the ensuing paras 46 to 55 repays study, but I have tried to limit my citation to the essential reasoning for present purposes:

> "47. … [I]n its case law on the applicability of art 6(1), the court originally held that claims regarding only welfare benefits which formed part of contributory schemes were … sufficiently personal and economic to constitute the subject-matter of disputes for 'the determination of civil rights'… . However, in the *Salesi v Italy* judgment (1998) 26 EHRR 187, art 6(1) was held also to apply to a dispute over entitlement to a non-contributory welfare benefit … .
>
> 48. It is in the interests of the coherence of the Convention as a whole that the … concept of 'possessions' in [A1P1] should be interpreted in a way which is consistent with the concept of pecuniary rights under art 6(1). It is moreover important to adopt an interpretation of [A1P1] which avoids inequalities of treatment based on distinctions which, at the present day, appear illogical or unsustainable.

> 49. …Given the variety of funding methods, and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of [A1P1]. Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter type of system also contribute to its financing… .
>
> 50. … Many domestic legal systems recognise that [some] individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding [A1P1] to be applicable. …
>
> 52. … If any distinction can still be said to exist in the case law between contributory and non-contributory benefits for the purposes of the applicability of [A1P1], there is no ground to justify the continued drawing of such a distinction.
>
> 53. It must, nonetheless, be emphasised that the principles, most recently summarised in *Kopecky* …[GC] … at [35] which apply generally in cases under [A1P1], are equally relevant when it comes to welfare benefits. …
>
> 54. In cases, such as the present, concerning a complaint under art 14 in conjunction with [A1P1] that the applicant has been denied all or part of particular benefit on a discriminatory ground covered by art 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question … . Although [A1P1] does not include the right to receive a social security payment of any kind, if a state does decide to create a benefits scheme, it must do so in a manner which is compatible with art 14."

31. Mr Howell argues that your Lordships should not follow this reasoning, and he invites us, instead, to remain faithful to the principle

enshrined in cases such as *Kopecky* 41 EHRR 944 and *von Maltzan* 42 EHRR SE92. I do not consider that your Lordships should accept that invitation. I recognise that the admissibility decision in *Stec* represents a departure from the principle normally applied to claims which rely on A1P1. However, *Stec* 41 EHRR SE295 was a carefully considered decision, in which the relevant authorities and principles were fully canvassed, and where the Grand Chamber of the ECtHR came to a clear conclusion, which was expressly intended to be generally applied by national courts. Accordingly, it seems to me that it would require the most exceptional circumstances before any national court should refuse to apply the decision.

32. I do not consider that any exceptional circumstances can fairly be said to arise here. It may well be that the conclusion in *Stec* 41 EHRR SE295 was founded more on broad policy than strict logic, but it is by no means exceptional, for the ECtHR to found a decision on such a basis. It is not as if there is any subsequent decision of the ECtHR which casts doubt on the reasoning in *Stec* 41 EHRR SE295. The decision in *von Maltzan* 42 EHRR SE92 came later, but it did not concern social welfare payments. *Stec* 41 EHRR SE295 was expressly distinguished (and therefore not doubted) in *Associazione Nazionale Reduci dalla Prigionia dall'Internamento e dalla Guerra di Liberazione v Germany* (2008) 46 EHRR SE11, para 77, on the grounds that what was involved in that case was "a one-off payment granted as compensation for events which occurred even before the Convention came into force" which was therefore "outside the framework of social security legislation" and could not be "likened to the payments in *Stec*".

33. Mr Howell, to my mind realistically, accepted that it was illogical to distinguish between funded social welfare payments (as in *Gaygusuz* 23 EHRR 364) and unfunded social welfare payments (as in *Stec* 41 EHRR SE295, and in the present case). However, he argued that this justified the conclusion that neither type of such payments was within the scope of A1P1. This presents his case with a further difficulty, as it means that, in order to succeed on this point, the Secretary of State would have to persuade this House that not merely *Stec* (2005) 41 EHRR SE295, but also *Gaygusuz* 23 EHRR 364, had been, in effect, wrongly decided. In agreement with Mr Richard Drabble QC, for RJM, it seems to me inconceivable that *Gaygusuz* 23 EHRR 364 would not be treated as good law by the ECtHR. Although not a decision of the Grand Chamber, it has stood for well over 10 years, and has been assumed to be right in a number of subsequent cases, not least by the Grand Chamber, and indeed by the UK government, in *Stec* 41 EHRR SE295.

34. In these circumstances, particularly bearing in mind this House's obligation under section 2(1)(a) of the Human Rights Act 1998 to "take into account any … judgment .. of the European Court of Human Rights", as explained by Lord Bingham of Cornhill in para 37 of *R(Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 2 WLR 781, I conclude that, as disability premium is part of the UK's social welfare system, RJM does have a sufficient "possession" to bring his claim within A1P1. I should perhaps add that, even on the somewhat more flexible approach proposed by Lord Scott of Foscote in paras 44 and 45 of that case, I would have reached the same conclusion.

Is RJM's homelessness a "status" for the purposes of article 14?

35. The Secretary of State's contention is that, in order to justify a claim under article 14, an applicant must show that he is being discriminated against on the grounds of a "personal characteristic", and that homelessness is not such a characteristic. RJM's response is twofold. First, on analysis, the ECtHR's jurisprudence establishes that there is no requirement that an applicant making a claim under article 14 must show that he is being discriminated against on the ground of a particular status or personal characteristic. Alternatively, if there is such a requirement, he satisfies it in this case, as homelessness is a personal characteristic.

36. There is no doubt that your Lordships' House has consistently proceeded in a number of cases on the assumption that an applicant who relies on article 14 must establish that the discrimination he complains of is based on a personal characteristic; in other words that "status" in article 14 should, where it is in issue, be addressed as a separate question, and should be given such a meaning. Examples include *R(S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196, para 48, *R(Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484, para 28, and *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719, paras 24 and 61. The approach of this House has been primarily based on the observation in para 56 of the judgment of the ECtHR in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, para 56, where it was "point[ed] out" that article 14 prohibits "discriminatory treatment having as its basis or reason a personal characteristic ('status')".

37. Further, there is a strong case for saying that, as a matter of language, article 14 (or at least the English version of article 14) appears to envisage precisely this, given the specific grounds on which unjustifiable discrimination is prohibited. In its recent judgment in *Kafkaris v Cyprus* (Application No 21906/04) (unreported) 12 February 2008, para 160, the ECtHR said that article 14:

> "safeguards persons who are in analogous or relevantly similar positions against discriminatory differences in treatment that have as their basis or reason a personal characteristic ('status') by which persons or a group of persons are distinguishable from each other".

38. Quite apart from this, there is no case which supports RJM's argument to the contrary. Your Lordships were taken by Mr Drabble to a number of decisions of the ECtHR dismissing article 14 claims without deciding whether the alleged discrimination could be said to have been on the ground of a personal characteristic. However, as the claims were dismissed on other grounds (eg no comparability or no discrimination), the absence of any consideration of this point gives no assistance to the argument that it was regarded as an unnecessary component of an article 14 claim. The absence of any reference in those judgments to the need for the alleged discrimination to be on grounds of a personal characteristic is just as easily explained on the grounds that it was unnecessary to consider the point, as the claim failed on other grounds, or that the point was irrelevant as there was no dispute on that issue in the particular case.

39. Nonetheless, it is fair to refer to the fact that the French version of article 14 (which has equal status with the English version – see article 59) ends with the words "ou toute autre situation", which may suggest a rather wider scope than "or other status". Further, while the ECtHR judgments relied on by RJM do not establish that no consideration need be given in an article 14 case to the issue of whether the discrimination is by reference to a "status" which can be characterised as a "personal characteristic", some of those judgments could be read as suggesting a rather less structured approach than that which has been adopted by this House. In particular, in an allegation of article 14 infringement, the ECtHR may not always consider whether the alleged discrimination is on the ground of "other status" as an entirely free-standing question: it sometimes appears to approach the overall allegation of infringement on a more holistic or "broad brush"

basis – see, for instance, the reasoning in *Kjeldsen* 1 EHRR 711, para 56, and *Kafkaris,*12 February 2008, paras 163-165, as well as *Stubbings v United Kingdom* (1996) 23 EHRR 213, paras 70-73.

40. Indeed, this was recently recognised in this House in *AL (Serbia)* [2008] 1 WLR 1434, para 24, where Baroness Hale of Richmond, in the course of an instructive analysis of the approach of the ECtHR to allegations of infringement of article 14, said that "the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator". Rather, she said, they "ask whether 'differences in otherwise similar situations justify a different treatment'" (quoting from *R(Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, para 3). Similarly, as she recognised in para 25, in most ECtHR judgments in article 14 cases, "the comparability test is glossed over, and the emphasis is (almost) completely on the justification test" (quoting from Feldman on *Civil Liberties and Human Rights in England and Wales*, 2nd ed (2002), p 144).

41. It is unnecessary to decide whether, and if so when, it may be appropriate in some cases not to consider the "status" issue as an entirely self-contained question. (However, having seen in draft the opinion of my noble and learned friend Lord Walker of Gestingthorpe, I agree with what he says in para 5). In any event, in the present case, I am content to adopt the approach which has been consistently taken in article 14 cases by this House, when the issue has arisen. Accordingly, it is necessary to decide whether homelessness can fairly be described as a "personal characteristic" as that expression was meant in *Kjeldsen* 1 EHRR 711 and in *Kafkaris*, 12 February 2008. In my view, it is.

42. First, it seems clear that "a generous meaning should be given to the words 'or other status'" – per my noble and learned friend, Lord Hope of Craighead, in *Clift* [2007] 1 AC 484, para 48. To similar effect, at para 4.14.21 of *Lester & Pannick, Human Rights Law and Practice*, 2nd ed (2004), it is stated that the ECtHR applies "a liberal approach to the 'grounds' upon which discrimination is prohibited". That appears to me to be entirely in accordance with the approach one would expect of any tribunal charged with enforcing anti-discrimination legislation in a democratic state in the late 20th, and early 21st, centuries.

43. The decisions of the ECtHR as to whether the "other status" requirement of article 14 is satisfied not only support such a wide

reading, but they also indicate that "other status" should not be too closely limited by the grounds which are specifically prohibited in the article. Thus, military rank, as against civilian (*Engel v The Netherlands* (1976) 1 EHRR 647), residence or domicile (*Johnston v Ireland* (1986) 9 EHRR 203), and previous employment with the KGB (*Sidabras v Lithuania* (2004) 42 EHRR 104) have all been held to fall within "other status" in article 14.

44. If persons living in a certain type of home (eg flats) were treated differently from those living in another type (eg houses), that would clearly, I think, potentially fall within article 14 (cf *Chassagnou v France* (1999) 29 EHRR 615, para 121). That would suggest that treating homeless people differently from those with homes should also potentially fall within article 14. Mr Howell said that a case of discrimination between those who lived in flats and houses might be said to fall within article 14 on the basis that occupiers will almost always have some sort of interest in, or rights over, their homes, and hence the difference in treatment would fall within the express "property" status. He may very well be right, but it does not detract from the force of the point: if that is indeed the basis upon which article 14 would apply in such a case, then homelessness should be a status, as, unlike those with homes, the homeless neither own nor enjoy rights over any residential property.

45. Further, while reformulations are dangerous, I consider that the concept of "*personal* characteristic" (not surprisingly, like the concept of status) generally requires one to concentrate on what somebody is, rather than what he is doing or what is being done to him. Such a characterisation approach appears not only consistent with the natural meaning of the expression, but also with the approach of the ECtHR and of this House to the issue. Hence, in *Gerger v Turkey* (Application No 24919/94) (unreported) 8 July 1999, the ECtHR held there could be no breach of article 14 where the law concerned provided that "people who commit terrorist offences … will be treated less favourably with regard to automatic parole than persons convicted under the ordinary law", because "the distinction is made not between different groups of people, but between different types of offence" (para 69). It appears to me that, on this approach, homelessness is an "other status".

46. This is also consistent with what Lord Bingham of Cornhill said at para 28 of *Clift* [2007] 1 AC 484, namely that he did not consider that "a personal characteristic can be defined by the differential treatment of which a person complains". I also note that, in the absence of decisions

such as *Gerger*, 8 July 1999, he would have been "incline[d] to regard a life sentence as an acquired personal characteristic and a lifer as having an 'other status'". On this basis, homelessness would appear to me to be a personal characteristic a fortiori, and there is no Strasbourg jurisprudence to justify a contrary conclusion.

47. In reaching the contrary conclusion, the Court of Appeal was influenced by the fact that being homeless was a voluntary choice – see para 45. Ignoring the point that in some cases it may not be voluntary, I do not accept that the fact that a condition has been adopted by choice is of much, if any, significance in determining whether that condition is a status for the purposes of article 14. Of the specified grounds in the article, "language, religion, political or other opinion, … association with a national minority [or] property" are all frequently a matter of choice, and even "sex" can be. (And it is noteworthy that in the recent case of *AL (Serbia)* [2008] 1 WLR 1434, being parentless was unhesitatingly accepted as being an "other status" under article 14). In para 42, the Court of Appeal also considered that the fact that homelessness was not a legal status was a "significant but not conclusive point" against it being a "status" for article 14 purposes, but I do not consider that it is a telling point. After all, "political or other opinion" involves no legal status, and I doubt whether some of the other statuses specified in article 14 do so either. The Court of Appeal was also influenced by the fact that the ECtHR had not recognised homelessness as a status (para 37), but in no case does the issue ever appear to have been raised, so the point appears to me to be entirely neutral.

Can the discrimination be justified?

48. Having decided that RJM has been the subject of discrimination which in principle is capable of infringing article 14, the remaining question to be addressed for the purpose of determining this appeal is whether the discrimination can nonetheless be justified. As was said in the judgment of the Grand Chamber on the merits in *Stec v United Kingdom* (2006) 43 EHRR 1017, para 51, a difference in treatment is discriminatory "if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised".

49. The evidence on behalf of the Secretary of State in support of refusing disability premium to those without accommodation is

contained in the witness statement of Mr Damien Johnson, a Senior Executive Officer of the Department for Work and Pensions. He explains that the present, income support, system was introduced in the late 1980s with a view to simplification and improved targeting. The justification for the policy under attack in this case appears to have two main strands, one of which may be characterised as policy-driven, the other being more practically based.

50. First, the Secretary of State takes the view that he should encourage the disabled homeless, who are "in a vulnerable position" to seek shelter, and therefore help, rather than rendering it easier, at least in financial terms, for them to remain without accommodation. It appears that 90% of those without accommodation in this country have problems connected with substance abuse and around 45% have mental health problems. Those who are disabled need, or at least would benefit from, accommodation, as indeed is reflected by the fact that they are included among those who are accorded priority need for housing under the Housing Acts (the 1985 Act when disability premium was introduced, and now the 1996 Act). As Mr Johnson explains, "In the government's view, helping homeless people into accommodation is a much more effective way of helping them than handing out money through the disability premium."

51. Secondly, the Secretary of State considers that the disabled are less likely to need a supplement if they are without accommodation than if they are not. This view is based on the proposition that, while the disability premium was not precisely calculated by reference to specific needs, much of it would be spent on heating and other household expenses, items which would not be required by someone without accommodation. Mr Johnson says that "claimants in accommodation have a range of expenses and financial pressures related to that accommodation that claimants without accommodation do not have".

52. The two grounds upon which the policy is sought to be justified are attacked on behalf of RJM. First, it appears that there may be an element of post hoc justification in some of what Mr Johnson says. However, it is impossible to be sure about that, and, in the end, the question to be determined is whether the policy can be justified at the time it is attacked – see for instance per Lord Hobhouse of Woodborough in *Wilson v First County Trust (No 2)* [2003] UKHL 40, [2004] 1 AC 816, para 144.

53. Secondly, there are no doubt arguments which can be put against the views expressed by Mr Johnson. Thus, while they may not have to pay for extra heating, the homeless may well have other expenses not necessarily incurred by those with homes, such as having to buy pre-prepared food and warmer clothing in winter. Also, it is not all those without accommodation who are disentitled from disability premium, but those characterised as "rough sleepers". Further, there is not a clear correlation between disability premium and accommodation.

54. However, policy concerned with social welfare payments must inevitably be something of a blunt instrument, and social policy is an area where a wide measure of appreciation is accorded by the ECtHR to the state (see para 52 of the judgment in *Stec* 43 EHRR 1017). As Lord Bingham said about a rather different statute, "[a] general rule means that a line must be drawn, and it is for Parliament to decide where", and this "inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial" – *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 2 WLR 781, para 33.

55. To similar effect, in this case, the Master of the Rolls said in the Court of Appeal at para 57 that "[i]t is not for the courts to form a view on what is or is not appropriate policy", provided that the "executive was … entitled to form the view that there are better ways of assisting disabled homeless people than by providing money, which may be spent in ways which may do them more harm than good".

56. In my view, the discrimination in the present case was justified, in the sense that the government was entitled to adopt and apply the policy at issue. This is an area where the court should be very slow to substitute its view for that of the executive, especially as the discrimination is not on one of the express, or primary, grounds – see *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, paras 14-17 (per Lord Hoffmann) and paras 55-58 (per Lord Walker of Gestingthorpe). Further, it does not seem to me to be unreasonable for the Secretary of State to take the view that he should be encouraging the disabled homeless to seek shelter and help. Similarly, I do not think it possible to characterise as unreasonable his view that the disabled will be less likely to need a supplement if they are homeless than if they are not.

57. The fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable. However, this is not such a case, in my judgment.

58. It is right to add that, after drafting this opinion, I have had the benefit of reading in draft the opinions of my noble and learned friends Lord Walker and Lord Mance. I entirely agree with, and respectfully adopt, what they say in connection with this topic.

Decisions of the ECtHR and the domestic doctrine of precedent

59. When considering the first issue, namely whether RJM's claim was within the scope of A1P1, the Court of Appeal was faced with one of its previous decisions, *Campbell v South Northamptonshire District Council* [2004] EWCA Civ 409, [2004] 3 All ER 387, in which it had decided that a claim based on A1P1 complaining of refusal of housing benefit could not succeed as it was a non-contributory benefit. This decision had itself involved the court following its earlier reasoning in *R (Carson) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577. As *Campbell* [2004] 3 All ER 387 had not been overruled by the House of Lords, the application of well-established principle appeared to suggest, at any rate at first sight, that the Court of Appeal should have dismissed RJM's appeal on the first issue, ie because his claim did not fall within the scope of A1P1.

60. The principle concerned is that famously laid down in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, 729-730, where Lord Greene MR stated that the Court of Appeal was obliged to follow one of its previous decisions unless (i) there are two conflicting decisions (in which case it was free to choose between them), (ii) the decision "cannot … stand" with a decision of this House, or (iii) the decision "was given per incuriam". This observation was approved when the case went to this House – see [1946] AC 163, 168, and it was re-affirmed in *Davis v Johnson* [1979] AC 264, 323-324, 336 and 349. The issue for the Court of Appeal in this case was whether it was compelled by that principle to follow its reasoning in *Campbell* [2004] 3 All ER

387 notwithstanding the subsequent decision of the ECtHR in *Stec* 41 EHRR SE295.

61. As the Master of the Rolls explained in paras 20 to 24, he would have felt constrained to follow the reasoning in *Campbell* [2004] 3 All ER 387, were it not for the fact that the Secretary of State conceded that, as a result of the ECtHR decision in *Stec* 41 EHRR SE295, RJM's claim fell within the scope of A1P1 (a concession which was, of course, withdrawn in this House). This raises the question whether one of its previous decisions must be treated by a later Court of Appeal as binding, in circumstances where the previous decision is inconsistent with a subsequent decision of the ECtHR.

62. Resolution of the question is complicated by the fact that the Court of Appeal considered the point by reference to what Lord Bingham of Cornhill said in paras 40 to 45 of *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465. At para 42, Lord Bingham, described "the doctrine of precedent" as "a cornerstone of our legal system". In the following paragraphs, he referred to the "potential pitfalls" of the Court of Appeal refusing to follow binding precedent on the ground of "a clear inconsistency" between the domestic decision which was prima facie binding on it and a subsequent decision of the ECtHR, and went on to explain why the normal domestic rule should continue to apply in such a case. In para 45, he explained that could be a "partial exception" to this rule. That exception was exemplified by the Court of Appeal's decision in *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558, where it refused to follow the earlier decision of this House in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. The decision in *Bedfordshire* [1995] 2 AC 633 had been given before the Human Rights Act 1998 came into force, there was no reference to the Convention in any of the opinions, and the plaintiffs (who failed in the House of Lords) succeeded in their subsequent application to the ECtHR.

63. In my judgment, there is a difference between a case (such as the present) where the Court of Appeal is faced with one of its previous decisions, and a case (such as *East Berkshire* [2004] QB 558) where it is faced with a decision of this House. Although Lord Bingham's remarks in paras 40 to 45 of *Kay* [2006] 2 AC 465 appear to refer to the doctrine of precedent generally in relation to the Court of Appeal, he was concerned with the issue of whether the Court of Appeal ought to have followed an earlier decision of this House (namely *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983), and all

the cases he discussed involved previous decisions of this House, not of the Court of Appeal.

64. Where the Court of Appeal considers that an earlier decision of this House, which would otherwise be binding on it, may be, or even is clearly, inconsistent with a subsequent decision of the ECtHR, then (absent wholly exceptional circumstances) the court should faithfully follow the decision of the House, and leave it to your Lordships to decide whether to modify or reverse its earlier decision. To hold otherwise would be to go against what Lord Bingham decided. As a matter of principle, it should be for this House, not for the Court of Appeal, to determine whether one of its earlier decisions has been overtaken by a decision of the ECtHR. As a matter of practice, as the recent decision of this House in *Animal Defenders* [2008] 2 WLR 781 shows, decisions of the ECtHR are not always followed as literally as some might expect. As to what would constitute exceptional circumstances, I cannot do better than to refer back to the exceptional features which Lord Bingham identified as justifying the Court of Appeal's approach in *East Berkshire* [2004] QB 558: see *Kay* [2006] 2 AC 465, para 45.

65. When it comes to its own previous decisions, I consider that different considerations apply. It is clear from what was said in *Young* [1944] KB 718 that the Court of Appeal is freer to depart from its earlier decisions than from those of this House: a decision of this House could not, I think, be held by the Court of Appeal to have been arrived at per incuriam. Further, more recent jurisprudence suggests that the concept of per incuriam in this context has been interpreted rather generously – see the discussion in the judgment of Lloyd LJ in *Desnousse v Newham London Borough Council* [2006] EWCA Civ 547, [2006] QB 831, paras 71 to 75.

66. The principle promulgated in *Young* [1944] KB 718 was, of course, laid down at a time when there were no international courts whose decisions had the domestic force which decisions of the ECtHR now have, following the passing of the 1998 Act, and in particular section 2(1)(a). In my judgment, the law in areas such as that of precedent should be free to develop, albeit in a principled and cautious fashion, to take into account such changes. Accordingly, I would hold that, where it concludes that one of its previous decisions is inconsistent with a subsequent decision of the ECtHR, the Court of Appeal should be free (but not obliged) to depart from that decision.

67. I note that my reasoning and conclusion on this point is not dissimilar to that of Jacob LJ in *Actavis UK Ltd v Merck & Co Inc* [2008] EWCA Civ 444, paras 92 to 107 in relation to decisions of the European Patents Office Board of Appeal ("the Board"). While I agree with him that the Court of Appeal should be free to depart from one of its previous decisions if satisfied that it is inconsistent with a subsequent decision of the Board, I disagree with him on two other points. First, I do not think that the Court of Appeal should be free to depart from a decision of this House which it considers to be inconsistent with a subsequent decision of the Board: for reasons already given, that should be a matter for your Lordships. Secondly, I do not consider that there is any reason for having a different rule of principle for decisions of the Board and decisions of the ECtHR, although I accept that (particularly in relation to decisions which are not of the Grand Chamber) the Court of Appeal may be less ready to depart from one of its earlier decisions which is inconsistent with a decision of the ECtHR than one which is inconsistent with a decision of the Board.

Conclusions

68. For these reasons, I conclude that:

(a) RJM's claim that he has wrongfully been deprived of disability premium falls, in principle, within the ambit of A1P1, and therefore of article 14;
(b) The discrimination of which RJM claims is based on his homelessness, which is an "other status" for the purposes of article 14;
(c) However, the discrimination of which RJM complains has been justified by the Secretary of State;
(d) The Court of Appeal was entitled to depart from its earlier decision in *Campbell* [2004] 3 All ER 387, as a result of the subsequent decision of the ECtHR in *Stec* 41 EHRR SE295.

Accordingly, as I agree with the Court of Appeal that the discrimination of which RJM complains can be justified, this appeal must be dismissed.