Trinity Term
[2015] UKSC 47
On appeal from: [2014] EWCA Civ 286

JUDGMENT

Cameron Mathieson, a deceased child (by his father Craig Mathieson) (Appellant) *v* Secretary of State for Work and Pensions (Respondent)

before

Lady Hale, Deputy President
Lord Mance
Lord Clarke
Lord Wilson
Lord Reed

JUDGMENT GIVEN ON

8 July 2015

Heard on 26 March 2015

Appellant	*Respondent*
Ian Wise QC Stephen Broach (Instructed by Scott-Moncrieff & Associates Ltd)	Tim Buley (Instructed by Government Legal Department)

LORD WILSON (with whom Lady Hale, Lord Clarke and Lord Reed agree):

Question

1. By notice dated 3 November 2010 the Secretary of State for Work and Pensions, in accordance with regulations, suspended payment to Cameron Mathieson, then a boy aged three, of Disability Living Allowance ("DLA") on the ground that he had by then been an in-patient in an NHS hospital for more than 84 days (12 weeks). Did the Secretary of State thereby violate Cameron's human rights?

Proceedings

2. On 10 January 2012 the First-tier Tribunal (Social Security and Child Support) dismissed Cameron's appeal against the Secretary of State's decision to suspend payment of the DLA. On 15 January 2013 the Upper Tribunal (Administrative Appeals Chamber) determined a further appeal which Cameron had brought and with which, following his sad death on 12 October 2012, his father, Mr Craig Mathieson, had proceeded pursuant to an appointment under regulation 30(1) of the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968). The Upper Tribunal set aside the decision of the First-tier Tribunal on the ground of an error of law but, in the event, it likewise dismissed the appeal. On 5 February 2014, by a judgment delivered by Laws LJ with which Ryder and Underhill LJJ agreed, the Court of Appeal dismissed Mr Mathieson's further appeal: [2014] EWCA Civ 286. Mr Mathieson now appeals to the Supreme Court.

Facts

3. Cameron was born on 19 June 2007. He lived in Warrington with his parents, together with his sister and two brothers who, at the time of his birth, were aged about ten, nine and two. At his birth, part of his bowel had to be removed. Shortly afterwards he was diagnosed with cystic fibrosis and, later, also with Duchenne muscular dystrophy. The conjunction of both conditions in Cameron was one of profound misfortune and grim prognosis which at that time befell only one other child in the UK. The muscular dystrophy precipitated severe developmental delay. One area of it was in Cameron's ability to communicate; so Mr Mathieson learnt the signs and symbols of Makaton in order better to communicate with him. Other conditions, including a clotting disorder and deep vein thrombosis in his left leg, made his needs even more complex. Mr and Mrs Mathieson had to learn how to

administer chest physiotherapy to him, entailing chest percussion and postural drainage, for 20 minutes twice a day. Thereafter they had to prepare and administer nebulised antibiotics to him through special equipment, as well as a host of other medications and supplements. Mr and Mrs Mathieson found that Cameron's need for exceptional and sophisticated care and attention, together with the ordinary care needs of the three older children, required them to relinquish their business and, once they had spent their savings, to fall back on state benefits. The First-tier Tribunal described Cameron as having the most severe and profound disabilities likely to come before a tribunal and added that he was blessed with loving and caring parents who were utterly devoted to his care.

4. On 4 July 2010 Cameron, who was showing symptoms of chronic bowel obstruction, was admitted to Ward C2 in the specialist respiratory unit at Alder Hey Hospital, Liverpool. He was to remain there until 4 August 2011. The doctors considered that he had needs for an even more complex package of care, including intravenous feeding, which could not easily be set up for delivery to him by Mr and Mrs Mathieson at home.

5. It is important to note the role played by Mr and Mrs Mathieson at Alder Hey during the 13 months of Cameron's treatment there. In this connection Nurse Burrows, an advanced nurse specialist attached to the cystic fibrosis team at the unit, wrote a report dated 28 October 2010, which, as the fact-finder, the First-tier Tribunal unsurprisingly accepted as accurate. The nurse reported that:

(a) Cameron's care needs far exceeded those of any other child in the clinic;

(b) the clinic relied heavily on Mr and Mrs Mathieson to undertake his daily care in the clinic;

(c) one or other of Mr and Mrs Mathieson was resident in the hospital at all times;

(d) "they remain[ed] his primary caregivers";

(e) the clinic relied on them to monitor his condition daily and on several occasions they were the first to notice deterioration in it;

(f) they participated in all discussions and decisions about his care;

(g) as they had done at home, they administered chest physiotherapy to Cameron at the clinic twice a day and thereafter the nebulised antibiotics;

(h) they prepared and administered his feeding by nasogastric tube;

(i) they administered warfarin to him in order to combat the clotting; and

(j) they changed his stoma bags up to eight times a day.

6. Mr Mathieson supplemented the evidence of the nurse. He said that Ward C2 had 13 beds for children in individual rooms; that most of the children there needed constant care; that the nurses were capable and dedicated but that there were never more than three of them at any one time; that parental care of the children was recognised as essential; that the result of the need for him or Mrs Mathieson to be at the hospital meant that during those 13 months they in effect spent no time together; that each of them had at first made numerous journeys from Warrington to Alder Hey (25 miles) and back in the family car but had been constrained to reduce them because of the cost of petrol; that, until it became too expensive, they had also regularly brought the older children to see Cameron at weekends; that, on days when he was well enough and with the encouragement of the clinic, they had taken Cameron back to his nursery school in Warrington for a short time and had then returned him to Alder Hey (ie another 50-mile journey); that, although he and Mrs Mathieson had been able to sleep free of charge either on camp beds alongside Cameron or in the Ronald McDonald house for parents at Alder Hey, they had incurred further expenditure in respect of food and drink for themselves, of parking and of Cameron's laundry; and that in his estimate (which the Upper Tribunal accepted) the extra expense caused by the need for Cameron to be moved to Alder Hey had been about £8,000 over the 13 months.

DLA

7. DLA was introduced by the Disability Living Allowance and Disability Working Allowance Act 1991 ("the 1991 Act"). The favoured mechanism was to insert sections about it into the Social Security Act 1975 ("the 1975 Act"). One section, namely section 37ZA, provided, at subsection (1), that DLA was to consist of a care component and a mobility component. Prior to 1991 the benefit analogous to the care component had been the attendance allowance, which, by section 2(1) of the 1991 Act, was from then onwards restricted to those aged at least 65; and the benefit analogous to the mobility component had been the mobility allowance, which, by section 2(3) of the 1991 Act, was abolished. In 1992 the 1975 Act was

repealed and the provisions for DLA were incorporated into sections 71 to 76 of the Social Security Contributions and Benefits Act 1992 ("the Benefits Act"). These sections remain in force. Under Part 4 of the Welfare Reform Act 2012 ("the 2012 Act"), DLA is to be replaced by the personal independence payment; and, once the scheme for making such payments is fully operable, the provision in section 90 of the 2012 Act for the repeal of sections 71 to 76 of the Benefits Act will come into force. To date, however, the personal independence payment has been introduced only for persons aged at least 16: regulation 5 of the Personal Independence Payment (Transitional Provisions) Regulation (SI 2013/387).

8. Section 72 of the Benefits Act governs entitlement to the care component. Cameron's entitlement derived from the second and third, labelled (b) and (c), of the three conditions set in subsection (1), which requires the person to be "so severely disabled physically or mentally" that (b) by day, he requires from another person frequent attention throughout the day in connection with his bodily functions and (c) at night, he requires from another person prolonged or repeated attention in connection with his bodily functions. In *Cockburn v Chief Adjudication Officer; Secretary of State for Social Security v Fairey (aka Halliday)* [1997] 1 WLR 799 the House of Lords held that the phrase "bodily functions" relates primarily to activities which the fit person normally performs for himself and which involve a high degree of physical intimacy; and Lord Hope of Craighead, at p 821, offered examples, namely getting into and out of bed, eating, drinking, bathing, washing hair and going to the lavatory. Subsection (1A) of section 72 of the Benefits Act adds that, in relation to a person under the age of 16, the conditions in subsection (1)(b) and (c) are satisfied only if his requirements are "substantially in excess of the normal requirements of persons of his age".

9. Section 72(3) and (4) of the Benefits Act specifies three rates of the care component – the highest rate, the middle rate, and the lowest rate – and provides that a person who satisfies the conditions set in both (b) and (c) of subsection (1) is entitled to the highest rate.

10. Section 73 of the Benefits Act governs entitlement to the mobility component. Cameron's entitlement derived from the conditions set in subsection (1)(a), which requires the person to be aged at least three and to be suffering from physical disablement such that he is either unable to walk or virtually unable to do so. Section 73(10) and (11) specifies two rates of the mobility component – the higher rate and the lower rate – and provides that a person who satisfies the conditions set in subsection (1)(a) is entitled to the higher rate.

11. Section 73 of the Social Security Administration Act 1992 ("the Administration Act") is entitled "Overlapping benefits - general". Section 73(1)(b) states that regulations may provide for adjusting benefit, including DLA, payable to

a person who is undergoing medical or other treatment as an in-patient in a hospital. The precursor to section 73(1)(b) was section 85(1) of the 1975 Act, which was in similar terms and was entitled "Overlapping benefits".

12. The regulations in issue in this appeal are regulations 8, 10, 12A and 12B of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890) ("the 1991 Regulations"). They were made pursuant, in particular, to section 85(1) of the 1975 Act and to section 5(1) of the 1991 Act, following Parliament's affirmative resolution pursuant to section 12(1) of the later Act. Regulation 8(1) provides that, subject to regulation 10, a person is not entitled to receive such DLA as is referable to the care component for any period during which he is maintained free of charge while undergoing medical or other treatment as an in-patient in an NHS hospital. But para 2 of regulation 10 provides that, in the case of a person aged under 16, regulation 8 shall not apply for the first 84 days of any such period; and para 1 provides that, in the case of any other person, regulation 8 shall not apply for the first 28 days of any such period. Regulations 12A and 12B make provision identical to regulations 8 and 10 in respect of receipt of such DLA as is referable to the mobility component. The regulations in force prior to 1991 in relation to payment of attendance allowance and mobility allowance had also provided for its suspension once the recipient had been in hospital for more than 28 days. But they had made no distinction between adults and children: the extension for children aged under 16 from 28 days to 84 days was therefore introduced in the 1991 Regulations.

Cameron's DLA

13. It is important to note that, notwithstanding that he was a child, it was Cameron, not either or both of his parents, who was entitled to DLA. There were changes, which it is unnecessary to record, in the rates of his entitlement. By 3 November 2010 the Secretary of State had decided that he was entitled to the highest rate of the care component and to the higher rate of the mobility component. But on 3 November 2010 he also decided to suspend payment of both components with effect from 6 October 2010 on the ground that by then Cameron had been an in-patient at Alder Hey for more than 84 days. By 6 October he had in fact been an in-patient there for 94 days.

14. The DLA had of course been payable to Mr Mathieson on Cameron's behalf. As such, it had no doubt to be deployed for Cameron's benefit but otherwise it had been deployable without restriction, whether in facilitating the performance of his bodily functions or otherwise. It had been a valuable component of the family's income. Mr Mathieson's estimate (accepted by the Upper Tribunal) was that its suspension between October 2010 and August 2011 caused the family to suffer a loss of about £7,000. His evidence was that, in order to help meet the shortfall, he had to borrow £4,000 from friends.

15. The Secretary of State is concerned to place the 84-day rule referable to DLA in the context of other state benefits payable to families generally and to the Mathieson family in particular. Prior to Cameron's removal to Alder Hey, the family received child benefit for all four children, child tax credit, carer's allowance and income support as well, apparently, as housing benefit and council tax benefit. Even after the first 84 days of Cameron's stay there, the family's child benefit continued to be payable in full, even the part referable to him, because Mr and Mrs Mathieson were still "regularly [incurring] expenditure in respect of" him: section 143(4) of the Benefits Act. Their child tax credit included an extra element because Cameron was in receipt of DLA and a further element because its care component was at the highest rate. But neither element fell to be withdrawn when, pursuant to the 84-day rule, DLA was suspended: regulation 8(3)(b) of the Child Tax Credit Regulations 2002 (SI 2002/2007). It was a condition of Mr Mathieson's entitlement to the carer's allowance that Cameron should be in receipt of the care component of DLA at either the highest or the middle rate; and the carer's allowance, as such, did indeed fall away upon suspension of his DLA. But it made little difference to Mr and Mrs Mathieson because their income support was thereupon increased proportionately. Thus, argues the Secretary of State, considerable benefits continued to be payable to the family, including in respect of Cameron, even after his 84th day at Alder Hey. But, with respect, to where does his argument lead? Prior to Cameron's removal to Alder Hey income support, which was means-tested, brought the family's economy up to, but not beyond, subsistence level. The Secretary of State concedes that there would have been no surplus available to meet such extra expenditure as the family might incur as a result of Cameron's removal. The fact that a number of benefits continued to be paid, even after his 84th day at Alder Hey, does not address the difficulty that, when the family was facing an increase in its expenditure of about £8,000, application of the 84-day rule caused it to suffer a decrease in its income of about £7,000.

Article 14

16. Article 14 of the European Convention on Human Rights ("the Convention"), entitled "Prohibition of discrimination", 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 enjoyment only of the rights and freedoms set out in the Convention which the article requires to be secured without discrimination on any of the identified grounds. The framers of the article did not wish the prohibition of discrimination to

extend beyond the four corners of the other articles. A free-standing prohibition of discrimination in the enjoyment "of any right set forth by law" and indeed generally, on any of the identified grounds, was introduced much later in the Twelfth Protocol; but the UK has not signed it.

(a) Scope

17. In his invocation of article 14, Mr Mathieson therefore needs first to establish a link with one or more of the Convention's other articles. He alleges a link with either or both of Cameron's rights to "the peaceful enjoyment of his possessions" under article 1 of Protocol 1 ("A1P1") and to "respect for his … family life" under article 8. For the purposes of article 14, Mr Mathieson does not need to establish that the suspension of DLA amounted to a violation of Cameron's rights under either of those articles: otherwise article 14 would be redundant. He does not even need to establish that it amounted to an interference with his rights under either of them. He needs to establish only that the suspension is linked to, or (as it is usually described) within the scope or ambit of, one or other of them. How can a public authority's action be within the scope of an article without amounting to an interference with rights under it? The case of *Carson v United Kingdom* (2010) 51 EHRR 369 provides an example. There the Grand Chamber of the European Court of Human Rights ("the ECtHR") explained at paras 63-65 that A1P1 did not require a contracting state to establish a retirement pension scheme but that, if it did so, the scheme fell within the scope of A1P1 and so had to be administered without discrimination on any of the grounds identified in article 14. The case of *Hode and Abdi v United Kingdom* (2012) 56 EHRR 960 provides another example. There the ECtHR explained at para 43 that article 8 did not require the state to grant admission to a refugee's non-national spouse but that, if it introduced a scheme for doing so, it fell within the scope of article 8 and so had to be administered without discrimination on any of the identified grounds.

18. The Secretary of State concedes that the provision of DLA falls within the scope of A1P1 but disputes that it falls within the scope of article 8. So I will proceed at first on the basis of the concession; later, and only if necessary, I will address the dispute.

(b) Status

19. On which of the grounds of discrimination prohibited by article 14 does Mr Mathieson rely? He relies on the concluding reference to "other status". The premise of his argument is that payment of the care component of DLA is expressly limited, and that the mobility component is in effect limited, to the "severely disabled": see sections 72 and 73 of the Benefits Act. Mr Mathieson argues that Cameron's status

on 6 October 2010 was that of a severely disabled child who was in need of lengthy in-patient hospital treatment and that, in comparison with a severely disabled child who was not in need of lengthy in-patient hospital treatment, application to Cameron of the 84-day rule discriminated against him contrary to article 14. Any such comparator would need to be a severely disabled child because otherwise he would not be entitled to DLA at all. But disability has degrees of severity and the suggested comparator could presumably be a child with a disability of severity either equal to, or indeed lesser than, that of the child in need of lengthy in-patient hospital treatment.

20. At first sight Mr Mathieson's contention appears contrived. Does it pass muster? The Upper Tribunal concluded that it did. Before the Court of Appeal the Secretary of State, without conceding that the Upper Tribunal's conclusion was correct, did not actively contest it; and so, "not without some misgivings", that court proceeded on the basis that, had there been discrimination, it would have been on the ground of the status identified by Mr Mathieson. In this court, however, the Secretary of State actively contests that Cameron had any "status" on which the decision to suspend his DLA was based.

21. In *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434, Lady Hale addressed at para 26 the list of prohibited grounds in article 14 and suggested that "[i]n general, the list concentrates on personal characteristics which the complainant did not choose and either cannot or should not be expected to change". In *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] AC 311, Lord Neuberger of Abbotsbury expanded at para 45 upon Lady Hale's analysis of the nature of the prohibited grounds by suggesting that they generally required concentration "on what somebody is, rather than what he is doing or what is being done to him". But, by its very decision in the *RJM* case, namely that the appellant's homelessness conferred on him a status prohibited by article 14, the House of Lords demonstrated that the prohibited grounds extended well beyond innate characteristics. The House held that they included not only the "suspect" grounds, or, to use a less ambiguous word, the "core" grounds, which, according to Lord Walker of Gestingthorpe at para 5, included gender, sexual orientation, pigmentation of skin and congenital disabilities. Lord Walker offered the simile of a series of concentric circles and suggested that these core grounds fell within the circle of the narrowest diameter. But then there was a wider circle which included acquired characteristics, such as nationality, language, religion and politics. Indeed, so Lord Walker suggested, there was an even wider circle which included, for example, the homeless appellant then before the House; which also included the complainant in the *Carson* case, who had chosen a particular country of residence; and which even included the complainant in *Sidabras and Dziautas v Lithuania* (2004) 42 EHRR 104, who had previously been employed by the KGB. The value of Lord Walker's simile lies in what he then added:

> "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."

22. The *RJM* case in the House of Lords was soon followed by the *Clift* case in the ECtHR. Mr Clift had been sentenced in England to a term of imprisonment of 18 years for crimes including attempted murder. The Parole Board recommended his release on licence once he had served half of his sentence. The Secretary of State rejected its recommendation. Had the recommendation been made in relation to a prisoner serving a sentence of a term of less than 15 years or a life sentence, the Secretary of State would have had no power to reject it. Mr Clift alleged that in such circumstances the Secretary of State's rejection of the Board's recommendation discriminated against him, contrary to article 14, in the enjoyment of his right to liberty under article 5 of the Convention. He contended that the discrimination was on the ground of his "status" as a person sentenced to a term of at least 15 years. In the domestic courts his contention had failed: *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484. The House of Lords had articulated an inhibition, less keenly felt by this court nowadays, about extending the meaning of convention terms beyond what the ECtHR had "authorised": see Lord Bingham of Cornhill at para 28 and also Lord Hope at para 49. In the ECtHR, however, Mr Clift's claim to have had a status within in the meaning of article 14 (and to have suffered discrimination on that ground) prevailed: *Clift v United Kingdom* (Application No 7205/07), The Times, 21 July 2010. The court said:

> "60 … 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 …" (emphasis supplied).

It is clear that, if the alleged discrimination falls within the scope of a Convention right, the ECtHR is reluctant to conclude that nevertheless the applicant has no relevant status, with the result that the inquiry into discrimination cannot proceed.

23. Decisions both in our courts and in the ECtHR therefore combine to lead me to the confident conclusion that, as a severely disabled child in need of lengthy in-patient hospital treatment, Cameron had a status falling within the grounds of discrimination prohibited by article 14. Disability is a prohibited ground (*Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117). Why should discrimination (if such it be) between disabled persons with different needs engage article 14 any less than discrimination between a disabled person and an able-bodied person? Whether, as in Cameron's case, the person is born disabled or whether he

becomes disabled, his disability is or becomes innate; and insofar as in the *RJM* case Lord Walker seems to have had three circles in mind, Cameron's case falls either within the narrowest of them or at least within the one in the middle.

(c) Justification

24. In *Stec v United Kingdom* (2006) 43 EHRR 1017 the ECtHR determined challenges to social security provisions which linked compensation for the financial effects of an accident at work to the different state retirement ages for men and women. So the argument was that, taken with A1P1, article 14 had been violated by discrimination on ground of sex. The Grand Chamber observed at para 51 that "[a] difference of treatment is … discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised". It is worthwhile to note, in parenthesis, a terminological difference between the ECtHR and the House of Lords. In the *RJM* case, cited at para 21 above, Lord Neuberger considered at para 22, as did Lord Walker at para 5 and Lord Mance at para 7, whether "the discrimination can be justified". I confess that I prefer the approach of the ECtHR. If justification is established, the result is not "justified discrimination". For justification will negative the existence of discrimination at all.

25. In the *Stec* case the Grand Chamber proceeded at para 52 to address the margin of appreciation which it should afford to the UK in relation to its social security provisions and held that it should generally respect its policy choices in that area unless they were "manifestly without reasonable foundation"; by application of that principle, it concluded that the challenges failed. Of course it does not necessarily follow that the domestic judiciary should afford a margin of equal generosity to the domestic legislature: *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] AC 173, para 37 (Lord Hoffmann). Indeed this court has at last helpfully recognised that the very concept of a "margin of appreciation" is inapt to describe the measure of respect which, albeit of differing width, will always be due from the UK judiciary to the UK legislature: *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] 2 WLR 481, paras 44 and 54 (Lord Mance).

26. Nevertheless, in the *RJM* case, Lord Neuberger cited para 52 of the judgment in the *Stec* case and concluded at para 56 that the provision of state benefits to the homeless was an "area where the court should be very slow to substitute its view for that of the executive." In *Humphreys v Revenue and Customs Comrs* [2012] UKSC 18, [2012] 1 WLR 1545, this court went further. There a father in receipt of means-tested benefits who cared for his children for three days each week challenged a rule that child tax credit should be paid entirely to their mother because she had "the

main responsibility" for them. He alleged indirect discrimination on grounds of sex because the rule prejudiced more fathers than mothers. Having considered the *Stec* case and the *RJM* case, Lady Hale (with whose judgment all other members of the court agreed) held at paras 19 and 20 that the court should determine the father's challenge by reference to whether the rule was manifestly without reasonable foundation; but she added at para 22 that it did not follow that the rule should escape careful scrutiny. Applying those principles, she rejected his challenge. She considered that the rule-makers had been entitled to conclude that some of a child's needs, such as for clothes and shoes, would be more likely to be met if the entire benefit was paid to the primary carer: para 29; and that there were costly administrative complexities in any apportionment of some of the benefit to the secondary carer while he remained in receipt of means-tested benefits: para 30. It is noteworthy that, in a "table of policy issues" which Lady Hale annexed to her judgment, the makers of that rule, when resolving not to amend it so as to permit the benefit to be shared, had carefully set out the rival advantages and disadvantages of so doing.

27. One of the rule-makers' arguments in the *Humphreys* case, as in the present case, was that a bright-line rule has intrinsic merits in particular in the saving of administrative costs. The courts accept this argument – but only within reason. In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312, Lord Bingham accepted at para 33 that hard cases which fell on the wrong side of a general rule should not invalidate it provided that it was beneficial overall. And when the *Carson* case had been considered, with another case, by the House of Lords, in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, Lord Hoffmann had observed at para 41 that a line had to be drawn somewhere. He had added:

> "All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line."

28. The Secretary of State has placed in evidence an extract from Hansard (HC Debates), 25 March 2003, col 26WH, in which Ms Maria Eagle, the Parliamentary Under-Secretary of State for Work and Pensions, responded to a complaint about the suspension of payment of DLA to an adult in hospital after 28 days. She pointed out that the suspension was pursuant to the rule against overlapping provision. As I have explained, the 1991 Regulations were indeed made pursuant to section 85 of the 1975 Act, entitled "Overlapping benefits". Ms Eagle continued as follows, at cols 27WH-28WH:

> "All in-patients' disability-related needs are met by the national health service. That is where the rule against overlapping provision comes in, and that is why DLA [is] withdrawn after a shorter period - namely,

> once an adult has been in hospital for 28 days. For children under 16, the rule is 84 days.
>
> Those arrangements are based on the principle that double provision – in this case, NHS in-patient care and payment of DLA – for the same need should not be made from public funds. The difference between the arrangements for adults and for children is recognition of the therapeutic value of visits and treats for a disabled child who is adjusting to life in hospital."

29. But are all the disability-related needs of children in hospital met by the NHS? And does Ms Eagle's reference to the value for the child that the family should make "visits" to him and bring him "treats" bear any relation to the demands, personal and financial, which are made of parents when their severely disabled child is in hospital? The evidence of Mr Mathieson gives a negative answer to both questions. But is the case of Mr and Mrs Mathieson a hard case, unreflective of the position of most parents in their situation?

30. In the only, short, witness statement filed on behalf of the Secretary of State in these proceedings his policy officer referred to an article by Dr Ruth Davies in the *Journal of Child Health Care,* vol 14(1) (2010) at p 6, entitled "Marking the 50th anniversary of the Platt Report: from exclusion, to toleration and parental participation in the care of the hospitalised child". Dr Davies explains that in Victorian times parents were not allowed to visit their children in hospital more than a few hours a week; that with the rise of behaviourism, with its rejection of the importance for a child of a parent's emotional support, there was little change in the approach to parental visits during the first half of the 20th century; that in 1959 a committee chaired by Sir Harry Platt wrote a report published by the Ministry of Health, entitled "The Welfare of Children in Hospital", in which it recommended that parents be allowed to visit their children whenever they could and to help as much as possible with their care and that consideration be given to the admission of mothers with their children, especially if aged under five; that for the next 20 years the nursing profession largely resisted the recommendation for unrestricted parental visiting; that after about 1980 changes occurred at an accelerated pace; that, in line with studies in the UK and elsewhere, hospitals increasingly recognised that there were both humanitarian and cost-saving advantages in encouraging parents to care for their children in hospital and indeed to reside with them there; and that, as the title of the article suggests, parental participation in the care of a child in hospital has ultimately become the norm.

31. The Children's Trust Tadworth, a charity devoted to the interests of children with multiple disabilities, and Contact a Family, a charity devoted to the support of families with disabled children, have been spear-heading a campaign designed to

persuade the Secretary of State to abrogate the rule whereby, after 84 days in hospital, a child's DLA is suspended. Their first report, entitled "Stop the DLA Takeaway" was published in 2010 and was placed in evidence before the Upper Tribunal. Subsequently they sought to strengthen their case by conducting an online survey, which was completed by 104 families across the UK with disabled children who had spent significant periods of time in hospital. This led to the charities' second report, entitled "Stop the DLA Takeaway Survey Report", which was published in 2013. Mr Mathieson sought to place it in evidence before the Court of Appeal, which put it aside on the basis that it added little to the first report.

32. In their first report the charities asserted:

> "The law as it stands suggests that families are getting some form of respite when their child is in a hospital or other medical setting. It suggests that a parent's responsibilities and costs are reduced. This could not be further from the truth."

It alleged that the level of care provided by parents either remained the same or increased when their children were in hospital. It asserted:

> "Research shows that there are extra costs for a family when their child is in hospital or another medical setting:
>
> - loss of earnings
> - travel for family members
> - parking costs
> - meals at hospital
> - childcare for siblings."

33. In their second report the charities were able to strengthen the assertions in their first report by reference to striking results of their survey. The results were as follows:

> "• Almost all carers (99%) provide more (68%) or the same (31%) level of care when their child is in hospital compared to when their child is at home.
>
> • 93% have increased costs relating to their child's disability when they are staying in hospital."

The survey confirmed that the families faced the types of increased costs identified in the first report, together with other costs relating to telephones, internet access and toys intended to keep the child occupied.

34. In the second report the charities estimated that each year about 400 to 500 families suffered the suspension of DLA after their child's 84th day in hospital and that the annual costs to the state of abrogating the suspension would be about £2.7m to £3.4m.

35. By consent, this court gave Mr Mathieson leave to place before it a letter from the Citizens Advice Bureau attached to Great Ormond Street Hospital ("the CAB"). It wrote:

> "It can be devastating for families when payments of Disability Living Allowance stop. The caring responsibilities of parents of child in-patients are enormous. It is often not realised that parents are *required* to attend hospital when their children are in-patients and to take an active part in their medical management. If they fail to attend, the hospital's social workers are informed. Many carers live either in make-shift beds on the wards or in nearby hospital-provided accommodation."

The CAB added that the caring responsibilities of parents may increase once their child becomes an in-patient; that they need to be trained to administer treatments, such as feeding through a gastrostomy; that the hospital relies on them to communicate with it on behalf of a non-verbal child; that their increased costs include costs of travel, of meals at the hospital and of childcare for siblings; and that their financial difficulties can be compounded by loss of earnings. The CAB concluded:

> "Our view is that the 84-day rule unfairly and unjustifiably restricts benefit entitlement. When the 84-day rule was introduced, it may have been the case that families were discouraged or not permitted to stay with their children in hospital. However, it ignores the modern reality

> of paediatric in-patient healthcare and it removes necessary support from under the feet of the country's most vulnerable people."

In that the person centrally affected by the suspension will be (a) a child under 16, (b) who is severely disabled and (c) whose medical problems are so profound as to necessitate his remaining in hospital for more than 84 days, it is hard to disagree with the CAB's reference to "the country's most vulnerable people". The Secretary of State's policy officer responds that by 1991 parental presence in hospital was no longer discouraged; but she does not adequately grapple with its evidence about an increase in family expenditure.

36. More significantly the Secretary of State has adduced no evidence in response to the charities' two reports. The court must bear in mind that, although both charities are highly reputable, they have launched a campaign and that the purpose of the reports is to support it. The court must therefore look critically at the reports but it has nothing to set against them. The survey's conclusion that 99% of parents provide no lesser level of care when their child is in hospital and that 93% of them suffer an increase in costs demonstrates:

(a) that the case of Mr and Mrs Mathieson is not a hard case, unreflective of the position of most parents in their situation;

(b) that the personal and financial demands made on the substantial majority of parents who help to care for their disabled children in hospital are, to put it at its lowest, no less than when they care for them at home.

37. The conclusion of the survey conducted by the charities also suggests that, with respect to Ms Eagle and always to whatever is said in Parliament, her reference in 2003 to visits and treats for a child in hospital betrayed her department's insufficient understanding of the role of parents with a child in hospital. The Secretary of State responds that any insufficiency in her parenthetical explanation of the reasons for the 84-day rule for children does not betoken his department's inability then to have given (or, more relevantly, now to give) a sufficient explanation of the reasons for it; that the very extension of the benefit for children in hospital from 28 days to 84 days, introduced in 1991, has demonstrated the sensitivity of his department to the different situation of adults and children in hospital; and, above all, that what matters is not how the reasons for a provision may have been presented but whether good reasons for it exist. Nevertheless there is nothing before the court to indicate that, whether in 1991 or at any time thereafter, the Secretary of State has asked himself: are benefits nowadays overlapping to an

extent which justifies the suspension of a child's DLA following his 84th day in hospital?

38. In this regard Mr Mathieson invites the court to approach the Secretary of State's need to justify the 84-day rule through the prism of international conventions. They are not part of our law so our courts will not ordinarily reach for them. Courts sometimes find, however, that the law which they *are* required to apply demands reference to them.

39. Article 3.1 of the UN Convention on the Rights of the Child (1989) (Cm 1976), ratified by the UK, provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

The UN Committee on the Rights of the Child, in its General Comment No 14 (2013) on article 3.1, analysed a child's "best interests" in terms of a three-fold concept. In *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, at paras 105-106, Lord Carnwath described the committee's analysis as authoritative guidance. The first aspect of the concept is the child's substantive right to have his best interests assessed as a primary consideration whenever a decision is made concerning him. The second is an interpretative principle that, where a legal provision is open to more than one interpretation, that which more effectively serves his best interests should be adopted. The third is a "rule of procedure", described as follows:

> "Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned … Furthermore, the justification of a decision must show that the right has been explicitly taken into account …"

40. Article 7.2 of the UN Convention on the Rights of Persons with Disabilities, also ratified by the UK, provides:

> "In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration."

It is impossible to conceive that the UN Committee's analysis of a child's "best interests" for the purposes of article 3.1 of the Convention on the Rights of the Child does not equally apply to the "best interests" of a disabled child for the purposes of article 7.2 of the Convention on the Rights of Persons with Disabilities.

41. There can be no doubt that the Secretary of State's decision to suspend payment of DLA to children following their 84th day in hospital has been an action concerning "children" and "children with disabilities", undertaken by an "administrative" authority with delegated "legislative" powers, within the meaning of both conventions. On the evidence before the court, however, the Secretary of State has never conducted an evaluation of the possible impact of the decision on the children concerned, with the result that he has perpetrated a breach of the procedural rule which constitutes the third aspect of the concept of the best interests of children. Unsurprisingly – might one say inevitably? – breach of the procedural rule has generated a violation of the substantive right of disabled children to have their best interests assessed as a primary consideration, which constitutes the first aspect of the same concept. So the Secretary of State is in breach of international law. But does this conclusion affect Cameron's human rights?

42. In *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, Lady Hale at para 21 quoted with approval the observation of the Grand Chamber of the ECtHR in *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131, that "the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law". The Court of Appeal concluded, however, that the circumstances of the present case left no room for either of the international conventions to give a steer to the proper interpretation of Cameron's rights. Consistently with that conclusion, the Secretary of State proceeds to submit that it is in principle illegitimate to have regard to the conventions and in this regard he relies upon the recent decision of this court in the *SG* case cited at para 39 above.

43. It is clear that in the *SG* case the Secretary of State submitted that, while an international covenant might inform interpretation of a substantive right conferred by the Convention, it had no role in the interpretation of the parasitic right conferred by article 14 and thus, specifically, no role in any inquiry into justification for any difference of treatment in the enjoyment of the substantive rights. But his submission was not upheld. While Lord Reed did not expressly rule upon it, it was rejected by Lord Carnwath (paras 113-119), by Lord Hughes (paras 142-144), by Lady Hale (paras 211-218) and by Lord Kerr (paras 258-262). Lord Carnwath, for example, pointed out at paras 117-119 that the Secretary of State's submission ran counter to observations in the Court of Appeal in the *Burnip* case, cited at para 23 above, and indeed to the decision of the Grand Chamber in *X v Austria* (2013) 57 EHRR 405. The decision of the majority in the *SG* case was not that international conventions were irrelevant to the interpretation of article 14 but that the UN Convention on the

Rights of the Child was irrelevant to the justification of a difference of treatment visited upon women rather than directly upon children: para 89 (Lord Reed), paras 129-131 (Lord Carnwath) and para 146 (Lord Hughes).

44. The noun adopted by the Grand Chamber in the *Neulinger* case, cited above, is "harmony". A conclusion, reached without reference to international conventions, that the Secretary of State has failed to establish justification for the difference in his treatment of those severely disabled children who are required to remain in hospital for a lengthy period would harmonise with a conclusion that his different treatment of them violates their rights under two international conventions.

45. Were this court to allow Mr Mathieson's appeal, it would, however, be disagreeing with the conclusion not only of the Court of Appeal but also, and in particular, of the Upper Tribunal. There is powerful authority which underlines the hesitation with which appellate courts should interfere with the conclusion of a specialist tribunal within the area of its expertise. In *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] AC 678, the House of Lords restored a conclusion by the Asylum and Immigration Tribunal ("the AIT") that it was reasonable to expect Sudanese asylum-seekers from Darfur to relocate to Khartoum. Lady Hale at para 30, in a passage with which Lord Hope agreed at para 19, observed that it was probable that, in understanding and applying the law in their specialised field, expert tribunals will have got it right. In *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49, [2011] 2 All ER 65, this court, adopting Lady Hale's observation, restored a conclusion by the AIT that a Somali asylum-seeker had failed to establish that, if returned to Mogadishu, he would be at real risk of inhuman or degrading treatment. Furthermore, in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, [2013] 2 AC 48, this court upheld the validity of a tribunal decision that there had been no "crime of violence" for the purposes of the Criminal Injuries Compensation Scheme; and Lord Carnwath observed at para 47 that the development of a consistent approach to that expression was primarily a task for the tribunal.

46. In this regard the Secretary of State relies in particular upon the recent decision of the Court of Appeal in *Obrey v Secretary of State for Work and Pensions* [2013] EWCA Civ 1584, [2014] HLR 133. A superficial reading suggests considerable similarities between the *Obrey* case and the present case. Under challenge was the rule whereby, after 52 weeks as an in-patient in hospital, a person was no longer to be treated as occupying his home for the purposes of entitlement to housing benefit. The claim was that, in breach of article 14 of the Convention when taken with A1P1, the rule indirectly discriminated against mental patients because they were more likely than other patients to remain in hospital for more than 52 weeks. The Court of Appeal dismissed the challenge of three claimants to the Upper Tribunal's conclusion that the 52-week rule was justified. Sullivan LJ at paras 17-18, in passages with which Laws LJ specifically agreed at para 30, rejected a

submission that the issue of justification under article 14 fell outside the specialist competence of the Upper Tribunal; and Sullivan LJ proceeded at paras 19 to 28 to explain that, in reaching its conclusion, the Upper Tribunal had made no error of law.

47. I agree that, albeit perhaps less obviously than, for example, in relation to circumstances in Khartoum or Mogadishu, the relevant chamber of the Upper Tribunal is likely to have particular insight into the existence or otherwise of justification for a social security provision. That said, I consider that there was an error of law in the tribunal's analysis of Mr Mathieson's case. First, it focussed upon the sort of attention which Cameron had received, or might have received, at Alder Hey in connection with bodily functions. His need for attention in connection with bodily functions had indeed been the threshold to his entitlement to the care component of DLA. But, as explained in para 14 above, there is no restriction on how DLA, once awarded, may, on his behalf and for his benefit, be deployed; and so it by no means followed that the inquiry into justification for the suspension should so narrowly be focussed. The focus should be upon whether the disability-related needs which Cameron exhibited at home continued to exist throughout his stay at Alder Hey and whether to a substantial extent Mr and Mrs Mathieson continued to attend to them there. In any event, however, the catalogue of care provided by them to Cameron at Alder Hey suggests that they there attended no less to his bodily functions than when he had been at home. Second, it observed that the staff at Alder Hey would if necessary have provided for Cameron the care which Mr and Mrs Mathieson provided for him there. "As long", said the tribunal, "as the general position is that the NHS will meet all in-patients' disability-related needs (in the sense of those that might otherwise found an entitlement to DLA), the position has a rational foundation". But what nursing staff need to do in the event that parents fail to perform the role expected of them is irrelevant. The tribunal also held:

> "… even if there are a small number of children … at the extreme end of the spectrum whose needs for attention in connection with their bodily functions cannot fully be met by the NHS and whose families may, as here, incur additional costs as a result, that is merely one facet of how adopting a bright line rule operates in practice. Even if the number of such children has increased since the early 1990s, there is no suggestion that the number represents more than a small minority even now."

With respect to the tribunal, and putting to one side its continued focus upon bodily functions, there was a suggestion in the charities' first report that the number of families which incurred additional costs as a result of their child's admission to hospital was more than a small minority. But that it is indeed far from being a small minority has now been amply established in their second report, which was not before the tribunal.

Answer

48. I conclude therefore that:

(a) by his decision dated 3 November 2010 to suspend payment of DLA to Cameron, the Secretary of State violated his human rights under article 14 of the Convention when taken with A1P1;

(b) there is therefore no need to consider whether he also violated Cameron's human rights under article 14 when taken with article 8;

(c) in that the Secretary of State was not obliged by any provision of primary legislation to suspend the payment, he acted unlawfully in making the decision dated 3 November 2010: section 6(1) and (2) of the Human Rights Act 1998 ("the 1998 Act");

(d) accordingly the First-tier Tribunal should have allowed Cameron's appeal against that decision; should have set it aside; and, if only for the sake of clarity, should have substituted a decision that Cameron was entitled to continued payment of DLA with effect from 6 October 2010 to the date from which payment of it was reinstated; and

(e) this court should allow Cameron's appeal and make the orders at (d) which the First-tier Tribunal should have made.

49. Mr Mathieson seeks further relief which the Secretary of State energetically opposes. First, he seeks a formal declaration that the Secretary of State violated Cameron's human rights. The First-tier Tribunal had no power to make a formal declaration and it appears that, by virtue of sections 12(4) and 14(4) of the Tribunals, Courts and Enforcement Act 2007, the jurisdiction of the Upper Tribunal and of the Court of Appeal in relation to Mr Mathieson's successive appeals was no wider than that of the First-tier Tribunal. It may well be that this court is not similarly confined but a formal declaration would seem to add nothing to the conclusions articulated in (a) and (c) of para 48 above. Second, more controversially, Mr Mathieson asks this court to discharge its interpretative obligation under section 3 of the 1998 Act by somehow reading the provisions for suspension of payment of DLA in regulations 8(1) and 12A(1) of the 1991 Regulations so as not to apply to children. In my view however it is impossible to read them in that way. Anyway, as the Secretary of State points out, it may not always follow that the suspension of payment of a child's DLA following his 84th day in hospital will violate his human rights. Decisions founded on human rights are essentially individual; and my judgment is an attempted analysis

of Cameron's rights, undertaken in the light, among other things, of the extent of the care given to him by Mr and Mrs Mathieson at Alder Hey. Although the court's decision will no doubt enable many other disabled children to establish an equal entitlement, the Secretary of State must at any rate be afforded the opportunity to consider whether there are adjustments, otherwise than in the form of abrogation of the provisions for suspension, by which he can avoid violation of the rights of disabled children following their 84th day in hospital.

LORD MANCE: (with whom Lord Clarke and Lord Reed agree)

50. I have had the benefit of reading Lord Wilson's judgment. I have found this appeal more finely balanced than he has done, although I have come ultimately to the same conclusion.

51. Courts should not be over-ready to criticise legislation in the area of social benefits which depends necessarily upon lines drawn broadly between situations which can be distinguished relatively easily and objectively. I would emphasise this as an important principle in terms rather more forceful than I think para 27 of Lord Wilson's judgment conveys. In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] AC 1312, Lord Bingham's speech on this point read more fully at para 33 as follows:

> "Thirdly, legislation cannot be framed so as to address particular cases. It must lay down general rules: *James v United Kingdom* (1986) 8 EHRR 123, para 68; *Mellacher v Austria* (1989) 12 EHRR 391, paras 52-53; *R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)*, [2002] 1 AC 800, para 29; *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, paras 72-74; *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, paras 41, 91. A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line 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."

52. In the present case, a line has been drawn in secondary legislation, the Social Security (Disability Living Allowance) Regulations 1991, regulations 8 and 10, according to which the receipt of a disability living allowance attributable to entitlement to the care component (which I shall for simplicity call "DLA") is made conditional in any period upon the person not being "maintained free of charge while undergoing medical or other treatment as an in-patient", except as regards the first

28 days or, in the case of a person under 16, the first 84 days during which he or she is so maintained.

53. That is a bright line, operating by reference to hospitalisation free of charge after defined periods. Inevitably, it is capable of being criticised as arbitrary. The length of the specified periods cannot be expected to correspond precisely with the extent of actual needs. They must have been seen as some form of broad allowance in respect of the initial period of adaptation from normal life to a substantial spell in hospital. There must be patients in hospital for more and less than the specified periods of 28 and 84 days who in practice have precisely the same needs. But the courts cannot expect the legislator to assess the appropriate length of any such period of adaptation on an individual basis or at any more precise level.

54. By the same token, the Secretary of State submits here that the basic criterion of hospitalisation free of charge represents a broad test, which draws a rational and readily applicable line, reflecting a view that in a National Health Service hospital the patient's disability-related needs will be met by the hospital.

55. The difficulty with that view is that it fails to reflect the modern emphasis on the importance of parents, in particular, continuing to provide assistance in connection with bodily functions while their child is undergoing long-term hospitalisation. Lord Wilson has drawn attention to this point in his paras 30 and 35. The Upper Tribunal was, in my view, in error (in para 46) in seeing it as an answer to the point that the National Health Service would itself have had to act, if the parents had not done so.

56. The Upper Tribunal went on to say that:

> "even if … there are a small number of children whose needs are at the extreme end of the spectrum whose needs for attention in connection with their bodily functions cannot fully be met by the NHS and whose families may, as here, incur additional costs as a result, that is merely one facet of how adopting a bright line rule operates in practice. Even if the number of such children has increased since the early 1990s, there is no suggestion that the number represents more than a small minority even now."

57. It is not evident from this passage what larger group the Upper Tribunal had in mind when speaking of "a small number" and "a small minority". On the evidence before us, a significant group of children with severe disability needs is adversely affected by the present regulations, and continues to receive in hospital attendance

in respect of disability by home carers such as parents no less than when at home. Again, I can refer to Lord Wilson's judgment, paras 31 to 36 and to his conclusion to that effect in para 47.

58. The absence of any restriction on the use of DLA, once awarded, cannot of itself bear on, or support, Mr Mathieson's case that the withdrawal of DLA during any period of hospitalisation extending beyond 84 days was unjustified. The grant of DLA is linked to the existence of disability-related needs. It is plainly legitimate to make its continuation or withdrawal conditional upon the continuation of the same needs. Here, however, the evidence indicates that the same needs, in terms of parental attention, existed and were met during Cameron's hospitalisation after, as before, the expiry of the 84-day period. But, in order to continue to provide this parental attention, the parents had, necessarily, to incur ancillary expenses and loss, such as extra travel and meal costs and loss of earnings.

59. The Secretary of State points out that other social benefits, in particular child benefit and child tax credit, remained in payment throughout Cameron's hospitalisation, and submits that they would not be required in the same way during hospitalisation. In particular, the child's meals would be provided in hospital. The Upper Tribunal made the same point in its para 48. Bearing in mind that this appeal is about disability-related needs, and the payments made in respect of them, this argument, essentially one of swings and roundabouts, is not to my mind particularly attractive. Had it been fully developed and been shown to be significant on the facts, I might nevertheless have given it more weight. As it is, I do not consider that it can counterbalance the prima facie conclusion that the withdrawal of DLA after 84 days was not justified in Cameron's case by any matching reduction in his needs for disability-related attention by his parents.

60. In the light of the above, I turn to consider whether Cameron was discriminated against on grounds of status within the meaning of article 14 of the Convention. To my mind, a child hospitalised free of charge (essentially in a NHS, rather than private, hospital) for a period longer than 84 days can be regarded as having a different status to that of a child not so hospitalised. The focus shifts on that basis to the issue of justification for the difference in treatment, and that I have already effectively covered. The difference in treatment was not justified, because on the evidence Cameron continued to have disability-related needs to which his parents were expected to continue to attend, and to meet which substantial expenditure was also necessarily incurred.

61. With regard to the appropriate remedy to give effect to these conclusions, I agree that this should be tailor-made and limited to Cameron's particular position, by simply deciding that the decision in his case cannot stand and that he was entitled to continued payment of DLA after 84 days. The Secretary of State may be able to

refine the criteria for the receipt or cessation of DLA in other cases in a manner which avoids the inequity involved in its withdrawal in respect of those in Cameron's position. We cannot address in general declaratory terms the position of children receiving DLA and hospitalised for longer than 84 days, as Mr Mathieson invites us to do.