

DISABILITY RIGHTS HANDBOOK UPDATER FEBRUARY 2022

- Disability Rights Handbook updates
 - Significant recent case law
-

Disability Rights UK bi-monthly updater

Keeping you up to date with disability and welfare rights

DISABILITY RIGHTS HANDBOOK UPDATES	3
Page-by-page updates to the 46th edition (April 2021-April 2022)	3
Updates by Handbook page number	15
CASE LAW DIGEST	18
Highlighting key welfare benefit decisions and judgments	18
CONTACT DISABILITY RIGHTS UK (DR UK)	25

Benefits or tax credits questions?

Members Organisations' Welfare Rights Helpline

Our member organisations' benefits and tax credits advice service is hosted by Ken Butler. Call 0203 687 0779 or email ken.butler@disabilityrightsuk.org

Unfortunately, we don't have the resources to answer queries from individuals who should ring the Disability Information and Advice Line (DIAL) on Freephone 0808 800 3333.

Helpline hours:

Tuesday and
Thursday:
10.30am-12.30pm

Join Disability Rights UK

Our Mission

We campaign for the rights of all disabled people to be included in every aspect of life. We bring the lived experiences of disabled people to everything we do. We challenge policy makers, institutions and individuals to remove the barriers that exist for us.

We have four priorities for 2020-23:

- Building a movement – strengthen our collective voice
- Independent living – live with choice and control and equality in everyday life
- Inclusive economic opportunities – campaign for a fairer benefits system, ensure disabled people have the opportunities to work and flourish
- Influencing public attitudes and behaviours – create a narrative about our lives, our contribution, our experiences

Disability Rights UK is a charity, led by people with diverse experiences of disability and health conditions, from different communities. We work with allies committed to equal participation for all. Together we can be stronger.

Membership is open to organisations and individuals.

For details of the benefits and costs of membership [visit our website](#) email members@disabilityrightsuk.org or call us on 0330 995 0411.

Our Vision

To create a society where disabled people have equal power, rights and equality of opportunity.

We are disabled people leading change

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Free to members

Disability Rights Handbook updates

Page-by-page updates to the 46th edition (April 2021-April 2022)

Compiled by its editor Ian Greaves, the following update the 46th edition of the Disability Rights Handbook based on information available up to 7 February 2022.

New amendments in each edition are shown with the page number in **bold**. A summary table listing all amendments since publication appears after the updates.

CARE AND MOBILITY

SECTION B

Disability living allowance

Does anything affect payment?

Your child is not entitled to DLA while they are entitled to child disability payment (Statutory Instrument 2021/804).

UPDATES Chapter 3(6) under 'Other benefits or help'

Page 13

Personal independence payment

Does anything affect what you get?

You are not entitled to PIP while you are entitled to child disability payment (Statutory Instrument 2021/804).

UPDATES Chapter 4(6) under 'Other benefits or help'

Page 28

How do you claim?

From 6 December 2021, you can complete the *How your disability affects you* form digitally; you can be sent an email with a link to the digital form.

UPDATES Chapter 4(14) under 'The *How your disability affects you* form'

Page 37

Child disability payment

If your child goes into legal custody

From 22 November 2021, your child will not be treated as being in legal detention if they are an inpatient in hospital or a similar institution (Scottish Statutory Instrument 2021/416).

UPDATES Chapter 6(7) under 'If your child goes into legal custody'

Page **52**

What if your child's condition changes?

From 22 November 2021, any increase can be paid from the day on which your child first satisfies the 3- or 6-month qualifying period if you tell Social Security Scotland about the change within one month of the date of the change. If the change of circumstances happened more than a month ago, you may still be able to get benefit backdated to the date of the change if you apply within 13 months of the change and you had good reason for reporting it late (Scottish Statutory Instrument 2021/416).

UPDATES Chapter 6(14) under 'If your child's condition gets worse'

Page **53**

HELP FOR CARERS**SECTION C****Carer's allowance****Do you qualify?**

From 17 November 2021, child disability payment care component at the middle or highest rate is a qualifying benefit for carer's allowance (Statutory Instrument 2021/1301).

UPDATES Chapter 8(2)

Page 56

Carer's allowance supplement

There will be a double payment (£462.80) of Scottish carer's allowance supplement to eligible carers who were receiving carer's allowance on 11 October 2021.

UPDATES Chapter 8(9) under 'Carer's allowance supplement'

Page 58

Time off from caring

The easements relating to coronavirus ended on 31 August 2021 (Statutory Instrument 2021/476).

UPDATES Chapter 8(10) under 'Coronavirus' [to be deleted]

Page 59

NOT IN WORK?**SECTION D****Statutory sick pay****Lengthy or frequent absences**

The 'Fit for Work' scheme is no longer in operation.

UPDATES Chapter 10 Box D.2

Page 64

Supporting medical evidence

The website to get an isolation note has changed. It is now: <https://111.nhs.uk/isolation-note/>

UPDATES Chapter 10(9)

Page 65

Employment and support allowance**Waiting days**

From 12 November 2021, the coronavirus easement rules are set to expire; this that means the waiting rules will now apply if you have coronavirus or need to self-isolate or if you are caring for a child or qualifying young person who has coronavirus or needs to self-isolate (Statutory Instrument 2021/476).

UPDATES Chapter 11(10) under 'Waiting days'

Page 68

Disqualification: Hardship

From 26 July 2021, you will be considered to be a person in hardship if you have been awarded the child disability payment (CDP) middle or highest rate care component (or have claimed the benefit in the last 26 weeks and are waiting for a decision). You will also be considered to be a person in hardship if you devote considerable time each week caring for another person who has been awarded the CDP middle or highest rate care component (or has claimed the benefit in the last 26 weeks and is waiting for a decision). (Statutory Instrument 2021/786).

UPDATES Chapter 11(17) under 'Hardship'

Page 70

The work capability assessment

Treated as having a limited capability for work

From 12 November 2021, the coronavirus easement rules are set to expire; this means that you will no longer be automatically treated as having a limited capability for work if you have coronavirus or need to self-isolate or if you are caring for a child or qualifying young person who has coronavirus or needs to self-isolate (Statutory Instrument 2021/476).

UPDATES Chapter 12(3) under 'Coronavirus' [to be deleted]

Page 77

The assessment

Face-to-face assessments have been resumed since 17.5.21. At first they will only take place if you cannot be assessed in another way, eg by phone or by video.

UPDATES Chapter 12(14)

Page 86

Jobseeker's allowance

Limited capability for work

The easements relating to coronavirus ended on 31 August 2021 (Statutory Instrument 2021/476).

UPDATES Chapter 13(4) under 'Coronavirus' [to be deleted]

Page 91

UNIVERSAL CREDIT

SECTION E

How do you claim?

If you need to obtain new ID such as a duplicate driving licence or birth certificate in a claim for universal credit, you can use the DWP flexible support fund (see Box 1.5 in Chapter 35) to help cover the costs of this.

UPDATES Chapter 14(5)

Page 96

Deductions

The deductions that can be made from universal credit to cover fines are now simply set at 5% of your standard allowance. Previously up to £108.35 a month could be deducted.

UPDATES Chapter 14(11) under 'Deductions for fines'

Page 99

Calculating universal credit

How is universal credit worked out?

From 24 November 2021, the taper is set at 55% (Statutory Instrument 2021/1283). The example of John's universal credit is now:

Example: John is a lone parent aged 63. He has one daughter aged 14. He has a part-time job at a bookshop. He has no childcare costs. He also has a small occupational pension from a previous employer. During this monthly assessment period, John earns £760 in his job (after allowable deductions have been made, such as income tax and national insurance contributions) and receives £42 from the occupational pension. He lives in a flat that he owns. Using the steps above, the calculation of John's universal credit is as follows:

Step 1: His maximum amount is £607.34 (this is the standard allowance of £324.84 for a single claimant aged 25 or over and the child amount of £282.50).

Step 2: His earnings during the assessment period are £760.

Step 3: The work allowance that applies in his case is £557. Deduct this figure from the result of Step 2: £760 less £557 equals £203

Step 4: His other income during the assessment period is the occupational pension of £42.

Step 5: From the result of Step 1 (£607.34), deduct 55% of the result of Step 3 (55% of £203 = £111.65) and all of the result of Step 4 (£42): £607.34 less £111.65, and less £42, equals £453.69.

John will therefore be entitled to universal credit of £453.69 for this assessment period.

UPDATES Chapter 15(1) and 16(1)Pages 101 & 106

Child amounts

From 26 July 2021, the higher rate of the disabled child addition is payable if your child or young person is entitled to child disability payment (CDP) highest rate care component, the lower rate if your child is entitled to any other rate of CDP (Statutory Instrument 2021/786).

UPDATES Chapter 15(4)Page 101

Childcare costs amount

The Court of Appeal has ruled that the requirement for you to have paid the childcare costs upfront before you can receive the childcare costs amount is not unlawful ([2021] EWCA Civ 1482).

UPDATES Chapter 15(8) under 'The childcare costs condition'Page **104**

The work allowance

From 24 November 2021, the lower work allowance is set at £335 a month, the higher work allowance at £557 a month (Statutory Instrument 2021/1283).

UPDATES Chapter 15(9)Page 104

The benefit cap: When the cap does not apply

From 26 July 2021, the benefit cap does not apply if you, your partner (if you are claiming jointly) or a child or qualifying young person you are responsible for are receiving child disability payment (Statutory Instrument 2021/786).

UPDATES Chapter 15(12)Page 105

Earnings, income and capital**Minimum income floor**

From 31 July 2021 the suspension of the minimum income floor due to the coronavirus pandemic has been lifted. Your work coach will contact you to discuss the matter before imposing a minimum income floor. The first people to be contacted will be those who had already completed the start-up period when the minimum income floor was first suspended on 13 March 2020 (Statutory Instrument 2021/807).

Your work coach has the discretion not to apply the floor if they think that your business continues to be affected by the pandemic. They can do this for up to two consecutive monthly assessment periods on a single occasion, for up to six assessment periods in total.

UPDATES Chapter 16(5) under 'Coronavirus'Page 108

Surplus earnings

From 24 November 2021, **Step 2** in the calculation of surplus earnings is as follow: The result of Step 1 is multiplied by 100 and divided by 55 (Statutory Instrument 2021/1283).

UPDATES Chapter 15(9) under 'The relevant threshold'Page 108

Benefits

Child disability payment is not listed in the universal credit regulations and can therefore be disregarded in the income calculation.

UPDATES Chapter 16(10)Page 109

Your responsibilities

The claimant commitment

From 15 February 2022, the DWP can decide that you do not need to accept a claimant commitment if you are terminally ill (Statutory Instrument 2022/60).

UPDATES Chapter 17(2) under 'When you do not have to accept a commitment' Page **112**

The work search requirement

From 8 February 2022, the maximum period of time during which you can limit your work search to work of a similar nature and rate of pay as your previous job has been reduced from three months to four weeks (Statutory Instrument 2022/108).

UPDATES Chapter 17(5) under 'Limitations to the work search requirement' Page **116**

Hardship payments

Recovering hardship payments

Following a judicial review claim, the DWP has now accepted that it has the discretion to waive recovery of hardship payment debts. The public law project has produced guidance on how to frame a successful waiver request: <https://publiclawproject.org.uk/content/uploads/2021/06/DWP-guidance-ii.pdf>

UPDATES Chapter 19(5) Page 125

MEANS-TESTED BENEFITS (PRE-UNIVERSAL CREDIT)

SECTION F

Income-related ESA

Full-time education

From 26 July 2021, you can study full time and receive income-related employment and support allowance if you get child disability payment (Statutory Instrument 2021/786).

UPDATES Chapter 20(4) Page 126

Premiums

Enhanced disability premium

From 26 July 2021, the child disability payment (CDP) highest rate care component has been added to the list of qualifying benefits for the enhanced disability premium. If your CDP is withdrawn while you are in hospital, you won't lose the enhanced disability premium. It can continue for up to 52 weeks of the hospital stay (Statutory Instrument 2021/786).

UPDATES Chapter 23(4) Page 133

Disabled child premium

From 26 July 2021, the child disability payment has been added to the list of qualifying benefits for the disabled child premium (Statutory Instrument 2021/786).

UPDATES Chapter 23(8) Page 134

Income and capital

Earnings disregards: Childcare costs earnings disregard in housing benefit

From 26 July 2021, you count as incapacitated if you get child disability payment (Statutory Instrument 2021/786).

UPDATES Chapter 24(6) under 'Childcare costs earnings disregard in housing benefit' Page 136

Income: Income from benefits, tax credits and pensions

From 26 July 2021, disability payments in Scotland (eg child disability payment) are completely disregarded as income (Statutory Instrument 2021/886).

UPDATES Chapter 24(7) under 'Benefits that are completely disregarded'

Page 137

Income: Charitable, voluntary and personal injury payments

From 1 January 2022, payments in kind or cash made by the following are disregarded: a payment compensating for historic institutional child abuse in the UK and a Windrush payment (Statutory Instrument 2021/1405).

UPDATES Chapter 24(8) under 'Payments from specific trusts and funds'

Page 138

Capital: Benefits

From 26 July 2021, arrears of disability payments in Scotland (eg child disability payment) are disregarded as capital for 52 weeks after you get them (Statutory Instrument 2021/886).

UPDATES Chapter 24(27)

Page 142

Capital: Your home

The DWP has confirmed that HS2 noise insulation grants can be disregarded in the assessment of capital for housing benefit (LA Welfare Direct 6/21).

UPDATES Chapter 24(31)

Page 143

Tax credits**Coronavirus**

The £500 one-off payment if you were getting working tax credit on 2.3.21 is to be disregarded as income in the tax credit calculation (Statutory Instrument 2021/495).

UPDATES Chapter 25(1) under 'Coronavirus'

Page 144

Child tax credit elements: disabled child element

From 9 December 2021, qualification for the severely disabled child rate of the disabled child element of child tax credit is restricted to the higher rate of the care component of child disability payment (Statutory Instrument 2021/1286).

UPDATES Chapter 25(4) under 'Disabled child element'

Page 146

Working tax credit elements: severe disability element

From 9 December 2021, the higher rate of the daily living component of a disability payment (Scotland) has been added to the list of qualifying benefits for the severe disability element of working tax credit (Statutory Instrument 2021/1286).

UPDATES Chapter 25(7) under 'Severe disability element'

Page 147

Working tax credit elements: childcare element

From 9 December 2021, disability payments (Scotland) have been added to the list of benefits in the third bullet that allow you to count as 'incapacitated' for the childcare element of working tax credit (Statutory Instrument 2021/1286).

UPDATES Chapter 25(7) under 'Childcare element: Incapacitated'

Page 148

Working tax credit disabled worker element

From 9 December 2021, disability payments (Scotland) have been added to the list of qualifying benefits for the working tax credit disabled worker element under Condition C (Statutory Instrument 2021/1286).

UPDATES Chapter 25(8) under 'The qualifying benefit test'

Page 148

HELP WITH HOUSING COSTS**SECTION G****Universal credit housing costs amount****Treated as occupying accommodation**

From 26 July 2021, you count as a disabled person if you receive child disability payment (Statutory Instrument 2021/786).

UPDATES Chapter 26 Box G.2 under 'Who counts as a disabled person?'

Page 157

The size criteria

From 26 July 2021, if you have a child who is not reasonably able to share a room because of their disability and they are entitled to the care component of child disability payment at the middle or highest rate, you will be allowed an additional bedroom for them (Statutory Instrument 2021/786).

UPDATES Chapter 26(9) under 'Disability: Disabled children'

Page 159

From 26 July 2021, child disability payment has been added to the list of qualifying disability benefits (Statutory Instrument 2021/786).

UPDATES Chapter 26(9) under 'Qualifying disability benefits'

Page 159

Non-dependant deductions

From 26 July 2021, there is no deduction for your non-dependants (no matter how many you have) if you or your partner get the care component of child disability payment at the middle or highest rate (Statutory Instrument 2021/786).

UPDATES Chapter 26(10)

under 'No non-dependant deduction: your (or your partner's) circumstances'

Page 161

Exceptions to the shared accommodation rules

From 26 July 2021, the care component of child disability payment at the middle or highest rate is included in the list of disability benefits (Statutory Instrument 2021/786).

From 31 May 2021, the 1-bedroom shared accommodation rule will not apply if you have lived in a homeless hostel for at least three months, regardless of your age. Nor will it apply if you were previously in care and are under 25; previously the age limit was 22 (Statutory Instrument 2021/546).

UPDATES Chapter 26 Box G.5

Page 162

Calculating the amount: social rented sector

From 1 October 2021, a deduction for under occupancy is not made if you are living in a social rented property that has been adapted under a sanctuary scheme as a result of you, or someone in your household, having suffered, or been threatened with, domestic violence by a partner, former partner or relative (Statutory Instrument 2021/991).

You must not be currently living with the person who inflicted or threatened the violence, unless they are a qualifying young person (see Chapter 15(4)) and are a dependant of a member of your household. You must provide evidence from someone acting in an official capacity which confirms that

you are living in a property adapted under a sanctuary scheme and that your circumstances are consistent with someone who has suffered domestic violence or the threat of domestic violence and that you have contacted them in connection with the incident.

A 'sanctuary scheme' is a scheme operated by a provider of social housing enabling victims of domestic violence to remain in their homes through the installation of additional security to the property or the perimeter of the property at which the victim resides. All other definitions relating to domestic violence are the same as those in Box E.4 in Chapter 17.

UPDATES Chapter 26(15) and (16) under 'Step 2' in each case

Pages 162 & 163

Housing benefit

The benefit cap

From 26 July 2021, child disability payment has been added to the list of benefits that exempt you from the benefit cap (Statutory Instrument 2021/786).

UPDATES Chapter 27 Box G.6

Page 165

Mixed-age couples

If you are getting housing benefit as a mixed-age couple because you are on a pre-universal credit means-tested benefit and this benefit ends, your housing benefit entitlement will also end.

UPDATES Chapter 27(2) under 'Existing claims'

Page 166

Rate of local housing allowance: young people

From 31 May 2021, the 1-bedroom shared accommodation rate of local housing allowance will not apply if you have lived in a homeless hostel for at least three months, regardless of your age. Nor will it apply if you were previously in care and are under 25; previously the age limit was 22 (Statutory Instrument 2021/546).

UPDATES Chapter 27(9) under 'Young people'

Page 169

The 'bedroom tax'

From 26 July 2021, if you have a child who is not reasonably able to share a room because of their disability and they are entitled to the care component of child disability payment at the middle or highest rate, you will be allowed an additional bedroom for them (Statutory Instrument 2021/786).

UPDATES Chapter 27 Box G.9 under 'Disabled children'

Page 170

From 26 July 2021, child disability payment has been added to the list of qualifying disability benefits (Statutory Instrument 2021/786).

UPDATES Chapter 27 Box G.9 under 'Qualifying disability benefits'

Page 171

From 1 October 2021, a reduction is not made if you are living in a social rented property that has been adapted under a sanctuary scheme as a result of you, or someone in your household, having suffered, or been threatened with, domestic violence by a partner, former partner or relative (Statutory Instrument 2021/991).

You must not be currently living with the person who inflicted or threatened the violence, unless they are a qualifying young person (see Chapter 15(4)) and are a dependant of a member of your household. You must provide evidence from someone acting in an official capacity which confirms that you are living in a property adapted under a sanctuary scheme and that your circumstances are consistent with someone who has suffered domestic violence or the threat of domestic violence and that you have contacted them in connection with the incident.

A 'sanctuary scheme' is a scheme operated by a provider of social housing enabling victims of domestic violence to remain in their homes through the installation of additional security to the property or the perimeter of the property at which the victim resides. All other definitions relating to domestic violence are the same as those in Box E.4 in Chapter 17.

UPDATES Chapter 27 Box G.9 under 'Exempt accommodation' Page 171

Non-dependants

From 26 July 2021, there is no deduction for your non-dependants (no matter how many you have) if you or your partner get the care component of child disability payment (Statutory Instrument 2021/786).

UPDATES Chapter 27(21) under 'No non-dependant deduction' Page 176

From 26 July 2021, child disability payment is not counted as income when considering whether or not the non-dependant is in remunerative work (Statutory Instrument 2021/786).

UPDATES Chapter 27(21) under 'Your non-dependant's gross income' Page 177

GRANTS AND LOANS

SECTION H

Housing grants

Child winter heating assistance (Scotland)

From 16 November 2021, the qualifying rules to child winter heating assistance have been expanded (Scottish Statutory Instrument 2021/415). The lump sum payments of £202 are now available to families with disabled children (or young people aged 16, 17 or 18) who, in the 'qualifying week' (the week beginning 20.9.21 for winter 2021/22), get:

- the highest rate of the care component of disability living allowance or child disability payment; or
- the enhanced rate of the daily living component of personal independence payment (including if this is suspended during a stay in hospital or a care home).

UPDATES Chapter 31(7) under 'Child winter heating assistance (Scotland)' Page 191

Housing grants

Grants system in Scotland

The website to get further information for tenants has changed. It is now:

www.gov.scot/publications/funding-adaptations-home-guide-private-tenants/

CORRECTS Chapter 32 Box H.2 Page 193

EDUCATION AND WORK

SECTION I

Financing studies

Students and means-tested benefits: universal credit

From 26 July 2021, you can claim universal credit even if you are receiving education if you are entitled to child disability payment and have a limited capability for work (Statutory Instrument 2021/786).

UPDATES Chapter 34(2) Page 200

From 15 December 2021, the rules on claiming universal credit if you are receiving education have been tightened. The second bullet will now read: You are entitled to attendance allowance, disability living allowance, child disability payment or personal independence payment *and* you have been found to have (or treated as having) a limited capability for work before you started the course (Statutory Instrument 2021/1224).

UPDATES Chapter 34(2) Page 200

Benefits and work

Universal credit: Work capability amount

From 26 July 2021, you can be referred to a work capability assessment to assess whether you are entitled to the work capability amount if you are also entitled to child disability payment (Statutory Instrument 2021/786).

UPDATES Chapter 35(2)

Page 204

CARE AND SUPPORT

SECTION J

Benefits in care homes

Disability benefits: Paying your own fees

The rules on whether or not you can get disability benefits if you receive NHS-funded nursing care are complex and require clarifying. Therefore the text in the third paragraph is replaced by the following:

Paying your own fees and receiving NHS-funded nursing care

Nursing homes – The payment of NHS-funded nursing care (FNC) for your nursing needs in a nursing home (see Box J.3 in Chapter 38) does not prevent you from receiving attendance allowance, DLA care component or PIP daily living component as long you do not get any funding from the local authority or are only getting interim funding (see above).

- **Attendance allowance and DLA care component** – For attendance allowance and DLA care component, where you are in a nursing home and FNC is paid, you are treated as a resident in a care home (see below) rather than as a patient. This is because you are only a patient if you are being ‘*maintained free of charge*’ while undergoing medical or other treatment (under NHS legislation) as an in-patient in a hospital or similar institution; as a self-funder/retrospective self-funder, you are paying the nursing home for your care and accommodation and therefore you are not maintained free of charge.

SSCBA, Ss.67(2) & 72(8); Social Security (Hospital in-Patients) Regs, reg 2(4); PIP Regs, reg 28; AA Regs, regs 6(1), 7(1) & 8(6); DLA Regs, regs 8(1), 9(1) & 10(8); Decision Makers Guide, Vol 3, Chap 18, paras 18021 & 18059

- **PIP daily living component** – For the PIP daily living component, you are treated as a patient if you are undergoing medical or other treatment (under NHS legislation) as an in-patient at a hospital or similar institution where any of the costs of the treatment, accommodation and any related services provided are borne out of public funds. The provision that you are maintained free of charge is not included in the hospital in-patient conditions for PIP. In addition, it is ‘*any of the costs of the treatment, accommodation and any related services provided*’ which is relevant. This has led to decisions that the daily living component is not payable where FNC is being paid to the nursing home for nursing care needs, even in the case of self-funders/retrospective self-funders.

WRA 2012, S.86(2)&(3); PIP Regs, reg 29(2)

However, if you can establish that you are not in a hospital or similar institution, you should be treated as a resident in a care home (see below) rather than as a patient. There is no definition of a ‘*similar institution*’, but guidance states that what should be taken into account is the purpose of the institution and the type of treatment provided and the level of care offered. It could therefore be said that a nursing home would only constitute a similar institution where NHS public funds are meeting the costs of the medical or other treatment that you are receiving (eg if you are funded by NHS continuing healthcare – see Box J.3). Where nursing needs are only a small part of costs funded by FNC and the majority of other costs (such as accommodation and personal care) are met by you as a self-funder, the level of nursing care is no more than incidental and ancillary and therefore, arguably, would not constitute medical or other treatment in a similar institution.

Advice for Decision Making, Chap P3, para P3003

Care homes – A ‘*care home*’ is defined as ‘*an establishment that provides accommodation together with nursing or personal care*’.

WRA 2012, S.85(3)

As a resident of a care home, if any of the costs of any qualifying services provided for you are borne out of public funds, then attendance allowance/DLA care component/PIP daily living component are not payable. 'Qualifying services' are defined as accommodation, board, personal care and 'such other services as may be prescribed'. As there are currently no 'other services' that are prescribed, FNC does not count as a qualifying service and therefore attendance allowance/DLA care component/PIP daily living component are payable if you are a self-funder/retrospective self-funder.

WRA 2012, S.85(2); AA Regs, regs 7(1) & 8(6); DLA Regs, regs 9(1) & 10(8); PIP Regs, regs 28(1)-(2) & 30(5)

UPDATES Chapter 40(2) under 'Paying your own fees'

Page 232

CHILDREN AND YOUNG PEOPLE

SECTION K

Child benefit

Do you qualify?

The terminal date rules have been changed to ensure that child benefit entitlement is protected when an exam or examinations have been cancelled due to the coronavirus pandemic, as a consequence of which the young person finishes their education earlier than originally planned (Statutory Instrument 2021/630).

UPDATES Chapter 43(1) under 'What happens when the young person leaves school?'

Page 241

RETIREMENT

SECTION L

Pension credit

Income

From 26 July 2021, disability payments in Scotland (eg child disability payment) are fully disregarded as income (Statutory Instrument 2021/886).

UPDATES Chapter 45(6) under 'Disregarded income'

Page 244

Capital

From 26 July 2021, arrears of disability payments in Scotland (eg child disability payment) are disregarded as capital for one year after you get them (Statutory Instrument 2021/886)..

UPDATES Chapter 45(7) under 'Arrears of benefits'

Page 246

COMPENSATION SCHEMES

SECTION M

Vaccine damages payments

Who qualifies?

Influenza has been added to the list of diseases providing exemption to the rule that the vaccination must have been given to the claimant when they were under 18 (Statutory Instrument 2021/508).

UPDATES Chapter 50(2)

Page 261

OTHER MATTERS**SECTION N**

Health benefits**Best Start Foods (Scotland)**

From 1 August the earnings limits have been increased: for universal credit £610 to £625; for housing benefit £311 to £317; for tax credits from £16,190 to £16,480 and from £7,320 to £7,500 (Scottish Statutory Instrument 2021/221).

UPDATES Chapter 53(6) under 'Do you qualify?'Page 269

COMMON RULES TO BENEFITS**SECTION O**

Coming to the UK**Residence and presence tests: Disability and carers benefits**

From 15 September 2021, the past presence test does not apply if you have been granted leave under the Afghan Relocations and Assistance Policy (or the previous scheme for locally-employed staff) or been granted leave as the dependent family member of someone with this type of leave, or been granted leave under the Afghan Citizens Resettlement scheme (Statutory Instrument 2021/1034).

UPDATES Chapter 55(3) under 'Disability and carers benefits'Page 277

Residence and presence tests: Child benefit

From 15 September 2021, the past presence test does not apply if you have been granted leave under the Afghan Relocations and Assistance Policy (or the previous scheme for locally-employed staff) or been granted leave under the Afghan Citizens Resettlement scheme. Nor does the test apply if you are not covered by one of these schemes but have left Afghanistan in connection with the collapse of the Afghan government on 15 August 2021 (Statutory Instrument 2021/1039).

UPDATES Chapter 55(3) under 'Disability and carers benefits'Page 277

Habitual residence test: Exemptions

From 15 September 2021, you are exempt from the habitual residence test (HRT) if you have been granted leave under the Afghan Relocations and Assistance Policy (or the previous scheme for locally-employed staff) or the Afghan Citizens Resettlement scheme. You are also exempt if you are not covered by one of these schemes but have left Afghanistan in connection with the collapse of the Afghan government on 15 August 2021 (Statutory Instrument 2021/1034).

UPDATES Chapter 55(4) under 'Child benefit, Scottish child payment and tax credits'Page 280

Leaving the UK**Income support**

From 26 July 2021, you can be paid income support for the first four weeks if you have been continuously entitled to statutory sick pay during the 196 days before the day you leave GB and you are entitled to child disability payment highest rate care component (Statutory Instrument 2021/786).

UPDATES Chapter 56(8) under '4-week rule'Page 283

Updates by Handbook page number

Amended entries are shown if re-updated during the year. The earlier entry is shown in grey and is followed by the most up-to-date entry.

Topic	Subhead	Section	Box	Chapter/ subsection	Page	Update edition
CARE AND MOBILITY						
Disability living allowance	Does anything affect payment?	B		3(6)	13	Aug 2021
Personal independence payment	Does anything affect what you get	B		4(6)	28	Aug 2021
Personal independence payment	How do you claim?	B		4(14)	37	Dec 2021
Child disability payment	If your child goes into legal custody	B		6(7)	52	Feb 2022
Child disability payment	What if your child's condition changes?	B		6(14)	53	Feb 2022
HELP FOR CARERS						
Carers Allowance	Do you qualify?	C		8(2)	56	Dec 2021
Carers Allowance	Carer's allowance supplement	C		8(9)	58	Dec 2021
Carers Allowance	Time off from caring	C		8(10)	59	Oct 2021
NOT IN WORK						
Statutory sick pay	Lengthy or frequent absences	D	D.2	10	64	June 2021
Statutory sick pay	Supporting medical evidence	D		10(9)	65	June 2021
Employment and support allowance	Waiting days	D		11(10)	68	Oct 2021
Employment and support allowance	Disqualification: Hardship	D		11(17)	70	Aug 2021
The work capability assessment	Treated as having a limited capability for work - coronavirus easement rules	D		12(3)	77	June 2021
The work capability assessment	Treated as having a limited capability for work	D		12(3)	77	Oct 2021
The work capability assessment	The assessment	D		12(14)	86	June 2021
Jobseeker's allowance	Limited capability for work	D		13(4)	91	Oct 2021
UNIVERSAL CREDIT						
How do you claim?		E		14(5)	96	June 2021
Deductions		E		14(11)	99	June 2021
Calculating universal credit	How is universal credit worked out?	E		15(1) and 16(1)	101 & 106	Dec 2021
Calculating universal credit	Child amounts	E		15(4)	101	Aug 2021
Calculating universal credit	Childcare costs amount	E		15(8)	104	Feb 2022
Calculating universal credit	The work allowance	E		15(9)	104	Dec 2021
Calculating universal credit	The benefit cap: When the cap does not apply	E		15(12)	105	Aug 2021
Earnings, income and capital	Minimum income floor	E		16(5)	108	Aug 2021
Calculating universal credit	Surplus earnings	E		16(6)	108	Dec 2021
Earnings, income and capital	Benefits	E		16(10)	109	Aug 2021
Your responsibilities	The claimant commitment	E		17(2)	112	Feb 2022
Your responsibilities	The work search requirement	E		17(5)	116	Feb 2022
Hardship payments	Recovering hardship payments	E		19(5)	125	June 2021

MEANS-TESTED BENEFITS (PRE-UNIVERSAL CREDIT)						
Income-related ESA	Full-time education	F		20(4)	126	Aug 2021
Premiums	Enhanced disability premium	F		23(4)	133	Aug 2021
Premiums	Disabled child premium	F		23(8)	134	Aug 2021
Income and capital	Earnings disregards: Childcare costs earnings disregard in housing benefit	F		24(6)	136	Aug 2021
Income and capital	Income: Income from benefits, tax credits and pensions	F		24(7)	137	Aug 2021
Income and capital	Income: charitable, voluntary and personal injury payments	F		24(8)	138	Feb 2022
Income and capital	Capital: Benefits	F		24(27)	142	Aug 2021
Income and capital	Capital: Your home	F		24(31)	143	June 2021
Tax credits	Coronavirus	F		25(1)	144	June 2021
Tax credits	Child tax credit elements: disabled child element	F		25(1)	146	Dec 2021
Tax credits	Working tax credit elements: disabled child element	F		25(4)	146	Dec 2021
Tax credits	Working tax credit elements: severe disability element	F		25(7)	147	Dec 2021
Tax credits	Working tax credit elements: childcare element	F		25(7)	148	Dec 2021
Tax credits	Working tax credit elements: disabled worker element	F		25(1)	148	Dec 2021
HELP WITH HOUSING COSTS						
Universal credit housing costs amount	Treated as occupying accommodation	G	G.2		157	Aug 2021
Universal credit housing costs amount	The size criteria	G		26(9)	159	Aug 2021
Universal credit housing costs amount	Non-dependant deductions	G		26(10)	161	Aug 2021
Universal credit housing costs amount	Exceptions to the shared accommodation rules	G	G.5	26	162	June 2021
Universal credit housing costs amount	Exceptions to the shared accommodation rules	G	G.5	26	162	Aug 2021
Universal credit housing costs amount	Calculating the amount: social rented sector	G		26(15) and (16)	162& 163	Oct 2021
Housing benefit	The benefit cap	G	G.6		165	Aug 2021
Housing benefit	Mixed-age couples	G		27(2)	166	June 2021
Housing benefit	Rate of local housing allowance: young people	G		27(9)	169	June 2021
Housing benefit	The 'bedroom tax' (disabled children)	G	G.9		170	Aug 2021
Housing benefit	The 'bedroom tax' (qualifying disability benefits)	G	G.9		171	Aug 2021
Housing benefit	The 'bedroom tax' (exempt accommodation)	G	G.9		171	Oct 2021
Housing benefit	Non-dependants (no non- dependant deduction)	G		27(21)	176	Aug 2021
Housing benefit	Non-dependants (your non- dependant's gross income)	G		27(21)	177	Aug 2021
GRANTS AND LOANS						
Housing grants	Child winter heating assistance	H	H.2	31(7)	191	Dec 2021
Housing grants	Grants system in Scotland	H	H.2	32	193	June 2021

EDUCATION AND WORK					
Financing studies	Students and means-tested benefits: universal credit	I	34(2)	200	Aug 2021
Financing studies	Students and means-tested benefits: Income-related ESA	I	34(2)	200	Dec 2021
Benefits and work	Universal credit: Work capability amount	I	35(2)	204	Aug 2021
CARE AND SUPPORT					
Benefits in care homes	Disability benefits: paying your own fees	J	40(2)	232	June 2021
CHILDREN AND YOUNG PEOPLE					
Child benefit	Do you qualify	K	43(1)	241	June 2021
RETIREMENT					
Pension credit	Income	L	45(6)	244	Aug 2021
Pension credit	Capital	L	45(7)	246	Aug 2021
COMPENSATION SCHEMES					
Vaccine damages payments	Who qualifies?	M	50(2)	261	Aug 2021
OTHER MATTERS					
Health benefits	Best Start Foods (Scotland)	N	53(6)	269	Aug 2021
COMMON RULES TO BENEFITS					
Coming to the UK	Residence and presence tests: Disability and carers benefits	O	55(3)	277	Oct 2021
Coming to the UK	Residence and presence tests: Child benefit	O	55(3)	277	Oct 2021
Coming to the UK	Habitual residence test: Exemptions	O	55(4)	280	Oct 2021
Leaving the UK	Income support	O	56(8)	283	Aug 2021

Case law digest

Highlighting key welfare benefit decisions and judgments

Disability Right’s UK’s Welfare Rights Adviser Ken Butler provides you with a selected summary of recent welfare benefit case law decisions issued since our last Updater.

[Detailed summaries hundreds of other significant decisions and Court judgments](#) are also available @ www.disabilityrightsuk.org

A disabled person’s welfare benefit entitlement is governed by rules set down in Acts and regulations agreed by Parliament. However, these are then subject to interpretation as to their exact meaning from the date they are passed.

While most benefit appeals are decided by First Tier Appeal Tribunals their decisions do not establish legal precedents.

Instead, precedent is set by judgments issued by appeals to the Upper Tribunal and other higher courts.

While the individual facts in every appeal are different, often legal issues are involved that have arisen before and the facts can be considered in light of legal precedent. For example, what needs to be established in deciding if finding someone fit for work would lead to a substantial risk to their health ([CE/2291/2014](#)) or whether someone’s inability to use an oven to cook can be considered in relation to their eligibility for PIP ([CSPIP/40/2015](#)). So, the citing of relevant case law may sometimes be useful in support of a disabled person’s welfare benefit appeal.

Whether appellant with mental health problems who can speak on telephone with representative can also be expected to participate in a telephone hearing

Benefit:	PIP
Upper Tribunal Judge:	Church
File number:	CPIP/729/2021

This is an appeal against a decision of the panel of the First tier Tribunal to uphold and confirm the decision that the appellant was not entitled to any award of PIP with either component at any rate.

In giving permission for her to appeal to the Upper Tribunal, Judge Church finds:

“... that it is arguable with a realistic prospect of success that the Tribunal failed to consider in sufficient depth whether to agree to the adjournment application or to proceed to determine the appeal in your absence given both your longstanding diagnosis of schizophrenia (which it accepted), given your representative’s submission that further evidence relating to your claim history should be obtained, and given that you were willing to wait until a face-to-face hearing could be listed (notwithstanding the uncertainty around this due to the public health situation).”

Judge Church then continues that:

“The health care which the appellant receives (including prescription of antipsychotic and anti-depressant medication) rendered her a “vulnerable adult” for the purposes of the hearing before the Tribunal (see [RT v Secretary of State for Work and Pensions \(PIP\) \[2019\] UKUT 207 \(AAC\)](#) (“RT v SSWP”)). This made the [Senior President of Tribunals’ Practice Direction on ‘Child, Vulnerable Adult and Sensitive Witnesses](#) (the “Senior President’s Practice Direction”).

This provides (among other things) that:
 “A child, vulnerable adult or sensitive witness will only be required to attend as a witness and give evidence at a hearing where the Tribunal determines that the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so.

In determining whether it is necessary for a child, vulnerable adult or sensitive witness to give evidence to enable the fair hearing of a case the Tribunal should have regard to all the available

evidence and any representations made by the parties.”

He then outlines that the Tribunal’s statement of reasons gave a fairly detailed account of its decision-making on whether to agree to the appellant’s representative’s application for an adjournment of the hearing given the anxiety that he said prevented his client from being able to participate in a remote oral hearing. However, he highlights that while the Tribunal referred to the overriding objective it did not refer, or allude to, the Senior President’s Practice Direction.

Judge Church holds that this means that the Tribunal wholly overlooked the requirements of the Senior President’s Practice Direction, or did not consider that it applied and to do so (at least without adequate explanation of why it considered that no measures were required) and this was an error of law as concluded by RT v SSWP.

He then finds that Tribunal’s reasoning as to why it was “reasonable” for the appellant to engage with the Tribunal by telephone was also flawed. This was because while the Tribunal drew an equivalence between the appellant’s ability to speak to her representative on the telephone and an ability to participate in a tribunal hearing by telephone, it had evidence before it which should have given it pause for thought.

Judge Church cites an email to the Tribunal from the appellant’s representative Mr. Guy that said: *“I have spoken by telephone to the client today. I can confirm her ability to communicate by telephone is poor. She suffers from severe and enduring mental health problems including schizophrenia. She has told me she is very nervous and apprehensive about a telephone hearing and does not think she will be able to take a full part and adequately explain her difficulties.*

She also feels that she needs her representative present to give her confidence and emotional support. I have explained that there will be a considerable delay but she is happy to wait.”

In view of this, Judge Church concludes by holding that:

“While the Tribunal was not bound to accept Mr Guy’s evidence about the appellant’s particular difficulties with participating in a telephone hearing its reasons for refusing Mr Guy’s application indicate that the Tribunal took an overly rigid and unsympathetic approach to the appellant’s accepted mental health difficulties. This falls short of a proper examination either of the specific issues highlighted by the Senior President’s Practice Direction or the general duty to ensure, so far as practicable, that the parties are able to participate fully in proceedings ([rule 2\(2\)\(c\) of the Tribunal Procedure \(First-tier Tribunal\) \(Social Entitlement Chamber\) Rules 2008](#)).”

High Court dismisses legal challenge to Disabled student’s exclusion from Universal Credit

Benefit:

UC

Judge:

Lord Justice Swift

File number:

[\[2022\] EWHC 167 \(Admin\)](#)

Since September 2020, the appellant, Flinn Kays, had been a student studying for a degree course. As a child, he was in receipt of DLA. Since age 16, he had received the mobility component of PIP and its daily living component both paid at the enhanced rate.

his claim for Universal Credit on the grounds that he was “in full-time education”.

Mr Kays submitted to the High Court that the Secretary of State for Work and Pensions acted unlawfully when, in November 2020, she refused

In particular, he argued that an amendment made to [regulation 14\(1\)\(b\) of the Universal Credit Regulations 2013](#) by the Universal Credit (Exceptions to the Requirement not to be receiving Education) (Amendment) Regulations 2020 [SI.No.827/2020](#) (the 2020 Regulations) was unlawful.

The 2020 regulations came into force in August 2020 but his Universal Credit claim that would have been allowed under the version of regulation 14 that had been in force previous to this.

Regulation 14, as originally made, set out six exemptions to the requirement not to be receiving education. Regulation 14(1)(b) disapplied the requirement where the claimant to Universal Credit was: "... entitled to Attendance Allowance, Disability Living Allowance or Personal Independence Payment and has limited capability for work."

As amended by the 2020 Regulations the requirement not to be receiving education is disapplied by regulation 14(1)(b) if the claimant for Universal Credit is entitled to any of Attendance Allowance, Disability Living Allowance or Personal Independence Payment.

14. Exceptions to the requirement not to be receiving education

- 1) A person does not have to meet the basic condition in section 4(1)(d) of the Act (not receiving education) if: ...
- b) the person is entitled to attendance allowance, disability living allowance or personal independence payment and it has been determined –
 - i) that the person has limited capability for work or limited capability for work and work-related activity on the basis of an assessment under Part 5 of these Regulations or Part 4 or 5 of the ESA Regulations;
 - ii) that the person is to be treated as having limited capability for work under Schedule 85 or limited capability for work and work-related activity under Schedule 9;
 - iii) that the person is to be treated as having limited capability for work or limited capability for work and work-related activity under regulation 19(2)(b) or (4)(b) of the Universal Credit (Transitional Provisions) Regulations 2014, and that determination was made on or before the date of claim to Universal Credit, where the person is receiving education on the date the claim is made, or the date on which the person starts receiving education, where the person starts receiving education after the date of claim to Universal Credit ...

Prior to making the 2020 Regulations, the Secretary of State came to accept that the effect of regulation 14(1)(b) in its original form was that a person such as Mr Kays, undertaking full-time advanced education and in receipt of Personal Independence Payment, could make a claim for Universal Credit and that claim would trigger the necessary assessment of whether the benefits claimant had limited capability for work.

However, she maintained that this was not what she had intended regulation 14(1)(b) to achieve. Her intention had been that regulation 14(1)(b) should provide an exception to the requirement not to be receiving education only for those who, before making a claim for Universal Credit, had already been assessed as having limited capability for work.

In this way, the Secretary of State's view was that regulation 14(1)(b) acted as an incentive to disabled persons already in receipt of state benefits to undertake advanced education with a view in future to reducing their reliance on state benefits. This being so, the Secretary of State made the 2020 Regulations.

More recently, the Secretary of State made the [Universal Credit \(Exceptions to the Requirement not to be receiving Education\) \(Amendment\) Regulations 2021](#). These came into force on 15 December 2021 and amended regulation 14(1)(b) for a second time.

As now amended this latest version of regulation 14(1)(b) limits the exception to the requirement not to be in education for persons entitled to AA, DLA, or PIP to those who have been determined to have limited capability for work and work-related activity before the date on which they start receiving education.

Mr Kays' case was that the amendment made to regulation 14(1)(b) by the 2020 Regulations was unlawful for four reasons:

- 1 that it was unlawful to make the amendment without prior consultation;
- 2 that the decision to make the amendment was irrational as the change made by the 2020 Regulations did not achieve the Secretary of State's purpose, a matter proved by the amendment that has since been made by the 2021 Regulations;
- 3 that the amendment to regulation 14(1)(b)

gave rise to discrimination contrary to ECHR article 14; and

- 4 that before making the 2020 Regulations the Secretary of State failed to comply with her obligations under section 149 of the Equality Act 2010 (“the public sector equality duty”).

In considering each of these in turn, Lord Justice Swift outlines why he finds that they fail.

1. The consultation challenge

Justice Swift holds that the lack of consultation was lawfully open to the Secretary of State and says:

“The reference to there being no consultation because there was no change of policy amounts to the Secretary of State saying she saw no need to consult because the policy the amendment the 2020 Regulations pursued had already been the subject of consideration within her Department and been determined to be appropriate. On the evidence I have seen this had been the position at least since early 2017.

The Secretary of State’s reason was not to the effect that consultation had already occurred (which would have been incorrect), rather it was that she did not consider there was any need to consult on a settled policy position.”

2. The rationality challenge

Justice Swift also dismisses that the Secretary of State acted irrationally, by still allowing a work around whereby disabled student could obtain a work capability assessment by claiming New Style ESA.

He quotes the following submission by the Secretary of State:

“ We are aware, as are stakeholders, that allowing a limited capability for work determination whilst the person was receiving ESA does provide a potential alternative route to meeting the exception via initially making a new claim to employment and support allowance to seek a limited capability for work determination and then claiming Universal Credit.

We will look to keep the operation of policy under review with a view of attempting to establish to what extent this might be the case and determine whether this remains appropriate. In the meantime, as these regulations clarify our current policy, this provision and that for claimants with a specific medical condition remain in place.”

Justice Swift holds that this amounted to a “wait and see” approach that was not irrational:

“The 2020 Regulations were consistent with the Secretary of State’s intention that for this class of applicant a claim for Universal Credit should not itself be the event triggering the capability for work assessment. The ministerial submission recognised that once regulation 14(1)(b) was amended, as then proposed, claims might still be possible by persons in full-time education who had not previously been in receipt of Universal Credit (or an equivalent legacy non-contributory benefit), but recommended that the amendment be made as proposed and the situation then be kept under review to decide if further amendment was appropriate.

Given the general complexity of the rules of the benefit system it is not irrational to take one step at a time. The step proposed in the 2020 Regulations may not have been the step required if regard was had only to strict logic.

But that alone is not sufficient to rule it out as an option lawfully open to the Secretary of State. One possibility was that practical experience might show that the amendment made to regulation 14(1)(b) by the 2020 Regulations was a sufficient implementation of her policy position. She was lawfully entitled to take one small step, leaving herself the option of considering the real-world consequences of that action, before deciding whether further action was required.”

3. The article 14 challenge

In dismissing the submission that the amendment made to regulation 14 by the 2020 Regulations resulted in unlawful discrimination against him in enjoyment of his Convention rights under article 1 of Protocol 1 to the ECHR, Justice Swift says:

“The amendment does not put disabled students in the same position as non-disabled ones. The only non-disabled students exempted from the “is not receiving education” requirement, are those who may be treated as having limited capability for work by reason of regulation 39(6) of and Schedule 8 to the 2013 Regulations, or regulation 40(5) of and Schedule 9 to the 2013 Regulations.

The number of such non-disabled persons is likely to be very small. More importantly, the position of disabled students cannot properly be assessed by reference only to access to Universal Credit ... [due to] the different benefits available to disabled students to meet additional expenses incurred in consequence of their disabilities.”

4. The Public sector equality duty challenge

Finally, Justice Swift rejects the contention that “Equality Analysis” of the 2020 Regulations showed a failure to comply with section 149 of the Equality Act 2010, holding that:

- it contained an adequate a consideration of the practical change to be made;
- it demonstrated due regard to the impact on some disabled students of the change made which restricted access to Universal Credit; and
- it was not deficient in its consideration of the fact that the change would tend to disadvantage students who moved straight from secondary to higher education when compared to those who for some period had relied on subsistence benefits.

As each of the claimant’s grounds of challenge failed, his application for judicial review was dismissed.

Whether suspension of DLA after 28 days in hospital breached Disabled adult’s rights under Article 14 ECHR

Benefit:

Judges:

File number:

DLA

Lord Justices Jackson, Singh, and Andrews

[\[2022\] EWCA Civ. 1](#)

This Court of Appeal case concerned the DLA “Hospitalisation Rule” that provides that, if someone aged over 18 is admitted to an NHS hospital, payment of DLA is suspended after 28 days in hospital. The given rationale for this is that payment would otherwise represent duplication of public funding to meet the same purpose.

The issue on this appeal was whether the Hospitalisation Rule unlawfully discriminates against the Appellant, contrary to [Article 14 of the European Convention on Human Rights](#) (“ECHR”), read with [Article 1 of the First Protocol](#) (“A1P1”), which are among the Convention rights set out in [Schedule 1 to the Human Rights Act 1998](#) (“HRA”).

The appellant in this case was MOC, who had been awarded the highest rate of both the care component and the mobility component of DLA since 1993 and received similar predecessor benefits before that.

His sister, MG, had been appointed to act as his deputy by the Court of Protection. She had also been MOC’s appointee for benefit administration purposes.

On 29 June 2016 MOC was admitted to hospital, re-admitted on 23 July 2016 and has, since 26 August 2017, resided at a nursing home within a local hospital.

As a result, the Hospitalisation Rule was applied to him and payment of both the care component and the mobility component of DLA were suspended after 28 days in hospital. Payment of the mobility component was reinstated on his transfer to the nursing home.

MOC’s appeals to the First-tier Tribunal (“FTT”) and subsequently to the Upper Tribunal (“UT”) were dismissed. He then appealed to the Court of Appeal with the permission of the UT.

The relevant regulations are 8, 10, 12, 12A and 12B of the [Social Security \(Disability Living](#)

[Allowance\) Regulations 1991](#). These regulations provide that, if someone aged over 18 is admitted to an NHS hospital, payment of DLA is suspended after 28 days.

The [Social Security \(DLA and Personal Independence Payment\) \(Amendment\) Regulations 2016](#) came into force on 29 June 2016. Prior to this, anyone under 16 would be paid DLA for the first 84 days of any hospitalisation.

However, following the decision of the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250, the regulations were amended so that anyone under 18 will continue to receive DLA payments while in hospital. The Hospitalisation Rule applies equally to those in receipt of PIP: section 73(6) of the Social Security Administration Act 1992.

Article 14 of the ECHR provides that:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

A1P1 provides that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”

It has been established that even non-contributory social security benefits like DLA can be “possessions” in this context.

The Appellant’s representative submitted to the Court of Appeal that the UT erred in finding that “a severely disabled adult in need of lengthy in-patient hospital treatment who for the time being is being treated as unable to make decisions as to care or medical treatment” could not be a “status” for the purposes of Article 14.

It was argued that any approach to a capacity-based status must recognise the prejudice in the

real world to a disabled person whose autonomy is so fundamentally compromised that a deputy has been appointed. The deputy must promote and protect his autonomy and identity; in particular by communicating with those delivering personal care and services at hospital.

In addition, in concluding that MG’s work was that of a family member or friend, the UT failed to recognise that in this case the law had recognised that the protective functions of a welfare deputy were necessary.

The Hospitalisation Rule disadvantaged MOC because the suspension of the care component of DLA has an adverse impact on his deputy’s ability to fulfil her functions on his behalf in relation to his care and treatment.

If the person fulfilling the deputy role does not duplicate care provided by the NHS but acts to protect P’s autonomy and agency. The role of the deputy, principally communicating effectively in the way P would wish, is not met by nursing care.

In dismissing the appeal, Lord Justice Singh says it was right to observe that the question of capacity as such is not a status under The Mental Capacity Act 2005:

“First, the scheme of the 2005 Act was designed to move away from a status-based approach to a functional approach, in other words to focus on particular decisions at a particular time. Secondly, there needs to be reasonable certainty: a person’s capacity may change from time to time and may do so quickly. That is not a sound foundation for the ‘status’ required by Article 14.”

He adds that:

“I should also observe that I can see no logical connection between the purpose of DLA and the role of a deputy appointed under the 2005 Act.

There were times at the hearing when it appeared to be suggested that what this case is really about is whether a deputy is entitled to claim expenses for performing her tasks as a deputy. Whether or not that would be a good idea as a matter of social and economic policy, in my view it has nothing to do with whether the rule under challenge is discriminatory.”

In going on to consider the issue of indirect

discrimination, Judge Singh says that has to be shown by the claimant that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination. However, he points out that:

“Such evidence was simply not placed before the [UT]Judge. The only evidence that was placed before him related only to this one case. The sort of data which has been placed before a court or tribunal in other cases was simply absent in this case.”

Lord Justice Singh ends by saying:

“As I have explained ... this appeal cannot succeed because, on the evidence, the alleged disproportionate impact on a certain group was not proved. This was never anything other than an indirect discrimination case, yet the argument

based on indirect discrimination fails on its facts.”

Finally, in a postscript to the judgment, Lord Justice Peter Jackson adds:

“It is the function of a welfare deputy to make decisions on behalf of a person lacking capacity, not to provide care, or indeed to direct it. In reality, the devoted support provided to MOC by MG was provided as a family member and not as his welfare deputy.

More fundamentally, I agree with Singh LJ that there are good reasons of principle and practicality why decision-making capacity does not provide a sound foundation for an Article 14 status. In my view, status is likely to be found in the disability itself, and not in the separate matter of capacity, and that is the conclusion to be reached in the present case.”

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Helplines for individuals

Equality Advisory & Support Service (EASS)

Phone: 0808 800 0082
Textphone: 0808 800 0084
Open Monday-Friday 9am-7pm
Saturday 10am-2pm
(closed Sundays and Bank Holidays)
There is a webcam portal for BSL users via the Royal Association for Deaf people.
Website: www.equalityadvisoryservice.com

Disabled Students Helpline

Phone: 0330 995 0414
Open Tuesday and Thursday 11am-1pm
Email: students@disabilityrightsuk.org

Personal Budgets Advice Service

Phone: 0330 995 0404
Open: Tuesday and Thursday 9.30am-1.30pm
Email: personalbudgets@disabilityrightsuk.org

Helplines for advisers

Member Organisations

Welfare Rights Advice Service

Phone: 0203 687 0779
Open Tuesday and Thursday
10.30am-12.30pm
Email: ken.butler@disabilityrightsuk.org

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