

Supreme Court considers disability living allowance rules

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Human Rights analysis: Discussing the Supreme Court's ruling on the suspension of benefits for a severely disabled child in hospital, Steve Broach, a barrister at Monckton Chambers, points out that Mathieson is the latest in a line of recent Supreme Court judgments where international human rights conventions have played a significant role.

Original news

Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47, [2015] All ER (D) 90 (Jul)

What was the Supreme Court asked to consider in this case?

The issue for the Supreme Court in *Mathieson* was whether the rule suspending payment of disability living allowance (DLA) to disabled children once they had been an inpatient in an NHS hospital for 84 days was compatible with the Human Rights Act 1998. The appeal was brought by a severely disabled three-year-old boy, Cameron, through his father Mr Mathieson.

The specific questions were whether the rule breached the right to respect for private and family life in the European Convention on Human Rights, art 8 (ECHR) and/or was discriminatory contrary to ECHR, art 14, read with either art 8 and or art 1 of the First Protocol (A1P1--right to peaceful enjoyment of possessions). On the basis of the Secretary of State's concession that A1P1 was engaged and the conclusion that the scheme discriminated against Cameron, the disabled child in question, contrary to art 14 the Supreme Court did not consider the art 8 submissions.

What is the legislative framework around payment of DLA? On what grounds was the payment of DLA suspended?

As with all welfare benefits, the legislative scheme around DLA is complex. The rule which led to the suspension of Cameron's DLA was contained in the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, regs 8, 10, 12A and 12B. Taken together these regulations stop the payment of both the care and mobility component of DLA to children under 16 who have been an inpatient in an NHS hospital for longer than 84 days. For children aged 16 and over and adults payment is suspended after just 28 days in hospital.

The Secretary of State's justification for the rule was that all children's disability-related needs are met by the NHS when they are in hospital. The rule was therefore made under the principle that overlapping benefits should be avoided. However, the Supreme Court found that this justification was not made out. In large part this was thanks to evidence filed by two national charities (Contact a Family and The Children's Trust) which showed that in the vast majority of cases families continue to provide the same or more care for their disabled children once they go into hospital.

What is the significance of the Supreme Court's ruling?

The immediate significance of the ruling is that children whose parents continue to provide them with the same or greater level of care in hospital than they did at home should continue to receive their DLA. It is to be hoped that the Secretary of State will change the rule or issue guidance to ensure this happens automatically. If it does not, decisions to suspend benefits will need to be appealed in hundreds of cases every year.

The Supreme Court's ruling also clearly calls into question whether the rule affecting older children and adults in hospital can stand. In very many cases older disabled children and disabled adults will continue to receive very significant care from their families when in hospital. It may need further litigation to test this--and also to test whether the rule which stops DLA being paid to children who become eligible for it in hospital is also illegitimate.

Away from the facts of this case, the judgment of the Supreme Court would seem to have three wider consequences:

- o The long-running question as to the breadth of the concept of 'other status' for the purposes of ECHR, art 14 looks to have been settled in favour of claimants. In the light of Lord Wilson's judgment it would appear that where there is arguably discriminatory treatment in an area covered by a convention right it would be very unlikely that a claim will be knocked out on the basis of a lack of 'status'.
- o *Mathieson* is the latest in a line of recent Supreme Court judgments where the international human rights conventions have played a significant role. Lord Wilson found (para [41]) that the Secretary of State was in breach of his international law obligation to treat disabled children's best interests as a primary consideration. This then assisted the court in finding a breach of ECHR, art 14 because of the requirement to read the ECHR in harmony with the principles of international law (see Lord Wilson at para [44]). There is therefore a growing trend in the Supreme Court (if not yet in the Court of Appeal) towards giving significant weight to relevant international instruments in deciding human rights cases.
- o There is a significant run of cases which state that the appellate courts should defer to the expertise of specialist tribunals. Lord Wilson considered those cases in his judgment at paras [45]-[48]--while accepting the principle, he held that the Upper Tribunal had made errors of law in its decision such that its decision did not need to be followed. This may make the appellate courts less willing to defer to the expertise of specialist tribunals in future where they consider the decision to be wrong.

What should lawyers take from this case?

The first lesson which, in my view, needs to be learned from *Mathieson* is the value of persistence. Cameron's family lost their appeal in the First-tier Tribunal, in the Upper Tribunal and in the Court of Appeal. Cameron sadly died during the proceedings but the family persisted as they wanted to avoid other families going through the same difficulties they had experienced. This tenacity paid off in the form of a unanimous decision in their favour from the Supreme Court. Hopefully this will help give other clients courage to continue to pursue their case even if it doesn't find favour with the lower courts.

A further lesson is the value of a strategic approach to litigation involving third party organisations with relevant expertise. The role of the charities in *Mathieson* was absolutely vital--from putting the family in touch with lawyers to providing evidence that significantly influenced the outcome. This requires lawyers being prepared to put in time, potentially pro bono, to build these relationships with charities and support them to get involved in legal proceedings with which they may well not be comfortable at the outset.

Steve Broach's practice encompasses the broad spectrum of public law. His practice has two main focal areas. Firstly, Steve has particular interest and expertise in the rights of children (in particular disabled children) and disabled adults and others in need of services and support. He acts mainly for individual claimants in judicial review claims and a wide range of parties in Court of Protection proceedings. He also advises and represents a number of NGOs and public bodies. Secondly, Steve regularly acts for professionals in appeals and challenges to regularly decision-making, particularly police disclosure decisions in the context of Enhanced Criminal Records Certificates and barring decisions under the Safeguarding Vulnerable Groups Act 2006. In Mathieson, Steve was junior counsel for the appellant.

Interviewed by Kate Beaumont.

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