

[2017] AACR 2
(ML v Secretary of State for Work and Pensions (DLA))
[2016] UKUT 323 (AAC)

Judge Markus QC
8 July 2016

CDLA/4367/2014

Human rights – suspension of DLA care component in residential care home not discrimination – Article 14

Disability living allowance – personal care – quality of care provision not relevant under regulation 9

The claimant, who had autism and learning disabilities, had lived for some two years in a residential care home partly funded by the NHS. The Secretary of State decided that the care component of disability living allowance (DLA) was not payable for this period under section 72(8) of the Social Security Contributions and Benefits Act 1992 and regulation 9(1) of the Social Security (Disability Living Allowance) Regulations 1991. The First-tier Tribunal upheld that decision, deciding that the claimant had been resident in a care home where he had received accommodation, board and personal care paid for by public funds under the Mental Health Act 1983. The claimant appealed to the Upper Tribunal where it was argued on his behalf, first that the inadequacy of the care services provided by the home meant that regulation 9 did not apply, either because not all three “qualifying services” were provided to the claimant or because the personal care he received was too poor to satisfy section 72(9), and secondly that the regulation was discriminatory contrary to Article 14 of the European Convention on Human Rights: *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250; [2015] AACR 19.

Held, dismissing the appeal, that:

1. the statutory requirement under regulation 9 was met for any period where the claimant was resident in a care home and the costs of any qualifying services were publicly funded, and it was not necessary under the legislation for all three qualifying services to be provided to him (paragraph 14);
2. the statutory definition of “care home” in section 72(9) required the provision of accommodation and personal care (or nursing care) but was silent as to the quality of the personal care provided. It was concerned with the nature or function of the establishment not the services actually provided to any particular individual. Regulation 9 applied if the claimant was in an establishment which had the characteristics of a care home (paragraphs 15 to 18);
3. (*obiter*) it was the statutory responsibility of the Care Quality Commission (CQC) to assess the quality of care in residential care homes and to correct inadequate provision. A care home could not be registered unless the CQC was satisfied that care was being provided in accordance with the statutory framework, including meeting the individual needs of the residents. Where the CQC had judged that those standards were met, there was no proper basis for the DWP or tribunals to intervene, as the CQC was the independent and expert body set up to make such judgments (paragraphs 18 to 21);
4. Regulation 9 was a proportionate means of avoiding duplication of state provision to meet the care needs of disabled people: *Mathieson* distinguished. Where the system operated as it should, the care needs of disabled people in residential homes would be met. The system recognised that there will be failings and had processes in place to remedy them. As the state was paying for care in the residential home, it was entitled to adopt a position whereby deficiencies were remedied, rather than paying extra to substitute for inadequate care. In the light of the above, regulation 9 was compatible with Article 14 and the claimant did not suffer discrimination contrary to Article 14 (paragraphs 44 to 45).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

DECISION

The appeal is dismissed.

REASONS FOR DECISION

Background

1. At the time of the Secretary of State's decision which is the subject of this appeal, ML was 21 years old. He has autism and learning difficulties. His father (RL) is his appointee.

2. A new claim for disability living allowance (DLA) was made for ML on 29 January 2010. On 16 February 2010 he was awarded the lower rate mobility component and the highest rate care component of DLA with effect from 29 January 2010. The Secretary of State now agrees that the mobility component should have been awarded at the higher rate from that date. On 20 June 2016, after the Upper Tribunal appeal hearing, the Secretary of State revised the decision accordingly. That reflects the agreed position of the parties at the hearing.

3. Between September 2011 and September 2013, after a period of detention in hospital under the Mental Health Act 1983, ML resided in a residential care home ("the Home"). The Home was registered as "caring for adults under 65 years" with learning or physical disabilities. ML's placement was funded in part by the NHS pursuant to section 117 Mental Health Act. On 25 June 2013, by way of supersession of the decision of 16 February 2010, the Secretary of State decided that the care component was not payable while ML was resident in the Home. RL appealed unsuccessfully to the First-tier Tribunal and, with the permission of the First-tier Tribunal, now appeals to the Upper Tribunal.

Statutory framework

4. Section 72 of the Social Security Contributions and Benefits Act 1992 empowers the making of regulations to provide that the care component of DLA will not be payable where a person is resident in a care home at public expense, as follows:

"(8) Regulations may provide that no amount in respect of a disability living allowance which is attributable to entitlement to the care component shall be payable in respect of a person for a period when he is a resident of a care home in circumstances in which any of the costs of any qualifying services provided for him are borne out of public or local funds under a specified enactment.

(9) The reference in subsection (8) to a care home is to an establishment that provides accommodation together with nursing or personal care.

(10) The following are qualifying services for the purposes of subsection (8) –

(a) accommodation,

(b) board, and

(c) personal care."

5. Regulation 9 of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890) ("the DLA Regulations"), made pursuant to that power, includes the following:

"(1) ...a person shall not be paid any amount in respect of a disability living allowance which is attributable to entitlement to the care component for any period where throughout that period he is a resident in a care home in circumstances where any of the costs of any qualifying services provided for him are borne out of public or local funds under a specified enactment.

(2) The specified enactments for the purposes of paragraph (1) are –

(a)

...(v) the Mental Health Act 1983"

The decision of the First-tier Tribunal

6. RL submitted that the Home was not a “care home” within regulation 9 and that qualifying services were not provided to him there, and so he argued that the care component of DLA should not have been suspended.

7. The tribunal noted that it was accepted that ML was resident at the Home during the period in question. Its reasons on the issue were as follows:

“30. Mr [RL] told the Tribunal that [ML’s] family had been unhappy with the quality of the care [ML] received at [the Home]. Family members visited every day to provide additional care in relation to the maintenance of his personal hygiene. Eventually they made the decision to remove him from the home because they considered he was not being looked after properly.

31. The Tribunal accepted [RL’s] evidence in relation to the deficiencies of the care provided to [ML] by [the Home]. However, we found on the facts that [the Home] was indisputably a ‘care home’ within the terms of the regulation. It provided ‘accommodation’ and ‘personal care’.

32. Once it has been established that the residence is a ‘care home’ there is no scope within the wording of Regulation 9 for an analysis of the nature and quality of the care services it provides.”

8. The tribunal also decided that ML received all three qualifying services listed in section 72(10) of the 1992 Act, notwithstanding that the family was unhappy with the quality of the personal care provision. Funding was provided under a specified enactment (the Mental Health Act 1983). Accordingly the tribunal decided that regulation 9 applied and the care component was not payable for the period in question.

The appeal to the Upper Tribunal

9. There was an oral hearing of the appeal before me, at which ML (through his appointee, RL) was represented by another family member, PL. The Secretary of State was represented by Mr Buley (counsel). Both had prepared skeleton arguments prior to the hearing. I am grateful to them for their assistance.

10. On behalf of RL, PL advances the appeal on two grounds. First, he says that the inadequacy of the care services provided by the Home meant that regulation 9 did not apply. Second, he says that suspension of payment of the care component of DLA was discriminatory contrary to Article 14 of the European Convention on Human Rights (ECHR). Mr Buley resists both grounds.

Evidence provided to the UT

11. RL provided a witness statement for the purposes of this appeal, which includes the following:

“3. After around 9 months, the owner and founder of the business sold it and there was subsequently a change of manager at the House.

4. Rapidly, the standards of care deteriorated such that the family had to provide extensive personal care, as it was not being provided by staff at the House.

5. By September 2012, we were providing around 30 hours a week of care to [ML]. This was acknowledged at a review meeting by the CCG Commissioning Manager.

6. This care included shaving [ML] daily, brushing his teeth daily, taking all his clothes home and washing them, taking [ML] out as no staff were prepared to go out with

him, tidying up his room, providing fruit and other basic foods that the House refused to provide, taking [ML] to the dentist and to get his hair cut, and eating with [ML] as he would often not eat otherwise.”

12. The Secretary of State has filed two inspection reports by the Care Quality Commission (CQC), which I refer to in more detail below.

Application of regulation 9

13. PL submits that regulation 9 of the DLA Regulations did not apply in this case because the Home was not providing ML with all three “qualifying services”. Alternatively, the Home was not a “care home” within regulation 9 because it was not providing ML with personal care and so did not satisfy the definition of “care home” in section 72(9). He accepts that it is not necessary for care to be of a high quality to satisfy the definition, but that a minimum threshold must be met. He says that the Secretary of State must assess whether the threshold is met in each case (at least where it is put in issue) and, in doing so, must take into account the evidence submitted by or on behalf of the claimant. In the present case, the First-tier Tribunal accepted the evidence provided on ML’s behalf as to the deficiencies in care at the Home. This gave rise to substantial extra expense being incurred by his family.

14. PL’s first submission is founded on a misunderstanding of the legislation. It is not necessary for all three qualifying services to be provided to a claimant. The requirement is that “any of the costs of any qualifying services provided for him” (my emphasis) are publicly funded.

15. I turn then to the second submission. The definition of “care home” in section 72(9) is that the establishment in question must provide accommodation and personal care (or nursing care, but that is not relevant in the present case). There is no issue in this case that the Home provided accommodation. The only issue is as to the provision of personal care.

16. The statutory definition is silent as to the quality of the personal care provided, either generally or to an individual claimant. It need simply be “an establishment that provides ... personal care”. This language shows that the provision is concerned with the nature or function of the establishment not the services which are actually provided to any particular individual. Regulation 9 applies if the claimant is in an establishment which has the characteristics of a care home. The language of the statutory provisions provides a complete answer to this part of the appeal.

17. PL submits that, if no minimum threshold of quality of care was envisaged by the legislation, the inclusion of “personal care” in the list of “qualifying services” would be irrelevant. This is not correct because the list of qualifying services in section 72(10) is not part of the definition of “care home” and in any event, as I have said, there is no requirement that all three services are provided.

18. The above analysis is decisive of this ground of appeal. But, if there were any doubt, it would be dispelled by the following considerations. If PL is correct that the Secretary of State must make an assessment of the quality of care provision to an individual claimant, that would sit very uncomfortably with the clear statutory framework which is in place to assess the quality of care in residential care homes and to correct inadequate provision, which is contained in the Health and Social Care Act 2008 and the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 (SI 2010/781) (since replaced by the identically named 2014 Regulations to similar effect). Under this legislation it is an offence for a person to carry out regulated activities (which include provision of “accommodation for persons who require nursing or personal care”) unless they are registered with the CQC. It follows that a care home within section 72(9) of the Social Security Contributions and Benefits Act carries out regulated activities and so must be

registered in accordance with the Health and Social Care Act. The CQC, which is responsible for registration, will not register a provider unless satisfied that certain specified standards are and will be met. The standards include those in regulation 9 of the 2010 Regulations, which provides:

“(1) The registered person must take proper steps to ensure that each service user is protected against the risks of receiving care or treatment that is inappropriate or unsafe, by means of –

(a) the carrying out of an assessment of the needs of the service user; and

(b) the planning and delivery of care and, where appropriate, treatment in such a way as to –

(i) meet the service user’s individual needs,

(ii) ensure the welfare and safety of the service user,

(iii) reflect, where appropriate, published research evidence and guidance issued by the appropriate professional and expert bodies as to good practice in relation to such care and treatment, and

(iv) avoid unlawful discrimination including, where applicable, by providing for the making of reasonable adjustments in service provision to meet the service user’s individual needs.”

19. The CQC also carries out reviews of registered providers in order to ensure ongoing compliance with the standards.

20. It follows that the Home, as a provider of accommodation and personal care, was required to be registered with the CQC. It could not have been registered unless the CQC was satisfied that care was being provided in accordance with the above standards including that it met the individual needs of the residents.

21. Where the CQC has judged that those standards are met, it would not make sense for there to be a separate judgment by the DWP as to the quality of the services provided and, indeed, doing so could give rise to some considerable difficulties as illustrated by the facts of this case. RL’s evidence to the First-tier Tribunal was that the deterioration in care of ML started in around June 2012 and lasted until the family removed him from the Home in September 2013. The CQC carried out a routine inspection of the Home in January 2013 and reported that the Home was not meeting the standard that “people should get appropriate care that meets their needs and supports their rights”. It said:

“Overall, people experienced care, treatment and support that met their needs and protected their rights. However, the shortfalls in assessing risks, reviewing and updating care plans meant that staff did not have clear up to date information on how to provide care and support to people. We have judged that this has a minor impact on people who use the service, and have told the provider to take action”.

22. The report also identified issues in relation to the required standards of “respecting and involving people who use the service” and “management of medicines”. The impact of those shortfalls was also described as minor. The CQC identified that action was needed but enforcement action was not required. It is clear from this that, during the period when RL considered that no or wholly inadequate care was being provided to ML, the CQC’s inspection identified that care (indeed, adequate care) was being provided to residents albeit with some shortfalls which had minor impacts.

23. The CQC prepared a follow up inspection report in June 2013, which was also during the period in which RL said the care was very poor and only shortly before he said it was so bad that

the family removed ML. The CQC reported that the Home had taken action and was by then compliant with all standards. It reported that

“People experienced care, treatment and support that met their needs and protected their rights.”

24. PL’s case is that the DWP (and, on appeal, the tribunal) should have investigated the family’s claims of inadequate care and made its own assessment. But a reasonable investigation would have been bound to take into account the CQC’s findings. There would not be any proper basis on which the DWP or the tribunal could have gainsaid the CQC’s findings, save perhaps in exceptional circumstances where something has gone badly wrong with the inspection process (which is not suggested in this case). The CQC is an independent body with the expertise and resources to make the necessary judgments, based on careful investigation. The DWP and the tribunal are not best placed to reach a judgment on those matters. The Home would have little if any interest in contributing to any investigation as it would be unaffected by the outcome. The CQC assessment would be of critical and almost certainly decisive importance. It follows that a requirement for DWP to make a judgment as to care standards could add nothing to the existing inspection regime under the Care Standards Act. This powerfully reinforces my conclusion that no such independent judgment by DWP is required. The system established by the legislation is that a home to which regulation 9 applies must be registered with the CQC and by that means the adequacy of care provision is secured.

25. For the above reasons, the appellant’s submissions fail as a matter of law. It is not necessary for me to go further but I also observe that the appeal would have been bound to fail on its facts. The tribunal accepted the inadequacies in care explained by RL but these facts get nowhere near to establishing that no personal care was provided to ML. The family was not present at the Home all the time. RL has estimated that the care provided by the family amounted to around 30 hours a week. That left a great deal of time when ML was not cared for by his family. During that time it is inconceivable that the Home did not provide personal care to him, even if it was of a poor quality. The fact that ML’s family was unhappy with the quality or amount of care provided does not mean that he was not provided with *any* personal care. And in the light of the CQC reports it is impossible say that the care was of such a low standard as to take it out of regulation 9 altogether.

26. I conclude that there was no error by the First-tier Tribunal in deciding that the Home was a “care home” within regulation 9 of the DLA Regulations.

Article 14

27. Article 14 of the European Convention on Human Rights 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.”

28. In support of his claim that suspension of DLA while ML was in a care home violated Article 14 PL relied on the judgment of the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250; [2015] AACR 19. That case was concerned with the statutory suspension of DLA after the claimant, a child, had been an in-patient in an NHS hospital for more than 84 days. The Supreme Court decided that it was discriminatory contrary to Article 14 read with Article 1 Protocol 1. PL seeks to argue that the principle in that judgment extends, by analogy, to the circumstances of this case.

27. The Secretary of State accepts that DLA care comes within the ambit of Article 1 Protocol 1 and by that means Article 14 is engaged, as was conceded in *Mathieson*. However, the Secretary of State disagrees that any further analogy can be drawn between that case and the present one.

Status

28. In *Mathieson* the Supreme Court held that the claimant had a status within Article 14, either as a severely disabled child in need of lengthy in-patient hospital treatment (the majority view), or as a child hospitalised free of charge in an NHS hospital (the minority view). The Secretary of State does not accept that being a disabled person in a care home is a status for the purpose of Article 14. Mr Buley submits that an analogy cannot be drawn with the position of the claimant in *Mathieson*. He says that Lord Wilson's question at [23], "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?" [my emphasis], made it clear that the relevant status was to be identified by reference to need not place of residence.

29. I am not so sure about this. Lord Wilson noted at [19] that the needs of a child in hospital for a lengthy period may be no greater than that of a child who was not. Further, he referred to the decision of the House of Lords in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311, commenting that "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." and noted that in the *Carson* case, (2010) 51 EHRR 13, the status was that the complainant had chosen a particular country of residence. Moreover, the minority view in *Mathieson* could be said to be consistent with status arising from place of residence or treatment.

30. Mr Buley submits that disabled people who live in care homes do not necessarily have greater needs than those who do not. Although I have not been provided with evidence about it, I am inclined to agree with this as a matter of common sense. Placement in a care home depends on many factors including the suitability of their own accommodation, the availability of family or other support in the community, and their wishes, as well as need. But residence in a care home is nonetheless a feature of a person's needs as a disabled person. And in any event the decision in *RJM* supports the view that place of residence can confer status.

31. However, these are merely my observations on what is an important issue with potentially wide ramifications. I do not decide the issue because I do not need to do so: even if the appellant were correct on the status point, I have concluded that the difference in treatment is justified for reasons which I explain next.

Discrimination and justification

32. Regulation 9 treats a disabled person differently when he moves into a care home. As Lord Wilson explained in *Mathieson* at [24], there will be no discrimination if the difference in treatment is justified. Thus in the following well-known passage from the judgment of the European Court of Human Rights in *Stec v United Kingdom* (2006) 43 EHRR 47, at paragraph 51 the Grand Chamber observed 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".

33. Lord Wilson noted that the Strasbourg doctrine of “margin of appreciation” is not apt to describe the measure of respect which the domestic courts will afford to the UK legislature, and in *Humphreys v Her Majesty’s Revenue and Customs* [2012] UKSC 18; [2012] 1 WLR 1545; [2012] AACR 46 the Supreme Court confirmed that such a challenge should be determined by reference to whether the rule in question was manifestly without reasonable foundation. The rule should not, however, escape careful scrutiny.

34. Lord Wilson (who spoke for the majority of the Court) addressed the issue of bright-line rules as follows:

“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, [2001] 1 AC 1312, Lord Bingham accepted at paragraph 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.’”

35. Lord Mance (speaking for the minority) agreed, while emphasising that courts “should not be over-ready to criticise legislation in the area of social benefits which depends necessarily on lines drawn broadly between situations which can be distinguished relatively easily and objectively” (paragraph 51).

36. In *Mathieson* the Supreme Court held that the cessation of DLA for a child after 84 days in hospital was not justified because, on the evidence, the personal and financial demands made on the substantial majority of parents who helped to care for their disabled children in hospital were no less than when they cared for their children at home.

37. PL says that the same reasoning applies in ML’s case. He says that, because of the inadequate care provided by the Home (which the First-tier Tribunal accepted), the family had to step in and provide substantial care to ML. He accepts that the purpose of regulation 9 is to avoid double provision for the same contingency out of public funds but submits that in this case there was no risk of overlap because ML received no care from the Home. In effect the NHS was paying for a non-existent service. PL relies on the CQC’s “State of Care” report in 2015 which said that seven per cent of care providers were inadequate. He says that this demonstrates that regulation 9 discriminates against a significant group of people. It does not allow for the circumstances of individual cases to be taken into account so as to ensure that adequate provision is made to meet their care needs. In *Mathieson* the Court was provided with evidence as to the costs incurred by families whose children were in hospital, including loss of earnings, travel, parking and meals. He said similar costs were incurred by the family in this case. He also said that the provision was additionally discriminatory in this case because ML’s care was funded under the Mental Health Act 1987 as a result of his having previously been detained in hospital under that Act, and so the regulation effectively disadvantaged those who had suffered serious mental illness. Moreover an adult with learning disabilities is like a child in that the person’s parents will be called on to provide support and so the costs incurred by the family are similar to those incurred by the family of a child who is in hospital.

38. PL submitted that the Secretary of State should not suspend payment of DLA under regulation 9 without evidence to satisfy him that a person's care needs were actually met by the care home. This was particularly important where the deficiencies in the care provided by the care home were attributable to state failings, as PL said they were in this case because ML had no social worker for a period of time and there was no proper supervision of the care provided to him.

39. I do not set out here the Secretary of State's submissions disagreeing with the case advanced for ML. I agree with the Secretary of State and, insofar as appropriate, his submissions are incorporated into my analysis below.

40. There can be no doubt that avoiding double provision for the same contingency out of public funds is a legitimate aim. In general it is sensible that the State should not pay to meet the same needs twice. This was accepted in *Mathieson* in the Upper Tribunal and the Court of Appeal, and the Supreme Court proceeded on that basis. The purpose of the care component of DLA is "to cater for the extra costs of requiring certain types of care" (see Lady Hale in *Secretary of State for Work and Pensions v Tolley* [2015] UKSC 55, [1]). The essence of the Supreme Court's decision in *Mathieson* was that NHS provision for children in hospital did not overlap with the care component of DLA. Thus Lord Mance said at [58]: "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". The situation of the claimant and his family was not "a hard case, unreflective of the position of most parents in their situation". The claimant's situation was typical of that facing most families with disabled children in hospital. There was substantial evidence which had not been effectively countered by the Secretary of State, to the effect that the "extra costs" incurred in caring for a child in hospital were greater than for a child at home. Lord Wilson summarised some of the evidence: parental participation in the care of children had become the norm and hospitals recognised this had both humanitarian and cost-saving advantages; parents are often *required* to attend hospital and taken an active part in their child's medical management; they are often trained to administer treatments and hospitals rely on them to communicate with it on behalf of a non-verbal child; 99 per cent of parents provide no lesser level of care when their child is in hospital and 93 per cent suffer an increase in costs. It followed that, adopting the words of Lord Hoffmann in *Carson*, the rule did not "reflect a difference between the substantial majority of the people on either side of the line".

41. The present case is different. The structural problem which was identified in *Mathieson* is not present. The only specific evidence advanced on behalf of ML as to the general position is the CQC report that in around seven per cent of cases the care received in a residential home was inadequate. I do not suggest that those cases are insignificant, but there is no evidence to suggest that this is a problem in anything other than a relatively small minority of cases. Moreover, it does not necessarily follow that care needs are not being met by a care home which provides inadequate care. They may not be met well, but that does not mean they are not met. The evidence indicates that in the great majority of cases the care needs of disabled adults in care homes are met, and are met adequately. The facts of ML's case do not evidence a generic problem. There was a failing in some of the processes and methodologies at that home for a limited period of time. Indeed, on RL's evidence ML's care needs had been met initially and the deterioration in care followed on a change in management.

42. It follows that in the majority of cases payment of the care component of DLA to care home residents would result in double provision. The fact that this may not be true in some cases which, on the evidence, are a small minority of cases, does not mean that the bright line rule is not justified. These are the hard cases which fall on the wrong side of the line but do not

invalidate a rule which, judged in the round, is beneficial (see Lord Bingham in *Animal Defenders International*, cited above).

43. It is also relevant that those who fall on the wrong side of the line are not left simply to put up with the inadequacies of the care. The CQC regime which I have described is designed to pick up such problems. The Secretary of State is entitled to rely on this in deciding that the needs for which DLA is paid will be met in other ways.

44. In summary, therefore, unlike the situation in *Mathieson*, taking the evidence at its highest, ML's case is a hard case. Where the system operates as it should, the care needs of disabled people in residential homes will be met. The system itself recognises that there will be failings and has processes in place to remedy those. As the state is paying for care in the residential home, it is entitled to adopt a position whereby deficiencies are remedied rather than paying extra to substitute for inadequate care.

45. In the light of the above, regulation 9 is compatible with Article 14 and ML did not suffer discrimination contrary to Article 14.