[2019] AACR 8

(FM v Secretary of State for Work and Pensions (DLA)
[2017] UKUT 380 (AAC))

Judge Jacobs **C**DLA/2952/2015
14 September 2017

Disability Living Allowance – Validity of the amended past presence test – Children

The appellant was born on 14 December 2007 to a British father and Thai mother. He was registered as British in 2008. He came to the United Kingdom with his mother on 31 May 2014. The appellant made a claim for a disability living allowance through his father as his appointee on 24 November 2014. The Secretary of State refused the claim on the basis that the appellant had not been present in Great Britain for 104 weeks out of the previous 156. The First-tier Tribunal dismissed the appeal, but gave the appellant permission to appeal to the Upper Tribunal (UT).

The issue before the UT was the validity of the new past presence test for disability living allowance, with particular reference to its application to children.

Held, dismissing the appeal, that:

1. past residence was not a status…. past residence in the context of the past presence test is merely a condition that a person has to satisfy, regardless of their personal characteristics, before a claim for an allowance will be entertained (paragraph 26);

2. bright lines are permissible *in principle*, but that if the gap between the test and what it is trying to achieve is too wide the result may be manifestly without reasonable foundation (paragraph 37);

3. the new past presence test is a tough one to establish, but it is not manifestly without reasonable foundation. It was permissible to review and then to change the length of the period in order to take account of the changing pattern of migration; the period fixed was within the proper limits allowed to Parliament and ministers. The new law seeks to distinguish between those children who are settled and those who are not, but taking into the account the child's age, ensuring that the most disabled children can qualify sooner (paragraph 38) and;

4. the Secretary of State did treat the best interests of the child as a primary consideration (paragraph 51)

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC242/15/02926, made on 16 June 2015 at Fox Court, did not involve the making of an error on a point of law.

REASONS FOR DECISION

1. This case concerns the validity of the new past presence test for disability living allowance, with particular reference to its application to children.

A. History and background

2. The claimant was born on 14 December 2007 to a British father and Thai mother. He was registered as British in 2008. He came to the United Kingdom with his mother on 31 May 2014; his father and brother (also British) were already here. The decision that the family should come to the United Kingdom had been made in 2012, but there was a delay in obtaining a visa for his mother. He made a claim for a disability living allowance through his father as his appointee on 24 November 2014, which the Secretary of State refused on 29 December 2014. The claim was based on disabilities arising from or in connection with attention deficit hyperactivity disorder. In the event, the Secretary of State did not have to assess that aspect of the claim, as it was refused on the ground that the claimant had not been present in Great Britain for 104 weeks out of the previous 156. The First-tier Tribunal dismissed his appeal, but gave permission to appeal to the Upper Tribunal.

B. The oral hearing

3. I directed an oral hearing, which took place on 7 June 2017. Tim Buley of counsel represented the claimant; Zoë Leventhal and Julia Smyth both of counsel represented the Secretary of State. I am grateful to the Free Representation Unit who arranged for Mr Buley to appear for the claimant. His written argument brought shape and content to the appeal. I am grateful to Ms Leventhal whose prompt response to Mr Buley's arguments ensured that relevant arguments and evidence were available for the hearing. In the event, Ms Smyth appeared at the hearing, relying on Ms Leventhal's written arguments. I am grateful to all three for their contributions to the discussion of the issues that I have had to decide.

C. The disability living allowance legislation

4. Disability living allowance is governed by the Social Security Contributions and Benefits Act 1992 and regulations made thereunder.

5. There are qualifying periods that must be satisfied before an award can be made. There is a past qualifying period and a forward qualifying period. The past period is three months for both the care component (section 72(2)(a)) and the mobility component (section 73(9)(a)).

6. Originally, there was no minimum age at which an award could be made, although in practice the past qualifying period imposed an age limit of 3 months. Since 9 April 2001, there has been an age limit for the mobility component. Section 73(1) provides that 'a person shall be entitled to the mobility component of a disability living allowance for any period in which he is over the relevant age'. Section 73(1A) defines the 'relevant age' as 3 years for the mobility component at the higher rate and 5 years for the mobility component at the lower rate.

7. This case is concerned with the residence and presence conditions. These are made under section 71(6):

> (6) A person shall not be entitled to a disability living allowance unless he satisfies prescribed conditions as to residence and presence in Great Britain.

The conditions are prescribed by regulation 2 of the Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890). These are the relevant provisions as in force from April 8, 2013:

> **2 Conditions as to residence and presence in Great Britain**
>
> (1) Subject to the following provisions of this regulation and regulations 2A and 2B, the prescribed conditions for the purposes of section 71(6) of the Act as to residence and presence in Great Britain in relation to any person on any day shall be that–
>
> (a) on that day–
>
> (i) he is habitually resident in the United Kingdom, the Republic of Ireland, the Isle of Man or the Channel Islands; and
>
> (ib) he is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 or section 115 of that Act does not apply to him for the purposes of entitlement to disability living allowance by virtue of regulation 2 of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, and
>
> (ii) he is present in Great Britain; and
>
> (iii) he has been present in Great Britain for a period of, or for periods amounting in the aggregate to, not less than 104 weeks in the 156 weeks immediately preceding that day.
>
> (2) For the purposes of paragraph (1)(a)(ii) and (iii), notwithstanding that on any day a person is absent from Great Britain, he shall be treated as though he was present in Great Britain if his absence is by reason only of the fact that on that day–
>
> …
>
> (d) he is temporarily absent from Great Britain and that absence has not lasted for a continuous period exceeding 13 weeks.
>
> …
>
> (5) Paragraph (1) shall apply in the case of a child under the age of 6 months as if in head (iii) of sub-paragraph (a) for the reference to 104 weeks there was substituted a reference to 13 weeks.
>
> (6) Where in any particular case a child has by virtue of paragraph (5), entitlement to the care component immediately before the day he attains the age of 6 months, then until the child attains the age of 12 months, head (iii) of sub-paragraph (a) of paragraph (1) shall continue to apply in his case as if for the reference to 104 weeks there was substituted a reference to 13 weeks.

> (7) Paragraph (1) shall apply in the case of a child who is over the age of 6 months but who has not exceeded the age of 36 months as if in head (iii) of sub-paragraph (a) for the reference to 104 weeks there was substituted a reference to 26 weeks.

8. Before April 8, 2013, the relevant periods were 26 weeks rather than 104 weeks and 52 weeks rather than 156 weeks. Mr Buley presented his case as if the change was a universally bad thing for claimants. I do not share that perspective. It is important to understand how the test works. It certainly works to the claimant's detriment when they first arrive. But the test is more flexible once it has been satisfied. A claimant who is abroad for more than 13 weeks (regulation 2(5)) loses entitlement, but the new past presence periods allow a claimant who makes a new claim after taking one long break abroad or a series of shorter ones spread over a period to continue to satisfy the test. Although the new test may be more difficulty to satisfy initially, it allows for more flexibility in absences thereafter.

9. As I have said, there was originally no minimum age at which a child could be awarded a disability living allowance, subject to satisfying the past qualifying period of 3 months. There is no express enabling provision under which regulations can impose a limit. When a limit was imposed for the mobility component, it was introduced by statute. If the past presence test of 104 weeks were applied to all children by regulations, it would effectively impose a minimum age under the guise of a presence condition, which would be an improper purpose.

10. As a claimant cannot be entitled to the mobility component below the age of 3 (section 73(1A) (a)), paragraphs (5) to (7) only apply to claims in respect of the care component.

11. As the past qualifying period for an award of the care component is 3 months (section 72(2)(a)), the effect of paragraph (5) is to align the past presence and past qualifying periods.

12. Paragraph (6) only applies if the claimant became entitled before the age of 6 months. Entitlement presupposes a claim; that is the effect of section 76(1). The significance of this paragraph is related to the fact that the presence conditions apply on a daily basis: see the opening words of paragraph (1). The practical effect of paragraph (6) is to prevent a child losing entitlement, which would be the effect of applying the 104 week test from the age of 6 months.

D. Ms D'Arcy's evidence

13. Ms D'Arcy is a Policy Manager in the Department for Work and Pensions. She has provided a detailed witness statement about how the changes to the residence conditions came to be made. No summary can do justice to her evidence, but summary there has to be.

14. As it imposed a direct burden on taxpayers, disability living allowance required from the outset a substantial connection with Great Britain, reflected in the presence and residence conditions, which mirrored the contribution tests for contributory benefits. Past presence is a guide to the degree of a person's integration in this country and an indication that they are likely to remain here.

15. By 2012, changes in migration patterns meant that the existing past presence test of 26 weeks in the past 52 was no longer sufficient as a connection with this country. Caselaw of the Court of Justice of the European Union had the effect of imposing greater burdens on the British taxpayers for claimants within the European Economic Area. The number claiming the benefit had increased significantly. All of these factors were compounded by austerity following the 2008 financial problems.

16. A consultation took place in 2012, with 1600 individual responses and 100 from organisations. This was supplemented by meetings organised for the Minster for Disabled People. There was little response on the residence condition for children.

17. The Social Security Advisory Committee did not raise any concerns about the change to 104 weeks, although it expressed concern about the period of temporary absence that would be allowed before entitlement ceased.

18. Before the legislation was amended, an equality impact assessment was carried out, thereby having regard to its duty under section 149 of the Equality Act 2010.

19. The approach taken involves the use of bright lines with exceptions. The former are less complex, and therefore cheaper to administer, and give more certainty for claimants than more subjective tests.

20. The position of children is different from that of adults. This was recognised in the consultation, following which a decision was made to adopt a graduated past presence condition. The Department rejected the idea of further adjustments for children of different ages, as this would increase the complexity of the allowance. Article 3 of the United Nations Convention on the Rights of the Child requires that the best interests of the child be a primary consideration, which was done by considering the needs of children as a separate cohort. Article 7.2 of the United Nations Convention on the Rights of Disabled Persons is to the same effect.

21. Financial support for children is not limited to disability living allowance. Cash help can be obtained through direct payments from social security or a local authority's children's Department.

E. The human rights argument

The ambit issue

22. There is no dispute that this case is within the scope of the Convention right in Article 14 when read with Convention right in Article 1 of Protocol 1:

> ARTICLE 14
> PROHIBITION OF DISCRIMINATION
>
> 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.

THE FIRST PROTOCOL
ARTICLE 1
PROTECTION OF PROPERTY

> 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. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

23. There is a dispute whether this case is within the scope of the Convention right in Article 14 when read with the Convention right in Article 8. I do not need to resolve that, as I can see no way that this would alter my analysis.

The status issue

24. There is a dispute whether Mr Buley identified a status. He relied on residence, arguing that the claimant was a disabled child who had lived outside Great Britain for the whole of his life until he came to this country in 2014. This was past residence, but with future effects, just like the 'previous' gender of a transgender person. He argued that the caselaw showed a very generous approach to status and contained examples of residence as a characteristic of status. Ms Smyth argued that this was a matter of historical fact, not status, and that Mr Buley's analogies were irrelevant.

25. As I understood the arguments, there was no dispute about what the caselaw said on this issue. The difference was how to apply that to this case. Just to get a (possibly) pedantic point out of the way first, the arguments generally elided the difference between presence and residence, referring to the claimant's past residence. Under regulation 2, the key fact is that he was not present in this country. It does not matter whether he was resident anywhere else. It is possible, if unusual, for someone not to be present in this country but not to be resident elsewhere, like someone who is touring from country to country without ever establishing residence anywhere. There is, though, no doubt that the claimant was resident in Thailand and I will follow the language of the arguments.

26. I accept Ms Smyth's argument that the claimant's past residence was not a status. I accept that residence can be a status (*Carson and others v the United Kingdom* (2010) 51 EHRR 13 at [70]) and that past events can affect current status (*R on the application of RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 [2009] AC 311 at [43], citing past membership of the KGB). But the answer is not to be found in analogies or by piecing together elements that have been found to be significant in other cases. Too much depends on the context for that approach to work. The answer is to be found by reasoning from principle, albeit principle derived from cases after taking into account their individual contexts. The issue for me is whether past residence abroad is a personal characteristic that is used to distinguish one group of people from another (*Carson and others v the United Kingdom* (2010) 51 EHRR 13 at [70]; *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42 ; [2008] 1 WLR 1434 at [9]), something that, while not innate or inherent (*Clift v United Kingdom* Application no. 7205/07 [2010] ECHR 1106), generally identifies what

someone is as opposed what is being done to them (*R on the application of RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 [2009] AC 311 at [45]). Taking that approach, I consider that past residence in the context of the past presence test is merely a condition that a person has to satisfy, regardless of their personal characteristics, before a claim for an allowance will be entertained. Their past residence does not seek to define them; nor does it carry any connotations for the individual's character or personality such as member of an organisation like the KGB might entail.

27. Having said that, I accept that the caselaw indicates that a broad, liberal approach should be taken and that there are signs that the extent to which differentiating factors amount to personal characteristics are but part of the justification analysis (*R on the application of RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 [2009] AC 311 at [5]).

The legitimate aim issue

28. Mr Buley argued that control of costs was a legitimate aim of policy, but not a legitimate basis on which to treat different claimants differently, although it might be relevant to proportionality once a proper basis had been established for distinguishing groups of claimants. Ms Smyth argued that targeting resources was a legitimate aim, although the methods of doing so might differ according to the context. In view of my conclusion on status and, to anticipate, on justification, I do not need to set out or analyse the caselaw cited.

29. I reject Mr Buley's argument, which is based on too analytical a reading of the evidence. He took the targeting of resources as itself a ground for treating claimants differently. That is not how I read it. My reading is this. The need to keep public spending under control was a consideration that led to a past present test from the inception of disability living allowance and one of the factors that led the Secretary of State to undertake a review of disability living allowance generally and, in particular, in the light of the changing pattern of migration. The evidence does not show that this was just a cost cutting measure – the evidence in the Equality Impact Assessment of 2012 at paragraph 3.8 shows that the Department for Work and Pensions did not have the evidence necessary to work out the financial impact on the change. It was legitimate to undertake a review, and then to propose and implement change, on a rational basis in order, in part, to target public funds most effectively.

30. In fairness to Mr Buley, this argument on costs was related to his argument that there was no rational connection between past presence and entitlement to a benefit that provides assistance with the costs of disability. I deal with that argument when I come to justification.

F. Justification

31. Assuming that the case does not fail on the status issue, it fails because the amended legislation is not manifestly without reasonable foundation.

32. Mr Buley accepted that it was permissible to refuse entitlement while a person was resident outside the country. In other words, he accepted that it was permissible to require some connection with this country. That must be right. I do not know of any benefit in this country or elsewhere in which no connection with the awarding State is required. The connection takes different forms for different benefits. To take some examples:

- contributory employment and support allowance depends on a record of national insurance contributions (section 1(2) of the Welfare Reform Act 2007);
- industrial injuries benefit only applies to someone employed in Great Britain (section 94(1) of the Social Security Contributions and Benefits Act 1992, read with section 2);
- housing benefit only applies to claimants who are habitually resident with a right to reside (regulation 10 of the Housing Benefit Regulations 2006 (SI 2006/213)).

For disability living allowance, there are the presence and residence conditions in regulation 2 of the Social Security (Disability Living Allowance) Regulations 1991.

33. Mr Buley argued that the purpose of disability living allowance was to provide financial assistance with meeting the costs of disability and that there was no rational connection between that and a past presence test. Children are not responsible for their residence, there is no issue of immigration control for children who are British citizens, and there are other rules that deal with any immigration issues. I accept that those factors are correct as matters of fact, but that does not mean that there has to be some direct relationship between the connecting factor and the nature and purpose of the benefit. The purpose of income support is to meet the basic costs of subsistence, but that does not make it improper to use tests of habitual residence and a right to reside as conditions of entitlement. The relationship in issue is that between the claimant and the United Kingdom, not between the function of the benefit and the connecting factor. In other words, it is permissible for the connecting factor to bring other matters into the equation than, in the case of disability living allowance, a need for help with the costs of disablement.

34. At the hearing, Mr Buley's argument varied between saying that any connection other than presence was manifestly without reasonable foundation and that any connection more than settlement would fail that test.

35. If he really meant that mere presence should be sufficient, I reject it. If that were the test, it would mean that every child would be potentially entitled if they were present here on holiday or even on a day trip. It is not manifestly without reasonable foundation to require more than mere presence. That leaves settlement.

36. Once presence is ruled out, the question arises: what form should the test take? Broadly, there are two approaches. One is to draw a bright line; the other is apply a general test such as whether the child was settled or habitually resident in the jurisdiction.

37. The advantage of bright lines is that they bring certainty for claimants and decision-makers alike, with an associated saving in administrative and appeal costs. The disadvantage is that the test may not tally precisely with the underlying policy. For example, if the policy is to identify cases where a child is settled in this country, a test that adopts a fixed number of weeks may not reflect, either in the individual case or generally, the period of time that it takes for settlement to occur. My conclusion is that bright lines are permissible *in principle*, but that if the gap between the test and what it is trying to achieve is too wide the result may be manifestly without reasonable foundation.

38. In my judgment, the new past presence test is a tough one to establish, but it is not manifestly without reasonable foundation. It was permissible to review and then to change the

length of the period in order to take account of the changing pattern of migration; the period fixed was within the proper limits allowed to Parliament and ministers. The new law seeks to distinguish between those children who are settled and those who are not, but taking into the account the child's age, ensuring that the most disabled children can qualify sooner.

39. I regard two considerations as particularly important. One is that, as Ms D'Arcy pointed out, disability living allowance is not the only source of funding for those children affected by disabilities; it is also possible to obtain funding from the claimant's local authority in appropriate cases. The other consideration is that the length of the period varies according to the age of the child and, therefore, with the degree of disablement necessary to satisfy the age qualification conditions (sections 72(1A) (b) and 73(4A) of the Social Security Contributions and Benefits Act 1992). Given the amount of attention that babies and young children generally require, it is more difficult to satisfy those conditions.

40. It may be that Ms D'Arcy has not acknowledged the relationship between the qualifying period and the age limit for an award and the internal logic of the disability living allowance scheme, both of which I have discussed in Section C, but those are legitimate factors to take into account, especially when fixing precisely where a bright line (in this case a variable one based on age) should be drawn.

G. The public sector equality duty

41. These are the relevant provisions of the Equality Act 2010:

> **113 Proceedings**
>
> (1) Proceedings relating to a contravention of this Act must be brought in accordance with this Part.
>
> (2) Subsection (1) does not apply to proceedings under Part 1 of the Equality Act 2006.
>
> (3) Subsection (1) does not prevent—
>
> (a) a claim for judicial review;
>
> (b) proceedings under the Immigration Acts;
>
> (c) proceedings under the Special Immigration Appeals Commission Act 1997;
>
> (d) in Scotland, an application to the supervisory jurisdiction of the Court of Session.
>
> (4) This section is subject to any express provision of this Act conferring jurisdiction on a court or tribunal.
>
> (5) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
>
> (6) Chapters 2 and 3 do not apply to proceedings relating to an equality clause or rule except in so far as Chapter 4 provides for that.

(7) This section does not apply to—

(a) proceedings for an offence under this Act;

(b) proceedings relating to a penalty under Part 12 (disabled persons: transport).

149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) tackle prejudice, and

(c) promote understanding.

> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
>
> (7) The relevant protected characteristics are—
>
> age;
> disability;
> gender reassignment;
> pregnancy and maternity;
> race;
> religion or belief;
> sex;
> sexual orientation.
>
> (8) A reference to conduct that is prohibited by or under this Act includes a reference to—
>
> (a) a breach of an equality clause or rule;
>
> (b) a breach of a non-discrimination rule.
>
> (9) Schedule 18 (exceptions) has effect.

42. There were two issues discussed on this duty. The first was whether the Upper Tribunal had jurisdiction to deal with it, given the terms of section 113. I do not need to deal with that issue, as I have decided that, in any event, the Secretary of State did comply with the duty. That was the second issue, which I now deal with.

43. I was shown an Equality Impact Assessment of 2012. I accept Ms D'Arcy's explanation in her supplementary witness statement that this document does deal with disability living allowance, despite it not being mentioned in paragraph 1.1. It is mentioned almost immediately in paragraph 1.4 and then throughout the document. I do not accept Mr Buley's argument that this is a document about personal independence payment only. It certainly mentions that benefit and, given the reform of disability living allowance and the introduction of personal independence payment, it was natural that their relationship should be considered. But reading the document as a whole, I consider that it does what Ms D'Arcy says it does.

44. I do not accept Mr Buley's argument that the Secretary of State did not have regard to the position of children. He concentrated on the Impact Assessment and he is right that it does not mention children specifically in the section on the residence and presence rules. But the focus must be wider than that. The test of whether the Secretary of State complied with section 149 must be assessed by reference to the whole process. The position of children was expressly part of the consultation process. Despite the large number of responses from individuals and organisations, the position of children generated little interest. Nor did the Social Security Advisory Committee express any concern about the change in the past presence test of the position of children. And the analysis that took place after the consultation process was complete led to the adoption of the graduated approach for children.

45. Moreover, as Ms D'Arcy pointed out in her first witness statement, it is important not to consider entitlement to disability living allowance in isolation from other sources of finance

for meeting or contributing towards the costs associated with children's disabilities. That is part of the background against which the change to the disability living allowance rules had to be assessed.

46. Looking at the evidence as a whole, I am satisfied that the Secretary of State had due regard to the position of children in relation to the changes to the past presence test.

H. The best interests of the child issue

47. Mr Buley referred in his written arguments to the United Convention on the Rights of the Child 1989 and to the United Convention on the Rights of Disabled Persons 2006. In his oral argument, he relied only on the former, accepting that the latter added nothing to his argument.

48. Articles 3 and 4 of the 1989 Convention reads:

> *Article 3*
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.
>
> *Article 4*
>
> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

49. I can deal with this briefly in view of what I have said so far.

50. There would be no benefit in setting out an analysis of the authorities cited to me. Having read them, some of them several times, I have not been able to extract any precise guidance on the status and role of these Articles for the case I have to decide. It seems to me that the interests of the child is a relevant but not decisive consideration in analysing the justification issue. That is how Mr Buley presented the case.

51. My conclusion is that the Secretary of State did treat the best interests of the child as a primary consideration. Picking up on points already made, this is how I have come to that conclusion.

52. First, focus is important:

- Children from abroad who claim disability living allowance and are otherwise entitled will be deprived for benefit for two years. In other words, there is a delay in payment, not an outright refusal of entitlement.

- Disability living allowance is not the only source of funding available for children with disabilities, so the child will not be deprived of all financial support.

- Whatever savings this may produce, will increase the pot available for other purposes, which may be to the benefit of children generally or children with disabilities.

- Children are almost always members of families. The new past presence rules are not entirely a bad thing, as they allow more flexibility of movement for the family than the old test.

53. Second, the issue must be judged on the evidence as a whole. I accept that, apart from Ms D'Arcy's statement, there is nowhere in the evidence any specific reference to the best interests of the child being a primary consideration. I would be astonished if any policy maker considering any issue in relation to children nowadays would take any other approach – the same may be said for the public sector equality duty – but evidence there must be. I would have expected the impact assessment to show that this was done. But the issue cannot be judged by mere empty formalism. What matters is what was done. For the reasons I have given on the public sector duty, I consider that the evidence shows that the Secretary of State did act in accordance with Article 3 when formulating the policy that is enacted in the new past present test.