Decision No: C38/20-21(PIP)

IRO: HH

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

PERSONAL INDEPENDENCE PAYMENT

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 6 November 2018

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal from the decision of an appeal tribunal with reference CN/6690/18/03/D.

2. For the reasons we give below, we allow the appeal under Article 15(8) of the Social Security (NI) Order 1998, and we set aside the decision of the appeal tribunal. We direct that the appeal shall be determined by a newly constituted tribunal in accordance with the directions we have given at paragraph 68.

REASONS

3. This appeal addresses the form of mobility activity 1 in Part 3 of Schedule 1 to the Personal Independence Payment Regulations (NI) 2016 (the 2016 Regulations) that should be applied in Northern Ireland between 20 April 2017 and 15 June 2018 in the light of an Administrative Court decision in England and Wales in the case of *RF and others v Secretary of State for Work and Pensions* [2017] EWHC 3375, that declared an identical Great Britain amending provision to be *ultra vires* and unlawful.

Background

4. The appellant previously enjoyed an award of disability living allowance (DLA). As her award of DLA was due to be terminated by regulations made under the Welfare Reform (NI) Order 2015, she was invited to claim personal independence payment (PIP) by the Department for

Communities (the Department). She duly claimed PIP from 27 February 2018 on the basis of needs arising from Asperger's Syndrome. The appellant agreed to the evidence relating to her previous DLA claim being considered by the Department. This included two general practitioner (GP) factual reports, a paediatrician's report and material relating to her special educational needs. She was asked to complete a PIP2 questionnaire to describe the effects of her disability and returned this to the Department on 22 March 2018, along with further material relating to her special educational needs. The appellant was then asked to attend a consultation with a healthcare professional (HCP) and the consultation report was received by the Department on 24 April 2018.

5. On 14 May 2018 the Department decided that the appellant did not satisfy the conditions of entitlement to PIP from and including 27 February 2018. The appellant requested a reconsideration of the decision. She was notified that the decision had been reconsidered by the Department, but not revised. Her mother was then appointed by the Department to act on the appellant's behalf in the claim. The appointee appealed.

6. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. The tribunal disallowed the appeal. The appellant requested a statement of reasons for the tribunal's decision, and this was issued on 10 June 2019. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 6 August 2019. On 12 August 2019 the appointee on behalf of the appellant applied to a Social Security Commissioner for leave to appeal. While it does not reflect the technical position accurately, for simplicity we may use the terms appellant and appointee interchangeably in the following text.

Grounds

7. The appellant, represented by Mr McCloskey of Law Centre NI, submitted that the tribunal has erred in law on the basis that:

   (i) its reasons were insufficient to explain its decision in relation to mobility activity 1, due to inconsistency in its findings regarding the appellant's difficulty in, respectively, undertaking a journey and following a route;

   (ii) it had failed to address and explain differences in the appellant's difficulty with following the routes of familiar and unfamiliar journeys;

   (iii) it had failed to distinguish between the appellant's overwhelming psychological distress undertaking a journey and her psychological distress following a route, rendering its reasons insufficient;

   (iv) it had failed to make clear in its findings and reasons whether the appellant required accompaniment during a journey.

8. The Department was invited to make observations on the appellant's grounds. Ms Patterson of Decision Making Services (DMS) initially responded on behalf of the Department. Ms Patterson submitted that the tribunal had not materially erred in law. She indicated that the Department did not support the application. Mr McCloskey responded in turn to the Department's observations.

9. Following some supplementary correspondence between November 2019 and February 2020, Ms Patterson resiled from her initial view of the case. She accepted that the tribunal had materially erred in law. However, the parties remained in disagreement about the correct disposal of the appeal and, in particular, over the form of legislation that a newly constituted tribunal to which the case might be referred would have to address.

Directions and procedural steps

10. On 1 July 2020 the parties were directed by the Commissioner to make submissions on the form of mobility activity 1 that the tribunal had to apply in this case, addressing the effect of the decision of the Administrative Court in England and Wales in *RF* on the Northern Ireland legislation, if any. The Commissioner observed that, at the time of the claim and decision in this case, the terms of descriptors 1(c), 1(d) and 1(f) were qualified by the words "for reasons other than psychological distress", whereas the court in England and Wales had found the amendment that introduced those words to be *ultra vires,* on grounds under section 6 of the Human Rights Act 1998 (*inter alia*). The relevant section is set out below at paragraph 22.

11. As the issues arising in the case appeared to involve an issue of special difficulty, on 21 October 2020 the Chief Social Security Commissioner directed that it should be decided by a Tribunal of Commissioners. Subsequently on 11 January 2021, the Tribunal of Commissioners granted leave to appeal on five grounds. The parties were directed to make submissions addressing particular grounds. An oral hearing was directed, with the expectation that this would be an online hearing in light of Covid-19 restrictions.

12. However, as judicial review proceedings were pending in a different case in which the appellant's representative appeared for the applicant, the appellant sought a postponement pending the resolution of those proceedings. We granted postponement. The judicial review proceedings were subsequently resolved by consent in February 2023, without assisting us in deciding the issues in this case. Due to personal circumstances of one of the members of the panel, it was not immediately possible to reconvene the hearing. The hearing eventually took place on 5 March 2024.

The appeal tribunal's decision

13. The LQM has prepared a statement of reasons for the decision of the appeal tribunal. This sets out a list of the documents before the tribunal. These included a Departmental submission, containing the PIP2 questionnaire completed by the appellant, previous DLA evidence and a consultation report from the HCP. It also included the appellant's GP records, a submission from the appointee and a *pro forma* completed by the appellant's GP dated 23 October 2018. The appointee attended the hearing and was represented by Ms Quinn of Citizens Advice. Ms Muldoon represented the Department.

14. The tribunal noted that the appellant had been diagnosed with Asperger's Syndrome in 2004. It addressed the disputed daily living activities – namely 1 (Preparing food), 2 (Taking nutrition), 4 (Washing and bathing), 6 (Dressing and undressing), 7 (Communicating), 9 (Engaging with other people) and 10 (Making budgeting decisions) - and mobility activity 1 (Planning and following a journey). The tribunal accepted that the appellant would experience anxiety that limited her in engaging with other people, awarding 2 points for activity 9(b). It did not accept that she required prompting in the other activities due to lack of motivation most of the time. It accepted that she might experience psychological distress on a journey, awarding 4 points for mobility activity 1(b). However, as the appellant did not reach the threshold of points for an award of either component, the tribunal disallowed the appeal.

Relevant legislation

15. PIP was established by article 82 of the Welfare Reform (NI) Order 2015. It consists of a daily living component and a mobility component. These components may be payable to claimants whose ability to carry out daily activities or mobility activities is limited, or severely limited, by their physical or mental condition. The 2016 Regulations set out the detailed requirements for satisfying the above conditions.

16. The 2016 Regulations provide for points to be awarded when a descriptor set out in Schedule 1, Part 2 (daily living activities table) or Schedule 1, Part 3 (mobility activities table) is satisfied. Subject to other conditions of entitlement, in each of the components a claimant who obtains a score of 8 points will be awarded the standard rate of that component, while a clamant who obtains a score of 12 points will be awarded the enhanced rate of that component.

17. The appellant's claim for PIP was made on 27 February 2018. The decision under appeal to the tribunal was made by the Department on 14 May 2018. A key aspect of dispute in the present appeal addresses the question of what form of mobility activity 1 in Schedule 1, Part 3 to the 2016 Regulations is legally valid in Northern Ireland in the relevant period.

18. Mobility activity 1 was amended from 20 April 2017 by regulation 2(4) of the Personal Independence Payment (Amendment) Regulations (NI) 2017 (the 2017 Regulations). For the word "Cannot" in paragraphs (c), (d) and (f) were substituted the words "For reasons other than psychological distress, cannot".

19. Subsequently, the equivalent amendment in the Great Britain version of the Regulations was declared *ultra vires* in *RF*.

20. The effect of the amendment in Northern Ireland was subsequently reversed from 15 June 2018 by regulations 2 and 3 of the Personal Independence Payment (Amendment) Regulations (NI) 2018 (the 2018 Regulations), which substituted the original wording by regulation 2 and which revoked regulation 2(4) of the 2017 Regulations by regulation 3.

21. As amended in the relevant period by the addition of the words, "For reasons other than psychological distress," and before it was subsequently re-amended to the original form, the descriptors in mobility activity 1 at the date of claim and decision were as follows, with the added words underlined:

Activity	*Descriptors*	*Points*
1. Planning and following journeys.		
	a. Can plan and follow the route of a journey unaided.	0
	b. Needs prompting to be able to undertake any journey to avoid overwhelming psychological distress to the claimant.	4
	c. For reasons other than psychological distress, cannot plan the route of a journey.	8
	d. For reasons other than psychological distress, cannot follow the route of an unfamiliar journey without another person, assistance dog or orientation aid.	10
	e. Cannot undertake any journey because it would cause overwhelming psychological distress to the claimant.	10

	f. For reasons other than psychological distress, cannot follow the route of a familiar journey without another person, an assistance dog or an orientation aid.	12

22. The appellant places reliance on the Human Rights Act 1998 (the Human Right Act). Section 6(1)-(3) of that Act provides as follows:

> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section "public authority" includes—
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

Submissions and hearing

Initial submissions

23. In his initial written submissions for the appellant, Mr McCloskey submitted that the tribunal had erred in law in its approach to mobility activity 1. He submitted that the tribunal's reasons were inadequate to explain its conclusions. He submitted that, while accepting that the applicant needed prompting to be able to undertake a journey, the tribunal had not addressed her needs when following a route. He referred to the decision of Upper Tribunal Judge Hemingway in *AA v SSWP* [2018] UKUT 339, which emphasised the need to address psychological distress when following the route of a journey.

24. For the Department, Ms Patterson opposed the application. She submitted that the legislation considered by Judge Hemingway in *AA v SSWP* was not the same as that in force in Northern Ireland at the material date for

the present application. This would have required the tribunal to have addressed difficulties arising only for reasons other than psychological distress and, therefore, a higher scoring descriptor could not apply on the evidence.

25. In reply, Mr McCloskey relied on the decision of Mostyn J in the Administrative Court in England and Wales in the case of *RF*. He noted that the equivalent provisions in Great Britain had been found to be discriminatory and *ultra vires* Part 4 of the Welfare Reform Act 2012. He invited the Commissioner to confirm that the equivalent provisions in Northern Ireland were *ultra vires* the Welfare Reform (NI) Order 2015.

26. In her turn, Ms Patterson submitted that in the absence of a similar declaration quashing the Northern Ireland version of the regulations, the tribunal was correct to apply the legislation in force. She noted that an exercise had been undertaken by the Department to ensure that no claimant was disadvantaged by the difference with the Great Britain legislation. She submitted in general that the Department's actions were not discriminatory.

27. Mr McCloskey relied on the decision of the UK Supreme Court in *RR v SSWP* [2019] UKSC 52 and referred to the judgment of Baroness Hale at paragraph 27-30, submitting that neither the Department nor the tribunal was bound by subordinate legislation to act incompatibly with a Convention right.

28. While initially in disagreement with Mr McCloskey, Ms Patterson accepted on balance that the tribunal had not given adequate reasons for its decision. She accepted that it had not explained whether the appellant could follow familiar or unfamiliar journeys, noting that it may have relied on the appellant's cognitive abilities without undertaking further analysis of the evidence before it.

29. Nevertheless, while agreeing that the tribunal had erred in law on this basis, she maintained that the tribunal was obliged to apply the regulations in force, even though the Great Britain equivalent had been declared *ultra vires,* relying on *R1/05(IB)(T)* – the decision of a Tribunal of Commissioners in Northern Ireland – at paragraph 31. Therefore, if the case was referred back to a newly constituted tribunal, it would have to apply mobility activity 1 as it had been amended from 20 April 2017 by regulation 2(4) of the 2017 Regulations.

Further submissions

30. Each of the parties subsequently instructed counsel and made further responses to the directions we had issued. We mean no disrespect to the industry of counsel by not setting out their submissions in full, acknowledging that some of our own questions sent them on routes that they might not otherwise have explored.

31. Counsel for the appellant submitted that, whereas the Administrative Court in *RF* quashed the Great Britain regulation, it nevertheless had an effect on how the Department and the tribunal in Northern Ireland should have approached the validity of regulation 2(4) of the 2017 Regulations. He submitted that the Department – being aware that the continued application of regulation 2(4) would be unlawful and in breach of Article 14 ECHR - should not have applied the regulation. He submitted that it was incumbent on the tribunal to follow *RF* and to disapply regulation 2(4).

32. Counsel for the appellant observed that a Tribunal of Commissioners in Northern Ireland had observed that where the same Act applied in both England and Scotland, but there is no interchange of functions between adjudicating authorities, then in the interest of comity there should be a uniform interpretation (*R1/05(IB)(T)* at paragraph 16, citing *R(SB)1/90* at paragraph 13). It found that the same principle applied between England and Northern Ireland. In the particular case, due to procedural differences, the Tribunal of Commissioners declined to follow the Court of Appeal in England and Wales. As a general rule of precedent, however, he submitted that where a higher court in a different jurisdiction has fully considered a question of the legality of an identical provision, then the tribunal should follow the higher authority.

33. As a matter of precedent, it was submitted that it was incumbent on the tribunal to interpret regulation 2(4) in the same way as the Administrative Court in *RF* because it was considering the identical provision. Moreover, the appellant, relying on *RR* and *O'Donnell v Department for Communities* [2020] NICA 36, submitted that a tribunal must dis-apply a provision of subordinate legislation which would result in it acting incompatibly with a Convention right, in order to comply with section 6 of the Human Rights Act 1998.

34. Counsel for the appellant submitted that the exclusion of the "psychologically distressed cohort" (as it had been described in *RF*) from certain descriptors was discriminatory and unjustified. It was also submitted that the exclusion was *ultra vires* powers given under Part V of the Welfare Reform (NI) Order 2015 and because it involved a failure to consult. He submitted that *RF* equally applied in Northern Ireland on the non-Convention rights grounds.

35. Counsel for the Department accepted that the tribunal had erred in law, both in relation to the adequacy of its reasons for the decision it gave and in relation to its failure to give consideration to *RF*. It was accepted that the tribunal further erred by failing to give adequate consideration to the interaction between the relevant descriptors and the appellant's Convention rights. In the absence of any exceptional features, the Department accepted that tribunal should have followed *RF,* and did not seek to argue that there were any such exceptional features in the context of the current appeal.

36. The Department submitted that the principles established in *R1/05(IB)(T)* remained good law, and broadly reflected the position adopted more generally by the courts in Northern Ireland, citing *Re Staritt's Application* [2005] NICA 48. While not strictly binding, Great Britain authorities - depending on the circumstances of the case - may be of persuasive effect. However, such authority would be subject to the statutory jurisdiction of the Commissioners and related policy considerations. Thus, the Department submitted, any authority addressing issues that were outwith the statutory remit of the Commissioners, and/or addressing issues more properly suited to a public law challenge, would be unlikely to be of assistance.

37. However, the Department accepted that, whilst *R1/05(IB)(T)* remained good law and reflected constitutional orthodoxy, the advent of the Human Rights Act 1998 had altered the position in relation to cases concerning Convention rights and subordinate legislation. The Department submitted that section 6 of the Human Rights Act may allow for subordinate legislation to be disapplied. It was submitted that this approach was not absolute and was constrained by what is possible in the circumstances of a particular case. Nevertheless, in the context of this particular case, the Department agreed that the remedial approach followed by the UK Supreme Court in *RR* and by the Court of Appeal in Northern Ireland in *O'Donnell v DfC* could be adopted.

38. Counsel for the appellant responded, submitting that *RR* does not make a distinction between human rights cases and common law cases, and that as a matter of general principle where a provision of subordinate legislation would otherwise result in the Department, (or other public authority, court, or tribunal) acting incompatibly with an Act of Parliament, the Department must immediately disapply the offending provision.

Notice of a devolution issue

39. The Commissioner had initially misapprehended that the Northern Ireland version of the challenged regulation had been made by the Department. However, it was quickly observed that the regulation in Northern Ireland had been made by the Department for Work and Pensions in Great Britain under powers given during a period when the Northern Ireland Assembly and Executive were not meeting. Nevertheless, since decision-making by the Department was arguably "an act done by a Minister of Northern Ireland", we considered the question of whether a devolution issue arose under section 24(1)(a), section 79 and Schedule 10, paragraph 1 of the Northern Ireland Act 1998.

40. The appellant submitted that a devolution issue did arise under Schedule 10, paragraphs 1(b) and (c), by reason of the Department's purported exercise of a function (i.e. the application of the legislation in deciding the appellant's case) that was incompatible - or its failure to comply - with Convention rights. The Department submitted that it did not, on the principle that the decision of the tribunal had superseded that of the Department. It advanced the submission that the Commissioners were

solely concerned with the decision of the tribunal. As Schedule 10, paragraphs 1(b) and (c) were primarily focussed on the Department, no devolution issue would arise on this view.

41. We took the view that a devolution issue arguably arose, noting the principles applied by the UK Supreme Court in *A Reference by the Attorney General for Northern Ireland* [2020] UKSC 2, and issued a notice of a devolution issue to the Advocate General and Attorney General for Northern Ireland. In the event, however, neither sought to appear as a party.

Hearing

42. We held an oral hearing of the appeal. The applicant was represented by Mr Aidan McGowan of Counsel, instructed by Law Centre NI. The respondent was represented by Mr Terence McCleave of Counsel, instructed by the Departmental Solicitor's Office. We are grateful to them for their helpful submissions.

43. In brief, Mr McGowan continued to rely upon *RF*. He submitted that, pursuant to the decisions in *R1/05(IB)(T)* and *RR*, it was incumbent on the Department and the tribunal to follow *RF* and to disapply regulation 2(4) of the 2017 Regulations, thereby returning the wording of mobility activity 1 to the form that it had prior to amendment.

44. He observed the principles expressed in *R1/05(IB)(T)* at paragraphs 16-17. He noted what the Tribunal of Commissioners had said at paragraph 31 to the effect that unchallenged regulations must remain in force but submitted that this statement of law had been overtaken by the judgement of the UK Supreme Court in *RR*. Moreover, he submitted that *R1/05(IB)(T)* was wrongly decided on its own facts regarding the particular issue of procedural requirements before Northern Ireland regulations could be considered valid.

45. Mr McCleave for his part submitted that *R1/05(IB)(T)* remained good law on the persuasive standing of Great Britain decisions. It reflected constitutional orthodoxy and the position adopted more generally by the courts in Northern Ireland. He submitted that legislation continues to apply until it is declared invalid. He accepted that there was broad agreement between the parties that *RR* permitted disapplication of subordinate legislation.

46. While there was agreement on the effect of the *RF* decision in the present case, Mr McCleave submitted that there will be cases where the disapplication of subordinate legislation is not possible without all sorts of policy implications. He indicated that he would not go as far as Mr McGowan on breadth of the *RR* principle. However, he submitted that we as Commissioners would not need to determine that issue in order to resolve the present case.

47. More generally, we asked the parties to clarify their views on the level of fact-finding that was required before it could be said that Convention rights were engaged in any particular claimant's case. Mr McGowan submitted that in *RF* the Administrative Court had decided that the legislation could not be applied compatibly at all. The question was whether a claimant would qualify for benefit in light of the lawful form of the legislation. Mr McCleave accepted that the appellant fell within the psychologically distressed cohort, and we did not understand him to differ from Mr McGowan.

Assessment

48. As will be evident from the above, there is a great deal of consensus between the parties on the legal issues before us. Before addressing the submissions and setting out our conclusions, we will set out the principles established in some of the cases cited in argument before us.

RF v SSWP [2017] EWHC 3375

49. In *RF,* judicial review proceedings were brought to challenge an amendment to the PIP regulations in Great Britain. The amendment had stemmed from the Upper Tribunal decision in *MH v Secretary of State for Work and Pensions* [2016] UKUT 531, which had held that mobility descriptors 1(c), (d) and (f) could be satisfied by claimants by virtue of "overwhelming psychological distress". The Secretary of State brought an appeal from that decision, while at the same time amending the regulations without public consultation.

50. It was submitted that the original intention of the Department for Work and Pensions, when formulating the PIP regulations, was to make a policy distinction between those afflicted by psychological distress and those who were not, and to treat the former group less favourably. However, Mostyn J found that such an intention was never communicated to the outside world and cannot be deduced from either a literal or purposive construction of the regulations. He found the amendment to be discriminatory against those with mental health impairments and lacking in objective justification. He found the amendment incompatible with the PIP scheme as defined in the Welfare Reform Act 2012, and of such a magnitude that it should have been consulted upon. He therefore found the Great Britain version of regulation 2(4) to be unlawful on the grounds that:

    (a) it was in breach of Article 14 ECHR in conjunction with Article 1 of Protocol 1 and Article 8;

    (b) it was *ultra vires* the Welfare Reform Act 2012; and

    (c) there was an unlawful failure to consult prior to making regulation 2(4).

51. Thus, the Administrative Court in England and Wales – which has no authority in Northern Ireland, declared a Great Britain provision which was identical to the equivalent Northern Ireland provision to be of no legal effect on three different grounds.

R1/05(IB)(T)

52. In *R1/05(IB)(T)*, a Tribunal of Northern Ireland Commissioners had to consider the validity of an incapacity benefit provision in circumstances where the Court of Appeal in England and Wales (EWCA) had declared an identical Great Britain provision to be *ultra vires* (in *Howker v Secretary of State for Work and Pensions and the Social Security Advisory Committee* [2002] EWCA Civ 1623). The EWCA decision had been grounded on the failure to comply with procedural requirements for consultation with the Social Security Advisory Committee in Great Britain. However, the same procedure was not mandatory for Northern Ireland regulations.

53. The Tribunal of Commissioners in *R1/05(IB)(T)* considered the rules of precedent in circumstances where a court in another United Kingdom jurisdiction gave a decision addressing legislation that was identical in Northern Ireland. They cited and accepted the principles adopted by an earlier Tribunal of Great Britain Commissioners in R(SB)1/90, which had said:

> 15. Although the social security legislation governing Northern Ireland is not contained in the same Act as applies to Great Britain – and to that extent the position is different from that arising in *Re Hartland* and *Abbott v Philbin* – we nevertheless consider that, where the relevant provisions are identical (as they are in this case), the same judicial approach should equally be adopted. At the end of the day, the legislative fount of the enactments found both in Great Britain and the province of Northern Ireland is the same, namely Parliament at Westminster. Moreover, it would be naturally expected that, where the statutory provisions operative both in Northern Ireland and Great Britain are identical, such provisions should be interpreted uniformly. Support for this contention can also be found in section 142 of the Social Security Act 1975, sub-section (1) of which reads as follows:
>
> > 'The Secretary of State may with the consent of the Treasury make arrangements with the Northern Ireland Department (the joint arrangements) for coordinating the operation of this Act and the Social Security (Northern Ireland) Act 1975 with a view to securing that, to the extent allowed for in the arrangements, those Acts provide a single system of social security for the United Kingdom'.
>
> Regulations have been made providing for a substantial degree of assimilation; we refer to the Social Security (Northern Ireland Reciprocal Arrangements) Regulations 1976 [SI 1976/1003]. Manifestly, it is in contemplation that the *same* social security system should within limits

operate both in Northern Ireland and in Great Britain, and in pursuance thereof, it would be natural to suppose that the same interpretation should be given throughout the United Kingdom to identically worded provisions. Accordingly, in our judgment, it is incumbent upon us, particularly as the decision of the Court of Appeal in Ireland [*sic*] was unanimous and notwithstanding that the Court chose not to have R(SB)10/88 argued, to follow that decision rather than that of the Tribunal of Commissioners in England in R(SB)10/88."

54. The Tribunal of Commissioners in *R1/05(IB)(T)* observed that this was not a case of a court in a different jurisdiction applying identical legislation, but involved a declaration that regulations were invalid. They said, further:

> 31. However, that, to our minds, brings into account an important constitutional principle. A court of competent jurisdiction can declare regulations invalid. However, until it does so, unchallenged regulations must be obeyed and enforced. It is not open to either the subject or officers of the Department to decide that a particular regulation is invalid and refuse to abide by it. If either the Department or a subject considers that regulations are defective then any challenge, to be effective, must be made in appropriately constituted proceedings before a court with the necessary jurisdiction. Only if the court declares the regulations, or some part of them, invalid can that invalidity be acted upon. The precise wording of the declaration or other order of the court will be of the utmost importance. Until that time, effect must be given to the regulations, and they must be treated as valid. Any other rule would divert jurisdiction from the court and confer it upon individuals. That way lies chaos".

55. In the context of legislation that had been declared invalid in England and Wales, but not in Northern Ireland, the Tribunal of Commissioners found that the tribunal had erred in law by electing to follow the EWCA authority of *Howker*. Despite the principle of comity normally applied to cases of persuasive authority that were not strictly binding, tribunals and Commissioners had no power to find that the Northern Ireland regulations were invalid. Only a court of appropriate jurisdiction in Northern Ireland had that power.

RR v SSWP [2019] UKSC 52

56. *RR* was addressed to the application of housing benefit (HB) amendments necessitated by earlier court decisions in *Carmichael v Secretary of State for Work and Pensions* [2016] UKSC 58 and *Rutherford v Secretary of State for Work and Pensions* [2016] EWCA Civ 29. In each of those cases, it had been established that HB regulations relating to the "bedroom tax" or "spare room supplement" were discriminatory on grounds of disability and in breach of Convention rights. Following the introduction of non-retrospective legislation making allowance for those two cases, the question arose as to whether authorities administering HB had to carry on applying the legislation in its original form in other cases, or whether they

should not apply the legislation in cases where to do would breach Convention rights.

57. Baroness Hale said at paragraphs 27-30:

27. Although the majority of the Court of Appeal in *Carmichael (CA)* accepted the arguments of the Secretary of State, in my view Leggatt LJ was entirely right to accept the arguments of the appellant. There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament, and its requirements are clear.

28. The HRA draws a clear and careful distinction between primary and subordinate legislation. This is shown, not only by the provisions of section 6(1) and 6(2) which have already been referred to, but also by the provisions of section 3(2). This provides that the interpretative obligation in section 3(1):

> "(a) applies to primary and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation, or enforcement of any incompatible primary legislation; and
>
> (c) does not affect the validity, continuing operation, or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents the removal of the incompatibility."

Once again, a clear distinction is drawn between primary and subordinate legislation.

29. The obligation in section 6(1), not to act in a way which is incompatible with a Convention right, is subject to the exception in section 6(2). But this only applies to acts which are required by primary legislation. If it had been intended to disapply the obligation in section 6(1) to acts which are required by subordinate legislation, the HRA would have said so. Again, under section 3(2), primary legislation which cannot be read or given effect compatibly with the Convention rights must still be given effect, as must subordinate legislation if primary legislation prevents removal of the incompatibility. If it had been intended that the section would not affect the validity, continuing operation, or enforcement of incurably incompatible subordinate legislation, where there was no primary legislation preventing removal of the incompatibility, the HRA would have said so.

30. Contrary to the Secretary of State's argument, *Mathieson* was not a "one off". As shown by the authorities listed in paras 21 to 23 above, the

courts have consistently held that, where it is possible to do so, a provision of subordinate legislation which results in a breach of a Convention right must be disregarded. There may be cases where it is not possible to do so, because it is not clear how the statutory scheme can be applied without the offending provision. ... As Dan Squires QC, for the Equality and Human Rights Commission, put it, where discrimination has been found, a legislator may choose between levelling up and levelling down, but a decision-maker can only level up: if claimant A is entitled to housing benefit of £X and claimant B is only entitled to housing benefit of £X-Y, and the difference in treatment is unjustifiably discriminatory, the decision-maker must find that claimant B is also entitled to benefit of £X".

58. Thus, in a case where a breach of Convention rights had previously been established, a decision maker must disregard a provision of subordinate legislation which results in a breach of a Convention right. The disapplication of subordinate legislation by a public authority - which includes a tribunal - is required by the terms of section 6(1) of the Human Rights Act. V This is subject to the *proviso* that there may be cases where the disapplication of the legislation is simply not possible due to the nature of a statutory scheme.

Turning to the present case

59. The legislation we are considering in the present case was made in identical terms and was made by the same government Department that was a party to the proceedings in *RF*. That legislation is an amending provision, namely regulation 2(4) of the 2017 Regulations. Without regulation 2(4) the form of mobility activity 1 in the statutory scheme would revert the original form it took in the 2016 Regulations. Therefore, the *proviso* for cases where disapplication may not be possible has no relevance to the appellant's case.

60. *RF* was decided on three grounds – the first of which was that the Great Britain version of the amended legislation breached the applicant's Convention rights.

61. It is not disputed by Mr McCleave for the Department that the appellant's medical conditions bring her within the ambit of the "psychologically distressed cohort" whose Convention rights were addressed in *RF*. At paragraph 59 of *RF*, Mostyn J found:

> "59. Having decided that the defendant has failed to satisfy all four limbs of the test, and therefore cannot be objectively justified, I now have to consider whether the measure is manifestly without reasonable foundation. As I have stated above, this means that I must be very strongly satisfied that the four-limbed test is not met. I have no hesitation in so concluding. In my judgment, the 2017 regulations introduced (and I emphasise introduced) criteria to descriptors c, d and f, which were blatantly

> discriminatory against those with mental health impairments, and which cannot be objectively justified. The wish to save nearly £1 billion a year at the expense of those with mental health impairments is not a reasonable foundation for passing this measure".

62. Having found that the amendment was discriminatory and in breach of the Convention rights of *RF*, he concluded that the parent statute would not give authority to pass a subsidiary measure with that effect. Mostyn J accepted that it amounted to excluding individuals from the scope of PIP because of the nature of their disability and not because of its impact on their ability to carry out mobility activities. It was therefore unlawful and *ultra vires*.

63. Under the principles expressed in paragraph 31 of *R1/05(IB)(T)*, that might have meant that until such time as the equivalent provision in Northern Ireland had been addressed by a court with the jurisdiction to declare regulations invalid, the decision in *RF* should not be followed. However, we consider that this aspect of *R1/05(IB)(T)* has been superseded, at least in one respect, by the thread of authorities culminating in the UK Supreme Court decision in *RR*.

64. A public body which is not a court with appropriate jurisdiction – including the Department, tribunals, and the Commissioner – does not have the power to declare regulations invalid. As seen, however, it has other obligations arising from the Human Rights Act. The obligation of a tribunal faced with a breach of Convention rights arising from a provision of subordinate legislation is to disapply that provision where possible. *RF* is the decision of a higher court in a different UK jurisdiction and with different powers. Nevertheless, we consider that its finding that the identical regulation 2(4) in the Great Britain Regulations breaches the Convention rights of the "psychologically distressed cohort" has sufficient authority to require a tribunal in Northern Ireland to disapply that regulation in a case where it accepts that a claimant falls within that cohort. There may be exceptional cases where the tribunal might choose not to follow such an authority, but we cannot envisage those at present.

65. We are informed that the Department conducted an exercise in and around 2017/18 to trawl for individual claimants who may be affected by the decision in *MH*. The Department further advises that a total of 59,512 cases were reviewed after the decision in *RF* in order to establish if they were impacted by the *MH* decision. We are informed that all claimants were notified in writing of the outcome of the review decision whether the review resulted in a change or no change decision. The Department's approach, which was conducted on its own initiative, would appear to have given due recognition to the effect of *RR*.

66. However, Mr McGowan argued for an even broader effect from the decision in *RR*. He submitted more generally that the non-Convention grounds in *RF* are equally a basis for disapplication of the regulation.

These grounds went to the *vires* of regulation 2(4) in the light of the powers given by the Welfare Reform Act 2012, and the failure to meet a requirement to consult on legislative schemes. These issues are less clear from the text of *RR*, and in light of our conclusions on the Convention ground, we do not need to consider them.

67. It is our conclusion that the tribunal has erred in law. We consider that it had an obligation under section 6(1) of the Human Rights Act to disapply regulation 2(4) of the 2017 Regulations. This would have the clear effect that the amended form of mobility activity 1 in Northern Ireland between 20 April 2017 and 15 June 2018 should not be applied. The correct form of the activity that should be applied in Northern Ireland in that period is the unamended form as originally appearing in the 2016 Regulations.

Disposal

68. We set aside the decision of the appeal tribunal. We direct that the appeal shall be determined by a newly constituted tribunal. We direct that the new tribunal must disapply regulation 2(4) of the 2017 Regulations, with the practical consequence that it must address mobility activity 1 in the unamended form that it took prior to 20 April 2017, interpreted in the light of the Upper Tribunal decision in *MH*.

(signed): K Mullan

Chief Commissioner

O Stockman

Commissioner

C G Ward

Deputy Commissioner (NI)

28 May 2024