**THE UPPER TRIBUNAL**

**ADMINISTRATIVE APPEALS CHAMBER**

**DECISION OF THE UPPER TRIBUNAL JUDGE**

**Before: Sir Crispin Agnew of Lochnaw Bt QC**

**Attendances:**

For the Appellant (Secretary of State): Brian Gill, Advocate instructed by Helena Janssen, Solicitor, of the Office of the Solicitor to the Advocate General

For the Respondent (Claimant): David Hornell

The appeal is allowed.

The decision of the tribunal given at Irvine on 19 August 2012 is set aside.

The Judge of the Upper Tribunal remakes the decision that the First Tier Tribunal ought to have given. It is as follows:

(1) the appeal is refused;

(2) the appellant remains entitled to the care component at the middle rate with effect from 10/08/2011 for an indefinite period.

(3) the claimant has no entitlement to the higher rate of the mobility component, but remains entitled to the lower rate from 10 August 2011 for an indefinite period.

**REASONS FOR DECISION**

**Summary**

# The claimant, who has a severe visual impairment, was awarded the lower rate of the mobility component. She appealed to the First Tier Tribunal, which allowed the appeal and awarded the higher rate of the mobility component.

# The claimant’s severe visual impairment is worse out of doors than it is indoors in ambient light. She does not qualify under the Snellen Scale on a reading in doors, but the tribunal held that her visual acuity would qualify out of doors on the assessment of the evidence and allowed the appeal. The Secretary of State appealed to the Upper Tribunal.

**Statutory background**

# This appeal concerns Regulation 12(1A) of the Social Security (Disability Living Allowance) Regulations 1991 (the 1991 Regulations) and the entitlement of a severely visually impaired person to claim the higher rate of the mobility component of DLA. It raises the question of whether or not the regulation is *ultra vires* if it is discriminatory in breach of convention rights and/or if the Secretary of State has failed to have regard to his equality duties.

# The regulation is in the following terms:

12. (1A) (a) For the purposes of [section 73(1AB)(a)](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=8&crumb-action=replace&docguid=IA0A75F80E44911DA8D70A0E70A78ED65) of the Act (mobility component for the severely visually impaired) a person is to be taken to satisfy the condition that he has a severe visual impairment if—

(i) he has visual acuity, with appropriate corrective lenses if necessary, of less than 3/60; or

(ii) he has visual acuity of 3/60 or more, but less than 6/60, with appropriate corrective lenses if necessary, a complete loss of peripheral visual field and a central visual field of no more than 10° in total.

(b) For the purposes of [section 73(1AB)(b)](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=8&crumb-action=replace&docguid=IA0A75F80E44911DA8D70A0E70A78ED65), the conditions are that he has been certified as severely sight impaired or blind by a consultant ophthalmologist.

(c) In this paragraph—

(i) references to visual acuity are to be read as references to the combined visual acuity of both eyes in cases where a person has both eyes;

(ii) references to measurements of visual acuity are references to visual acuity measured on the Snellen Scale;

(iii) references to visual field are to be read as references to the combined visual field of both eyes in cases where a person has both eyes.

**Factual background**

# The claimant is registered blind. She claimed the higher rate of mobility DLA, but was only awarded the lower rate. She appealed to the tribunal which allowed her appeal. The Secretary of State has appealed to the Upper Tribunal.

# The claimant’s claim comes under regulation 12(1A)(a)(ii). It is accepted that she has a complete loss of peripheral visual field and a central visual field of no more than 10° in total. She has a visual acuity of a maximum of 6/36 in both eyes on the Snellen Test and therefore on a straight reading of the regulation does not qualify as a person who has a visual acuity of 3/60 or more, but less than 6/60, with appropriate corrective lenses if necessary.

# The speciality of this case is that the claimant suffers from Retinitis Pigmontosa (RP). The nature of this condition is “that a person who has this condition would be photophobic in bright light and would have extremely poor vision in bright light. … The consultant ophthalmologist confirmed at page 78 that (the claimant’s) vision is virtually non-existent in dark or dim light and that she has extreme photophobia in bright light”. The claimant requires to maintain ambient light in her house “in order to maximise what little vision she has in order to avoid falls and injury”. The tribunal went on to hold “in any other environment her vision including her visual acuity would be virtually non-existent … as lighting conditions are likely to be too bright or two dim.” (See Statement of Reasons § 10). The tribunal concluded “it is likely that (the claimant’s) visual acuity would come within the correct spectrum as stated in Regulation 12(1A) if she tried to walk outdoors” - Statement of Reasons § 11.

# The other agreed fact is that the Snellen test required to be done indoors with specific ambient lighting and that it could not be done in any other light, so there was no means of measuring the claimant’s visual acuity outside in bright or dim lighting.

**Tribunal’s reasoning**

# The tribunal’s reasoning is set out in § 11 of the Statement of Reasons:

“11. For these reasons the tribunal decided that [claimant] is *de facto* virtually unable to walk as a result of her severe sight impairment due to Retinitis Pigmontosa in anything other than artificial ambient lighting. In an eye condition in which lighting is of particular relevance to visual acuity in ambient conditions indoors are misleading in terms of [claimant]’s true visual acuity when trying to walk outdoors. The tribunal accepts the opinion of the consultant ophthalmologist that her visual acuity is worse in poor or bright light. In light of this opinion it is likely that [claimant]’s visual acuity would come within the correct spectrum as stated in Regulation 12(1A) if she tried to walk outdoors. This evidence was supported by the evidence of [claimant] herself whom the tribunal found to be consistent and credible in her evidence. The tribunal therefore accepted the cogent evidence of the consultant together with the credible evidence of [claimant]. The intention behind the higher rate of the mobility component of DLA is to benefit people who are unable to walk or virtually unable to walk outdoors. It is accepted that the rolling out of the mobility component to the severely visually impaired was by way of a subsequent amendment, however the philosophy behind the mobility component ought to apply to this amendment also. Whilst the tribunal did not dispute the arithmetic in relations to Snellen presented by the Secretary of State of the Department of Work and Pensions (though for slightly different reasons as the tribunal did not appreciate why a denominator approach was used in relation to what is otherwise fairly straightforward logic once one understands how the Snellen test works), it decided that no consideration had been taken in account by the decision maker of the specific condition of Retinitis Pigmontosa and the effect of lighting on the sufferer’s ability to see. Notwithstanding the exact terms of regulation 12(1A)(a) the test contained therein is of little value if it does not accurately test a person’s ability to see and therefore to walk whilst outdoors. Given that [claimant]’s consultant tells us that her vision is even worse in dim or bright light the tribunal concluded that her combined visual acuity outdoors, or in any environment in which ambient lighting was not maintained, would be less than 6/36 and, on the balance of probabilities, also ‘less than 6/60’. For these reasons the tribunal finds that [claimant] meets the requirements of regulation 12(1A) and is entitled to the higher rate of mobility component of DLA.”

**Secretary of State’s appeal**

# The Secretary of State appealed on the ground that the tribunal had no discretion under Regulation 12(1A) and that as the claimant had a visual acuity of 6/36 as measured in the Snellen test she did not qualify for the higher rate of the mobility component. That this was an objective test was confirmed by the decision of Judge Bano in *Secretary of State for Work and Pensions v MS (DLA)* [2013] UKUT 0267 (AAC) [CDLA/1899/2012].

**Directions**

# I directed an oral hearing and raised the question, if Judge Bano’s decision was correctly decided, did this raise an issue of discrimination in the application of the test “to a person such as the claimant who has Retinitis Pigmontosa which is sensitive to light and therefore that in bright light the visual acuity is affected in circumstances were other persons suffering from visual impairment would not be affected.” I asked for submissions on:

“1. Is the regulation, as construed by Judge Bano in CDLA/1899/2012, compatible with the claimant’s rights under Article 14 of the ECHR?

2. Does the regulation comply with the Secretary of State’s equality duties under the Equality Act 2006?

3. If the regulation, as construed by Judge Bano in CDLA/1899/2012, is not compatible with the claimant’s rights under Article 14, can the regulation be construed in a manner that is compatible – section 3(1) of the Human Rights Act 1998.

4. If the regulation, as construed by Judge Bano in CDLA/1899/2012, is not compatible with the Secretary of State’s equality duty, is that something to which I can have regard or can the regulation only be challenged in a judicial review? The jurisdiction point should be answered, whatever view the parties might take of whether or not the equality duty has been complied with.”

# Both parties confirmed that they considered that I had jurisdiction to determine whether or not the regulation was *vires* on the basis that if the regulation was discriminatory or if it the Secretary of State had not had regard to the equality duty, then the regulation would be *ultra vires*. I therefore not need to consider Question 4 in my direction.

**Oral hearing**

# I held an oral hearing. Prior to the hearing the parties put in written submissions, which for the claimant are at pages 183 to 187 and for the Secretary of State at pages 216 to 241. There was a discussion about the written submissions at the hearing and beyond giving a summary of the parties’ positions I do not intend to rehearse the submissions except in so far as I discuss them further in my decision. A summary of the respective positions is set out in the following paragraphs.

# For the Secretary of State:

* Judge Bano was correct. This is an objective test and the tribunal had no discretion to modify the Snellen test readings;
* While Article 14 of the ECHR was engaged, because the benefit was a possession and this fell within “other status”, there was no discrimination in this case because “The claimant’s case and the case of a person suffering from a more severe type of ‘severe visual impairment’ are not ‘like cases’”;
* Even if there was discrimination it was legitimate to establish “bright lines” and the policy was justified;
* The Secretary of State did have regard to his equality duties under the Equality Act 2006, which applied as the regulations came into force before the Equality Act 2010 came into force, and in particular to his duty under section 49A of the Disability Discrimination Act 1995.
* It was also submitted that even if the Regulations were not compatible with the ECHR or the equality duty this did not avail the claimant, because in those circumstances the regulations would be *ultra vires* and therefore a nullity. In the absence of the regulation a visually impaired person has no right to anything other than the lower rate of the mobility component to which the claimant was in any event entitled.
* The only way the claimant might benefit would be if the regulations could be read to be compliant with the convention and they could not be read down in that way because that would be the Upper Tribunal legislating.

# The Secretary of State referred to the following cases:

***Authorities***

1. *R (on the application of MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (QB), [2013] PTSR 1521

2. *Secretary of State for Work and Pensions v MS (DLA)* [2013] UKUT 0267 (AAC)

3. *Humphreys v HMRC* [2012] UKSC 18, [2012] 1 WLR 1545

4. *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311

5. *R (Wilson) v Wychavon DC* [2007] EWCA Civ 52, [2007] QB 801

6. *Stec v United Kingdom* (65731/01) (2006) 43 EHRR 47

7. *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173

8. *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557

9. *Lees v Chief Adjudication Officer* [1985] AC 930 (HL)

10. *Kjeldsen, Busk Madsen and Pedersen v Denmark* (A-23) (1979-80) 1 EHRR 711

***Additional materials***

11. Social Security (Disability Living Allowance) (Amendment) Regulations 2010

12. Explanatory Memorandum to the Social Security Advisory Committee (Social Security (Disability Living Allowance) (Amendment) Regulations 2010)

13. Explanatory Memorandum laid before Parliament (Social Security (Disability Living Allowance) (Amendment) Regulations 2010)

14. Repealed section 21B of the Disability Discrimination Act 1995

15. Repealed section 21C of the Disability Discrimination Act 1995

# For the claimant:

* The regulations were not compatible with the convention. There was either direct discrimination or indirect discrimination or Thlimmenos discrimination.
* The regulations did not comply with the Secretary of State equality duties because the Secretary of State never had regard to the issues arising from RP as was clear from the papers.
* That the regulation could be construed in a manner compatible with convention rights. The whole DLA provisions were all a matter of judgement and the tribunal was correct to hold that it could conclude that the claimant’s visual acuity was below the threshold outside. The whole regulation was concerned with the ability to get out and about.
* Reference was made to some of the cases cited by the Secretary of State.

**Discussion**

***Secretary of State for Work and Pensions v MS (DLA) [2013] UKUT 0267 (AAC)***

# The start point is whether *MS* was correctly decided. In *MS* Judge Bano sets out the background to the introduction of regulation 12(1A) to assist severely visually impaired persons. It is clear that the claimant in *MS* was in a similar position to the claimant in this case. *MS* was described as having “a rare inherited condition called achromatopsia. … The vision is much worse outdoors than it is under controlled light conditions in the consulting room. …” The hospital report went on to say that *MS’s* binocular visual acuity was not less than 3/60, but added “outdoors the vision is likely to be less than 3/60 as the vision is much worse in sunlight.” Accordingly, it is clear that *MS* is in a similar position to the claimant, in that the claimant’s visual acuity is not less than 6/60 [it is 6.36], but as the tribunal found, her vision is likely to be less than 6/60 outdoors. In *MS* the tribunal went on to hold that it was *MS’s* visual acuity outdoors that has to be established and accepted the hospital evidence and held *MS* entitled to the higher rate.

# Judge Bano allowed the Secretary of State’s appeal saying:

“11. As the tribunal in this case recognised, it may equally be difficult to see why entitlement to a benefit which is concerned with mobility out of doors leaves out of account the claimant’s visual acuity in an outdoor environment. However, I have come to the conclusion that regulation 12(1A)(a)(i) must be read as applying only to an actual, and not a hypothetical, Snellen Scale measurement.

12. Unlike the previous functional tests of visual disablement, it seems to me that the test in the new regulation 12(1A) of the 1991 Regulations is intended to provide an objective and consistent yardstick of entitlement. At the cost of penalising some claimants for whom the test does not provide an accurate indication of their visual impairment when out of doors, the new test relies on a scientific measurement of visual acuity carried out in controlled and standardised conditions. I agree with Mr Heath that it cannot have been intended that the provision should apply to the results of a hypothetical test carried out in conditions in which the test cannot in practice be performed. For those claimants like the appellant in this case, whose visual acuity varies according to the brightness of the surrounding light, it would in any case be impossible to say what measurement should be used for the purposes of determining the claim.

13. The new regulation 12(2A) of the 1991 DLA regulations specifies in precise detail the conditions which have to be satisfied in relation to both visual acuity and visual field defects in respect of one or both eyes in order for a claimant to qualify as severely visually impaired. If the regulation were taken as applying to anything other than actual Snellen Scale measurements, it would in my view introduce into the test elements of judgement and interpretation which the very prescriptive terms of the new regulation were intended to exclude.”

# On a straight reading of regulation 12(1A), I agree with the decision of Judge Bano that the intention is to have an objective yardstick to measure visual acuity. A claimant therefore either qualifies or does not qualify for the higher rate of mobility component depending on the Snellen test result alone.

***Is the regulation discriminatory?***

# The Secretary of State’s submission accepts that Article 14 of the ECHR is engaged and that “the claimant’s particular sight disabilities constitute a “personal characteristic” conferring on her an “other status” for the purposes of Article 14.” However the Secretary of State argued that there was no discrimination:

“24. Difficult questions may arise as to the classification of the different comparators which should be used to determine whether there is discrimination between different classes of person. In this case the question is not whether the claimant, with her particular sight disability, suffered discrimination in comparison with a person who has no disability; but whether she suffered discrimination in comparison with a person who has a “severe visual impairment” which is more severe because the person’s visual acuity measured indoors in clinical conditions on the Snellen Scale is less than the claimant’s. In other words, the comparison is between, on the one hand, disabled persons suffering from one category of “severe visual impairment” and, on the other, disabled persons suffering from a different (more severe) type of “severe visual impairment”.

25. [*R (on the application of MA) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (QB)]

26. It is submitted, as the Secretary of State’s primary position, that regulation 12(1A) of the 1991 Regulations does not offend the principle of consistency so as to give rise even *prima facie* to discrimination. The claimant’s case and the case of a person suffering from a more severe type of “severe visual impairment” are not “like cases”.

# The claimant’s representative founded on direct discrimination, indirect discrimination and Thlimmenos discrimination (*Thlimmenos v Greece* (2001) 31 EHRR 411 § 44) where there is a failure to make a different rule for those adversely affected and also referred to *MA*. In *Thlimmenos* the court said:

“44. … The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”

At § 48 the court referred to the fact “That State did so by failing to introduce appropriate exceptions to the rule …”.

# I consider that it is clear that the effect of the regulation relying solely on the Snellen test discriminates between persons who have a visual acuity that is the same in the consulting room taking the Snellen test as it is outdoors and persons that have a particular Snellen test reading in the consulting room, but whose visual acuity outside is significantly worse.

# I consider that in the present case that the effect of the regulation is to create indirect discrimination because the regulation has disparate impact on one group, namely the group that has more severe visual acuity outside than inside as opposed to another group where their visual acuity is the same inside or outside. This can also be categorised as *Thlimmenos* discrimination, because there has been a failure to make a different rule for those, such as the claimant or *MS*, who are more adversely affected out of doors. Regulation 12(1) therefore fails to treat differently persons whose situation is significantly different. The Secretary of State could have introduced exceptions for the purposes of the regulation.

# I therefore hold that regulation 12(1A) is discriminatory and unless there is an objective and reasonable justification for the discrimination, that the regulation is *ultra vires*.

***Is the discrimination justified?***

# In *MA* Laws LJ summarised the case law on discrimination [§s 35-38) and ended saying:

“Notwithstanding these categorisations, the law of discrimination, domestic or European, rests on a single principle: the principle of consistency. Elias LJ at once stated the principle and exposed its different applications in *AM (Somalia*) [2009] EWCA Civ 634: "[l]ike cases should be treated alike, and different cases treated differently. This is perhaps the most fundamental principle of justice" (paragraph 34). Even so, discrimination, including direct discrimination in Article 14 cases, may be justified; and the difference between direct and indirect discrimination (and *Thlimmenos* discrimination) retains a conceptual importance, because it will determine what it is that must be justified. Where the discrimination is direct – where a rule, practice or policy prescribes different treatment for persons in like situations – it is the rule itself that must be justified: the difference in treatment. Where the discrimination is indirect – where a single rule has disparate impact on one group as opposed to another – it is the disparate impact that has to be justified. With *Thlimmenos* discrimination, what must be justified is the failure to make a different rule for those adversely affected.”

# The Secretary of State argued and I accept the proposition that in the realm of justification of discrimination under Article 14 that the Secretary of State has a margin of appreciation – *MA* at § 36. However the Secretary of State went on to argue that where one was dealing with a social strategy, such as benefits that the margin was a wide one. Reference was made to *Humphreys v HMRC* [2012] UKSC 18, [2012] 1 WLR 1545 (§ 15) where Baroness Hales of Richmond cited with approval *Stec v UK* (2006) 43 EHRR 1017 at paragraph 52:

“The scope of this margin will vary according to the circumstances, the subject matter and the background. As a general rule, very weighty reasons would have to be put forward before the court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the court will generally respect the legislature's policy choice unless it is ‘manifestly without reasonable foundation’.”

# The Secretary of State’s argument continued:

“It is well established that this margin of appreciation allowed to the state means that it is entitled to draw “bright lines” when making general legislation of this kind in the interest of a workable system, rather than attempting to cater for the individual situation of every claimant; and that the need to draw those lines at some reasonable point may create hard cases. It is well established that a workable system may depend on the adoption of clear, easily applicable “bright line” rules rather than attempting to cater for the individual situation of every claimant. An example was discussed by Lord Hoffmann in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, a case where the Article 14 challenge was based on the fact that the rate of jobseeker’s allowance payable was lower if the claimant was aged 25 or over:

“a line must be drawn somewhere. All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line. If one wants to analyse the question pedantically, a person one day under 25 is in an analogous, indeed virtually identical, situation to a person aged 25 but there is an objective justification for such discrimination, namely the need for legal certainty and a workable rule”.

(See also the various examples of Convention-compatible “bright lines” discussed by Richards LJ in *R (Wilson) v Wychavan DC* [2007] EWCA Civ 52, [2007] QB 801 (paragraphs 57-60.)”

# The Secretary of State submitted that in the field of social security benefits the test was in fact one of being “manifestly without reasonable foundation” and referred, amongst other cases, to *MA* at § 60 where Laws LJ adopted this test “for the ascertainment of the Secretary of State’s margin of discretion”. I accept that is the test. The factual basis on which the justification was founded in set out in the written submissions at § 35 and relies on the Memorandum I refer to hereafter.

# However, I note that Laws LJ in *MA* at § 62 said:

“62. Though the wide margin remains, it is important to have in mind that what has to be justified for the purpose of Article 14 (at least in a case like this) is not the policy as a whole but the relevant difference in treatment. So much was common ground. I note in particular the reference by Ms Mountfield to the decision of the Supreme Court in *Quila* [2012] 1 AC 621, [2011] UKSC 45, in which the court held that it is not enough for a decision-maker in a field of sensitive public policy to draw attention to a particular pressing social problem and pray that in aid as an intrinsic justification for the measures adopted to address it. This is certainly so with respect to the discrimination issue here. As I have said the concrete question is whether the refusal to exclude (some) disabled persons from the regime of B13, and the provision made and to be made by way of access to DHPs, constitutes a proportionate approach to the difficulties suffered by such persons in consequence of the HB policy.”

# In considering whether or not the discrimination in the regulation is objectively and reasonably justified, having regard to the width of the discretion as set out in *MA*, I start with the “Explanatory Memorandum to the Social Security Advisory Committee” (SSAC) (page 510) that is put to the Committee for comment before the regulation is enacted. Paragraph 9 refers to the preliminary consultation and states:

“9. The Department has been working closely with officials from the RNIB since they launched their campaign to develop the necessary level of detail on which the Government could commit to change. Those discussions have led to a position where we are agreed that the fundamental policy position should be that the extension of entitlement to the higher rate mobility component should only be extended to those “who have no useful sight for orientation purposes”. This position recognises that many severely visually impaired people (including those that have been registered as such) have a sufficient degree of visual acuity and/or visual field to safely negotiate their way when out of doors on familiar routes and should be excluded from being within scope”.

# The Secretary of State emphasised the “who have no useful sight for orientation purposes”, saying that the claimant had sufficient sight for orientation purposes inside under the Snellen test, whereas the claimant’s representative referred to the fact that the mobility component was concerned with the ability to walk outside. It is clear to me from § 9 of the Explanatory Memorandum that the “no useful sight for orientation purposes” test was being considered against the ability “to safely negotiate their way when out of doors”. This fits in with Judge Bano’s comment that:

“it may equally be difficult to see why entitlement to a benefit which is concerned with mobility out of doors leaves out of account the claimant’s visual acuity in an outdoor environment.”

# There is a reference to RP in Annex C to the Explanatory Memorandum in the comments on the consultation response by Elizabeth Felon, where the DWP’s Response is:

“We acknowledge that people with less severe visual impairments may have difficulties when out of doors. The lower rate mobility component of DLA remains available to those people who require guidance or supervision when out of doors in unfamiliar places.”

I note the comment, but I do not consider that it has considered or addressed the question of whether or not the fixed measurement provided for in the regulation might be discriminatory. The Memorandum at § 23 “Equality and Diversity” refers to the Impact Assessment published alongside the Welfare Reform Bill at Annex D. This suggests at § 432 (page 529) that:

“extending the higher rate of mobility to people with severe sight loss is unlikely to amount to unlawful discrimination …. The change means that other less severely sight impaired people and other disabled people with similar problems out of doors will not gain from this measure. This may risk that the Government will appear to be failing to promote equality of opportunity for disabled people. However we believe that treating the most severely sight impaired people more favourably is justifiable to: (sic) enable them to get around more easily; promote choice and control around how much their mobility needs are met; expand their opportunities for social engagement; and to reduce barriers to entering or remaining in employment”. [underlining in the document]

In context this is again referring to the ability to get around out of doors.

# The Explanatory Memorandum to The Social Security (Disability Living Allowance)(Amendment) Regulations 2010 No. 1651 (page 126) that was laid before Parliament states at paragraph 6 that as the instrument is a negative resolution that no ECHR statement is required, which suggests that the ECHR implications were not considered. At § 7.4 it states:

“7.4 This amendment extends the “deeming provisions” to allow prescribed categories of severely visually impaired people to gain access for the first time to the higher rate mobility component of DLA. The change acknowledges that people with the most severe forms of sight loss, such that they have no useful sight for the purposes of independently getting out and about even in familiar environments, face additional, mobility-related costs. The intention is that this change will allow severely visually impaired people greater freedom to participate in social activities, get out and about and to work where that is an option.

7.5 The two categories of severe visual impairment specified in the Regulations represent a sub-group of those who have been certificated by a consultant ophthalmologist as being severely sight impaired (blind). People who have been certificated as being severely sight impaired, but who do not fall within the ambit of this measure, are excluded on the basis that they will have sufficient vision to enable them to be independently mobile in familiar places. These people will continue to be entitled to the lower rate mobility component where applicable.”

# In my opinion that the Explanatory Memorandum for the SSAC makes clear that the amendment is directed towards mobility out of doors. There is nothing to suggest that the Secretary of State has really addressed the situation where a person might have a better visual acuity indoors compared to their visual acuity outdoors. Further in the Explanatory Memorandum for Parliament specifically refers to “The change acknowledges that people with the most severe forms of sight loss, such that they have no useful sight for the purposes of independently getting out and about” making it clear that the change is directed towards people who have no useful sight for getting out an about. The next paragraph refers to the group that is excluded namely those who “will have sufficient vision to enable them to be independently mobile in familiar places.” The claimant and *MS* are people who have no useful sight when out of doors and do not have “sufficient vision” to be independently mobile in familiar places – in context familiar places out of doors.

# In these circumstances I consider that from the material available that the Secretary of State has not really addressed the situation that arises in this appeal or that arose in the *MS* appeal decided by Judge Bano. If the matter was not properly addressed, I cannot see that the Secretary of State can claim that the discrimination is objectively and reasonably justified however wide the margin of discretion. Separately, it is my opinion that where there is a group of individuals whose visual acuity outside is comparable with a group whose visual acuity is less than 6/60 both inside and outside, that it cannot be objectively or reasonably justified to treat them differently in regulations whose objective is to benefit people with “no useful sight for the purposes of independently getting out and about” out of doors.

# I consider that the justification that has been put forward in this case for the Secretary of State is an attempt to justify the policy as a whole, rather than to try and justify the exclusion of persons such as the claimant from a right to claim the higher rate of the mobility component – see comments by Laws LJ at § 62 in *MA*.

# I therefore hold that regulation 12(1A) has no reasonable or objective justification and is accordingly *ultra vires*.

***Section 3(1) of the Human rights Act 1998***

# Section 3(1) provides that “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” The Secretary of State submitted under reference to *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at §s 33 and 121 that the regulation was so clear in its reference to “visual acuity measured on the Snellen Scale”, that it could not be read in a way that allowed some other assessment, such as the tribunal had made by accepting external evidence of what the claimant’s visual acuity might be out of doors.

# I agree with the Secretary of State that the regulation cannot be read in a manner that is compatible with convention rights. Regulation 12(1A(c)(ii) is quite clear that “references to visual acuity are references to visual acuity measured on the Snellen Scale”. To read into that a provision “or as may be assessed by the decision maker” would be to legislate and that goes beyond trying to read the regulation in a manner that is compatible with convention rights.

***Did the Secretary of State comply with the equality duty***

# The regulation came into effect prior to the coming into force of the Equality Act 2010 and so the equality duty that applies arises from the Equality Act 2006 and links back to the Disability Discrimination Act 1995. The Secretary of State submitted (§s 42 – 44) that section 49A of the DDA 1995 applied and referred to other provisions of the 2006 Act. The submission was that having regard to the Explanatory Memorandum it could be seen that the Secretary of State did have “due regard” to the duties and all he was required to do was have “regard” to those duties.

# For the reasons given above it is my opinion that that the Secretary of State has not really addressed the situation that arises in this appeal or that arose in the *MS* appeal. In those circumstances, I consider that there was an equality duty to have regard to the discrimination that arises in the circumstances of this case. While it might be a fairly narrow situation, as the regulation was directed towards bringing in an additional entitlement for persons with a severe visual impairment out of doors, I consider that there was a duty to have regard to the group of persons, like the claimant and *MS*,whose visual acuity outdoors is worse than it is indoors. As that was not done, as I have held, I therefore consider that the Secretary of State has not complied with the equality duty.

# I therefore hold that the regulation is separately *ultra vires*, because it was enacted without regard to that equality duty.

**Outcome of the appeal**

# The Secretary of State submitted that if I were to hold that the regulation was *ultra vires* that would not benefit the claimant. Until the amending regulation was introduced a visually impaired person who could walk was only entitled to the lower rate of the mobility component. Regulation 12(1A) was the “door” to the higher rate. If I held that the regulation was *ultra vires* then it was as if it had never been enacted, unless it could be read as compatible under section 3(1) of the HRA 1998.

# With regret I agree with the Secretary of State. I have held that the regulation cannot be construed in a manner that is compatible, in circumstances where I have held that the regulation to be *ultra vires*. I have not made a formal decision that the regulation is a nullity, because I do not have a jurisdiction to reduce or set the regulation aside and there are undoubtedly claimants who qualify for the higher rate of the mobility component under the regulations as they stand. It is therefore for the Secretary of State to consider what action should be taken to amend the regulations so as not to discriminate against persons such as the claimant in this appeal.

# In these circumstances the claimant has no entitlement to the higher rate of mobility component. Accordingly the appeal has to be allowed and the decision of the tribunal set aside. I hold that the claimant is only entitled to the lower rate of mobility component.

**Further ground of appeal by claimant**

# Late on in the hearing the claimant’s representative said that in any event I should sent the appeal back to the tribunal to be considered under Regulation 12(1)(a)(b) on the grounds that the photosensitivity made the claimant’s eyes so painful that any walking was with “severe discomfort”.

# I am not prepared to consider that suggestion at this late stage in the process. There is nothing in the papers to suggest that it was ever raised before the tribunal and there is nothing to suggest that in the exercise of their investigatory function the tribunal ought to have been alerted to considering a claim on this basis. I therefore will not consider sending the appeal back to the tribunal on this basis.

# That is not to say that the claimant could not ask for the decision to be superseded again on the basis that walking out of doors with her eye condition is limited through “severe discomfort”. In saying that I am not to be taken to make any comment on the prospects of such a claim

(Signed)

Sir Crispin Agnew of Lochnaw Bt QC

Judge of the Upper Tribunal

Date: 7 February 2014