

R(IS) 7/09

(CM v Secretary of State for Work and Pensions [2009] UKUT 43 (AAC))

Judge Lloyd-Davies
10 February 2009

CIS/1132/2006

Human rights – Article 14 – whether denial of income support to pregnant student indirect discrimination

The claimant was a student nurse in receipt of an NHS bursary. She had to interrupt her course because of pregnancy and her bursary stopped. Her claim for income support was refused on the ground that she was a “full-time student” within the definition in regulation 61(1) of the Income Support (General) Regulations because she had not abandoned her course or been dismissed from it (regulation 61(2)(b)). She appealed to an appeal tribunal, arguing that regulation 61(2)(b) should be disapplied in her case as it was discriminatory contrary to Article 14 of the European Convention on Human Rights, taken with Article 1 or 2 of Protocol 1. The tribunal found that there was insufficient evidence placed before it to demonstrate that intercalating women students were disproportionately discriminated against by the income support regulations. The claimant appealed.

Held, allowing the appeal, but substituting a decision to the same effect, that:

1. the tribunal had erred in failing to consider a submission on behalf of the claimant which argued that statistical evidence was not a prerequisite to establishing indirect discrimination in a human rights context, referring to *O’Flynn v CAO* [1998] ICR 608 and *Secretary of State for Work and Pensions v Bobezes* [2005] EWCA Civ 111 (reported as R(IS) 6/05) (paragraph 9);
 2. the right to claim a non-contributory social security benefit such as income support was within the scope or ambit of Article 1 of Protocol 1 to the Convention so as to enable Article 14 to be engaged following *R (RJM) v Secretary of State for Work and Pensions* ([2008] UKHL 63, [2009] 1 AC 311), where it was held that the decision in *Stec v United Kingdom* (2005) 41 EHRR SE18 was, notwithstanding certain Court of Appeal authority to the contrary, to be followed in the United Kingdom (paragraph 10);
 3. the case did not fall within Article 2 of Protocol 1 (right to education) as there had been no denial of the right to education and the funding arrangements available for tertiary education did not fall within the ambit of Article 2 unless they had been specifically designed to discriminate against a particular category of person (*R (Douglas) v North Tyneside Metropolitan Borough Council* [2003] EWCA Civ 1847 followed) (paragraphs 11 to 14);
 4. statistics were not a necessary pre-condition to determining whether there was indirect discrimination in this case (*AL (Serbia) v Home Secretary* [2008] UKHL 42 and *DH and Others v The Czech Republic* (2008) 47 EHRR 3 followed) and, the Secretary of State having conceded that pregnancy was an “other status” for the purposes of Article 14, the question was whether there was an objective and reasonable justification for disentiing pregnant intercalating students from income support (thereby distinguishing them from students who intercalate for other reasons) (paragraphs 17 and 18);
 5. the policy behind the regulatory structure was that students who intercalate for essentially transient reasons (even through no fault of their own) should not receive benefit, but should rely on such support as might be available from the education authorities concerned, and there was objective and reasonable justification for the inclusion of intercalating students during the later term of their pregnancy within that policy (paragraph 21);
 6. (*obiter*) to bring the claimant within paragraph 14 (relating to pregnancy) of Schedule 1B would entail a positive legislative change, which no court or tribunal could make, and it was doubtful whether, if a breach of Article 14 were found, a statutory tribunal could give declaratory relief (such as that granted by the Court of Appeal in *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303 (reported as R(IS) 6/06)) (paragraph 31).
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DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision:

My decision is that the decision of the tribunal held on 22 November 2005 involved an error of law. I set it aside. This does not, however, assist the claimant: I give my own decision which is to the same effect as that of the tribunal, namely that the claimant is not entitled to an award of income support from and including 4 February 2005.

REASONS

1. The claimant, a woman born in 1972, began studying learning disabilities nursing at the University of Sheffield in May 2003. She was in receipt of an NHS bursary. Her course involved not only academic study but also 24 weeks a year hospital-based training: during those weeks' training she was subject to the same health and safety rules as a fully qualified nurse. She became pregnant, with an expected date of delivery in April 2005. When she was 31 weeks pregnant, she had complications which meant that she could no longer continue her then period of hospital training: in any event NHS rules meant that, at 32 weeks pregnant, she would have to have had a medical certificate enabling her to continue her in-hospital training. In the event she ceased her course on 11 February 2005: her NHS bursary stopped. She did not abandon her course and was not dismissed from it: she wished to return to qualify when she was able to do so. She claimed income support by a claim treated as made on 4 February 2005. Her claim was disallowed on 10 March 2005 on the grounds that she did not fall within any of the prescribed categories of person entitled to claim income support. Her daughter was born on 18 April 2005. The claimant claimed income support again and was awarded it as a lone parent with effect from 28 April 2005.

2. The claimant appealed the 10 March 2005 disallowance of her original claim of 4 February 2005. The tribunal disallowed her appeal. The claimant appeals the decision of the tribunal with my leave.

3. I held an oral hearing over two days in May 2007. The claimant was represented by Mr Daniel Kolinsky of counsel, instructed by the Child Poverty Action Group, and the Secretary of State was represented by Miss Marie Demetriou of counsel instructed by the Solicitor to the Department. I am grateful to them both for their submissions.

4. A central issue that arose during the hearing was whether a claim to non-contributory social security benefit (such as income support) fell within the scope or ambit of Article 1, Protocol 1 of the European Convention on Human Rights so that Article 14 of that Convention (relating to discrimination) might be engaged. That issue, involving the question whether (in the then state of English authority) the admissibility decision of the Grand Chamber of the European Court of Human Rights in *Stec v United Kingdom* (2005) 41 EHRR SE18 (*Stec I*) was to be followed, was known to be coming shortly before the Court of Appeal in *R (RJM) v Secretary of State for Work and Pensions* [2006] EWCA Civ 1698. In the event the relevant point, so far as concerned RJM's claim, was conceded by the Secretary of State in the Court of Appeal. Subsequently leave was granted by the House of Lords for an appeal to the House. In that appeal the concession previously made was withdrawn. I

have deferred giving my decision in this case until after the decision of the House of Lords (handed down on 22 October 2008). Since my decision refers not only to the decision of the House of Lords in *RJM* ([2008] UKHL 63, [2009] 1 AC 311) but also to certain other authorities which have come to my notice since the oral hearing, I wrote this decision in draft and invited the parties to make any observations they might have on the new authorities to which I have referred. I received no further observations.

5. The operation of the legislative framework, and in particular the Income Support (General) Regulations 1987 (SI 1987/1967) (the 1987 Regulations), in relation to the claimant was agreed before me. A person is entitled to income support if he or she falls within a prescribed category of person (see section 124(1)(e) of the Social Security Contributions and Benefits Act 1992). Regulation 4ZA(1) of the 1987 Regulations provides that a person to whom any paragraph of Schedule 1B to the 1987 Regulations applies falls within a prescribed category of person. However regulation 4ZA(2) further provides that regulation 4ZA(1) does **not** apply to a full-time student during the period of study. It is common ground that the claimant at the material time fell within the definition of full-time student (contained in regulation 61(1) of the 1987 Regulations), namely, that she was 19 or over but under pensionable age and was attending or undertaking a full-time course of study at an educational establishment. By virtue of regulation 61(2) a person is **still** to be regarded as attending or undertaking a full-time course of study:

“(b) ... throughout the period beginning on the date on which he starts attending or undertaking the course and ending on the last day of the course or on such earlier date (if any) as he finally abandons it or is dismissed from it”

This provision means that a person (such as the claimant) who temporarily ceases a full-time course but neither abandons it nor is dismissed from it continues to be treated as a “full-time student during the period of study” and hence is not entitled to income support, unless any of the exceptions referred to in regulation 4ZA(3) or 4ZA(3A) applies. Those exceptions include:

- (i) lone parents (under paragraph 1 of Schedule 1B)
- (ii) single persons looking after foster children (paragraph 2)
- (iii) students who are disabled, or incapable of work for more than 196 days (paragraphs 10 and 11)
- (iv) deaf students (paragraph 12) and
- (v) refugees (paragraph 18)

These “full-time student” exceptions do **not** however include pregnant women, who would, by virtue of paragraph 14, be otherwise entitled to income support if **either** incapable of work **or** within 11 weeks of the expected date of confinement: nor do the exceptions include students who have caring responsibilities and who would otherwise be entitled under paragraphs 3 or 4.

6. Accordingly unless a student (an intercalating student) who has taken leave of absence from his course falls within one of the listed exceptions he cannot obtain income support. If he wishes to claim income support and would otherwise be entitled, he must abandon his course: abandonment usually means that course credits previously gained are lost. The central thrust of the argument on behalf of the

claimant before the tribunal and me was that regulation 61(2)(b) was indirectly discriminatory against women, alternatively pregnant women, because only women could become pregnant.

7. No attempt was made before me to argue that regulation 61(2)(b) was **directly** discriminatory because of the decision of the Court of Appeal in *Walter v Secretary of State for Social Security* [2001] EWCA Civ 1913 (reported as R(JSA) 3/02). In that case the Court of Appeal was considering parallel provisions in the JSA Regulations (in the context of EU legislation) with reference to a pregnant student who had also taken leave of absence from her university course. The Court decided that no direct discrimination against women (or pregnant women) had been established since the disqualification from obtaining benefit that the claimant suffered arose not by reason of her sex or pregnancy but from her choice to take leave of absence from her course, rather than to abandon it. The Court did not consider any question of indirect discrimination, but indicated that the question might well arise. (No argument on human rights was then raised, presumably because the Human Rights Act 1998 was not in force at the relevant time.)

8. In CJSA/825/2004 the Commissioner had to consider the question of indirect discrimination, again in the context of JSA, in relation to a pregnant student who had taken leave of absence from her course: only EU law appears to have been raised. He held that the relevant pools for comparison were (i) male students who had taken leave of absence and (ii) female students who had taken such leave; that there was no statistical evidence to demonstrate that the latter class were disproportionately affected by the legislation; and that in the absence of such evidence the claimant's appeal in his case was bound to fail.

9. Before the tribunal in the present case the facts were agreed. It was referred to the decision in *Walter* and CJSA/825/2004. In its decision notice the tribunal essentially found that there was insufficient evidence placed before it to demonstrate that intercalating women students were disproportionately discriminated against by the income support regulations. In the tribunal's statement of reasons it did not fundamentally expand its reasoning, save to say that it had adopted a submission made by the Secretary of State received on 2 November 2005 and to be found at pages 85 to 92 of the case papers. Before the tribunal, there was a submission on behalf of the claimant at pages 94 to 96 which referred to authority namely *O'Flynn v CAO* [1998] ICR 608 and *Secretary of State for Work and Pensions v Bobezes* [2005] EWCA Civ 111, [2005] All ER 497 (also reported as R(IS) 6/05) and argued that statistical evidence was not a prerequisite to establishing indirect discrimination in a human rights context. This submission post-dated that on behalf of the Secretary of State, but was not referred to at all by the tribunal. In my judgment the tribunal, even if it considered that the submission on behalf of the claimant was not well founded, should have dealt with it: it did not do so and hence its decision involved an error of law. I therefore set its decision aside.

10. The argument before me covered the following issues:

- (1) Whether the decision in *Stec I* (to the effect that the right to claim a non-contributory social security benefit was within the scope or ambit of Article 1 of Protocol 1 to the Convention so as to enable Article 14 to be engaged) was, notwithstanding certain Court of Appeal authority to the contrary, to be followed in the United Kingdom. The House of

Lords in *RJM* held that it was. Accordingly that issue is decided in the claimant's favour.

- (2) Whether the denial of the claimant's claim was within the ambit of Article 2 of Protocol 1 (relating to education) and whether that Article (whether alone or taken with Article 14) was engaged.
- (3) Whether, to establish indirect discrimination for the purposes of Article 14, it was **necessary** for statistics showing such discrimination to be adduced.
- (4) Whether, whichever way issue (3) was decided, the claimant could establish indirect discrimination either by reason of her gender or by reason of her pregnancy.
- (5) If issue (4) was decided in the claimant's favour, the remedy to be afforded to the claimant.

11. I first turn to Protocol 1, Article 2 of the Convention. That provides:

“No person shall be denied to the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

12. It has been decided by the Court of Appeal in *R (Douglas) v North Tyneside Metropolitan Borough Council* [2003] EWCA Civ 1847, [2004] 1 WLR 2363 that tertiary or higher education such as the claimant in this case was pursuing falls within the meaning of “education” in Article 2.

13. As I understand the argument on behalf of the claimant it was to the effect that the denial of income support to pregnant intercalating students meant that such students would be more likely to be forced to abandon their course (rather than intercalate) so as to have means of subsistence. I cannot see that this argument brings **this case** within Protocol 1, Article 2. The simple fact is that the claimant did not in fact abandon her course, but chose to intercalate. There has been **no denial** of the right of education to the claimant (whose personal circumstances caused her to interrupt her course): indeed the claimant was in the position of being able to take up her course again. The argument advanced on behalf of the claimant does not, in my judgment, bring this case within Article 2 of Protocol 1.

14. In any event, it is clear from *Douglas* (which concerned the non-availability of a student loan to a mature student over the age of 55) that the funding arrangements available for tertiary education do not fall within the ambit of Article 2. Admittedly, at [59] Scott Baker LJ stated:

“If the funding arrangements had been specifically designed to discriminate against a particular category of person that might have been another matter, for then the arrangements could be said to be necessarily concerned with the right to education.”

This does not, in my view, however assist the claimant. It cannot be said, even if the facts of this case otherwise came within Article 2, that the provisions of regulation 61(2)(b) are “specifically designed” to discriminate against pregnant students.

15. I now turn to Article 14, taken with Article 1 of Protocol 1. I first consider the question of statistics. Before me it was argued on behalf of the claimant that if as a

matter of commonsense and an examination of the rules in question a disproportionate effect could be shown without recourse to statistics the claimant should not be required to substantiate it: only a woman could become pregnant. The claimant relied on EU law authorities namely *Bobezes* and *O'Flynn*. On behalf of the Secretary of State it was submitted that in *Esfandiari v Secretary of State for Work and Pensions* [2006] EWCA Civ 282, [2006] HRLR 26 (also reported as R(IS) 11/06) at [16]–[18] it was held that EU law principles of indirect discrimination did not necessarily apply for the purposes of Article 14. Reference was made to the case of *Hoogendijk v Netherlands (Admissibility)* (2005) 40 EHRR SE22 at [207] and *Esfandiari* at [18] as authority for the proposition that the claimant must show on the basis of undisputed official statistics that the allegedly discriminatory rule is “disproportionately prejudicial” and affected a clearly higher percentage of women than men and that “statistics were not automatically sufficient evidence”.

16. The Secretary of State further submitted that the provisions of regulation 61(2)(b) were not intrinsically liable to affect more women than men and that it was not obvious that they would do so since there would be many reasons for persons to intercalate (for example illness, bereavement, caring responsibilities or academic problems). In the skeleton argument on behalf of the Secretary of State there was set out a table of statistics from the Higher Education Funding Council which showed that, of the total number of students who started academic study in September 2002, the percentage of female students who ceased academic study for one year (whether those students were over 21 or under 21 at the point of commencement) was lower than the percentage of male students who ceased academic study for one year. On behalf of the claimant issue was taken with these statistics because they did not identify those students who took leave of absence for less than one year, who took leave of absence for more than one year, or eventually abandoned their course.

17. I consider that I do not have to find that statistics are a necessary precondition to determining whether there is indirect discrimination in this case, for the following reasons.

- (a) The only difference between the class of female intercalators and the class of male intercalators that was argued before me was that women could become pregnant and men could not. The true distinction was the factor of pregnancy. It was conceded by the Secretary of State during the hearing that pregnancy was an “other status” for the purposes of Article 14.
- (b) It is clear from the opinion of Baroness Hale in *AL (Serbia) v Home Secretary* [2008] UKHL 42, [2008] 1 WLR 1434 at [22]–[25] that rather than seeking to establish comparators, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification.
- (c) The Grand Chamber of the European Court of Human Rights stated in *DH and Others v The Czech Republic* (13 November 2007) (2008) 47 EHRR 3 at [188] that “statistics which appear on critical examination to be reliable and significant will be **sufficient** [my emphasis] to constitute the prima facie evidence the applicant [alleging discrimination] is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.”

18. I therefore consider whether there is an objective and reasonable justification for disentitling **pregnant** intercalating students from income support (thereby distinguishing them from students who intercalate for other reasons). Article 14 provides:

“The enjoyment of the rights and freedom set forth in [the] 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.”

In *Stec v United Kingdom* (2006) 43 EHRR 47 (*Stec 2*) at [1028] the European Court of Human Rights stated:

“51. Article 14 does not prohibit a Member State from treating groups differently in order to correct ‘factual inequalities’ between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article. A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.

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.’ ”

19. The claimant’s case is that the failure to allow an intercalating pregnant student income support was a failure, without objective and reasonable justification, to treat differently persons (pregnant students) whose situations were significantly different from other intercalating students (reference was made to *Thlimmenos v Greece* (2001) 31 EHHR 15 at [44]).

20. I turn to the policy background. In Appendix 2 to the Explanatory Memorandum to the Social Security Advisory Committee on the draft Amending Regulations (SI 2000/1981) which were to introduce regulation 61(2) the Government stated:

“4. The Government believes that the primary source of financial support for full time higher education students should be the student/loan grant system and not the social security system (except in one specified circumstance – see paragraph 6 below) ...

5. In providing the right to higher education support by the loan/grant mechanism, the Government considers that students have a responsibility to make proper progress on their course and to study so that they pass the

necessary examinations. Educational institutions do recognise that some students might find difficulty in adjusting to higher education and so provide the opportunity for failed examinations to be retaken at the end of an academic year. ... The Government believes that students should take responsibility for their own actions and will not provide State support in these types of cases. Where, through their own actions, students take a year off or change to part time attendance for the institution's permission, they are expected to support themselves, usually by obtaining temporary work.

6. However where absence from a course is involuntary because of illness, the Government has provided and will continue to provide support. The proposed Regulations do not affect this position. In the case of temporary absence from a course, for example, because of illness, Local Education Authorities may continue to support students who have mandatory awards and will receive a 100% grant from the Department of Education and Employment on their payments. If the student remains ill after 28 weeks, he can apply for Income Support which will continue until he is well.

7. Nor do the proposed regulations affect the position of those on Income Support because they are in vulnerable groups, like lone parents or disabled people. Most vulnerable people who are entitled to income support can choose to study full time and the time spent on study does not affect their benefit."

It is clear from the above that the policy is that the full-time students (including intercalating students) should be supported by the loan/grant system rather than by benefits. If a student had to take time out from his course, then he would be expected to seek temporary work: otherwise the primary source of temporary assistance was to be via education authorities, rather than benefits. As a result of this policy, those intercalating students who intercalate on the grounds of illness are not entitled to income support until after 196 days (see paragraph 10(b) of Schedule 1B to the 1987 Regulations); and those intercalating students who intercalate because of caring responsibilities are not entitled under paragraphs 3 or 4. (After illness or caring responsibilities have ceased intercalating students may claim JSA for the period from the end of the illness or caring responsibilities until intercalation stops or the next academic year begins – see regulation 1(3D) and (3E) of the Jobseeker's Allowance Regulations 1996 (SI 1996/207)).

21. On behalf of the claimant it was argued that the lack of reference to pregnancy in paragraphs 6 and 7 of the Explanatory Memorandum showed that the policy did not contemplate the period of pregnancy and hence it could not be argued that there was objective and reasonable justification for the way in which pregnant intercalating students were treated. In my judgment (notwithstanding the lack of mention of pregnancy) the policy behind the regulatory structure is that students who intercalate for essentially transient reasons (even through no fault of their own) should not receive benefit, but should rely on such support as might be available from the education authorities concerned. The later period of pregnancy cannot, given this policy, be distinguished from the periods (such as of illness or caring responsibilities) for which other students, who might also be regarded as hard cases, are denied benefit: once the policy of non-recognition of transient reasons for non-entitlement to benefit is accepted (and there was no general challenge to that policy before me), then I consider that there is objective and reasonable justification for the

inclusion of intercalating students during the later term of their pregnancy within that policy. (In any event not all pregnant students will have to intercalate or abandon: factors such as the type of course, health, the date of confinement and the availability of care may affect the decision.)

22. I therefore conclude that it has been established that there is objective and reasonable justification for the policy behind the limitation on the availability of income support in the claimant's case: I cannot conclude (within *Stec 2*) that this policy is "manifestly without reasonable foundation". I should add that I was informed at the hearing that, after the claimant's child was born, the NHS put into place provisions enabling student nurses to continue to receive NHS bursaries during pregnancy and after the child was born for a total period of up to 45 weeks.

23. In the light of the conclusion I have reached, it is not necessary for me to consider the question of to what remedy, had I found otherwise, the claimant might be entitled. I should however remark that, in effect, the claimant is seeking that paragraph 14 (relating to pregnancy) of Schedule 1B should apply to her – a positive legislative change, which no court or tribunal can make (EU legislation not being in point); that the remedy actually sought, the disapplication of regulation 61(2)(b) when that regulation **clearly** applies to the claimant, is not a legitimate means of avoiding making such a positive legislative change; and that I am in doubt, even if I had found in the claimant's favour, whether a statutory tribunal, with limited statutory jurisdiction, can give declaratory relief (such as that granted by the Court of Appeal in *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303, [2006] 1 WLR 3202 (also reported as R(IS) 6/06)).

