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Mel Cousins, Glasgow Caledonian University

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The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?

Mel Cousins
School of Law and Social Sciences, Glasgow Caledonian University

This article examines the non-discrimination provisions of the European Convention on Human Rights (ECHR) in relation to social security law. There is now a broad power of review under the ECHR as most social security payments fall within the scope of the Convention. There is also a more flexible approach to the grounds upon which discrimination can be challenged under art.14. However, it is suggested that the European courts may need to adopt a more nuanced (or proportionate) approach to equality review rather than a binary approach.

Introduction
This article examines where the non-discrimination provisions of the European Convention on Human Rights stand in relation to UK social security law following important decisions of both the House of Lords in RJM and the Court of Human Rights in Carson.1 It argues that the result of these cases (and other recent decisions such as Stec)2 is that there is a now a broad power of review under the ECHR and the Human Rights Act 1998 as most social security payments now fall within the scope of the Convention. Secondly, the impact of the recent decisions tends towards

a more flexible approach to the grounds upon which discrimination can be challenged under art.14. In particular, both recent decisions applied the non-discrimination provisions to claims on the basis of homelessness (RJM) and place of residence (Carson) neither of which is specifically mentioned in art.14. The case law has also developed somewhat along the lines of the US Supreme Court whereby different standards of review are to be applied to different types of discrimination. However, this article suggests that the European courts may wish to learn from the experience of the US courts in relation to the difficulties of a binary approach to standards of review. In particular there may be a need to adopt a more nuanced (or proportionate) approach to the review by the courts rather than a binary approach.

The first part of this article outlines briefly the facts of the two cases recently considered by the courts. The second part goes on to look at a number of key issues including material scope, whether a particular ‘‘status’’ is necessary to bring a claim under art.14, if so which concepts fall within the notion of status, the standard of review to be applied to different types of discrimination and the application of those standards to non-core statuses. The final part of the article discusses some of the key issues arising from these cases in the context of the experience in other jurisdictions.

Carson and RJM

Readers may well be familiar with the facts of the Carson case which was considered by the House of Lords in 2005. The case involved persons in receipt of UK state pensions who lived abroad in certain countries which do not have reciprocal agreements with the United Kingdom under which cost-of-living increases are payable. As a result, Ms Carson and the other applicants received a pension, which was not updated. It was not disputed that there was no particularly logical scheme as to the countries with which reciprocal agreements had been negotiated and whose residents thereby benefited from annual increases. The applicable countries represented whatever the United Kingdom had from time to time been able to negotiate without placing itself at an undue economic disadvantage.


4 Lord Hoffman in Carson [2005] UKHL 37 at [27], quoted in the ECtHR judgement.
RJM involved a challenge to the rule whereby persons in receipt of income support without accommodation ("rough sleepers") who otherwise satisfy the requirements for receipt of a disability premium are not entitled to that premium. It appears that this is a longstanding rule dating back to pre-income support system of supplementary benefits. The case had been rejected by the Court of Appeal which had held that homelessness was not a personal characteristic for the purposes of art.14 ECHR which was, therefore, not engaged and that, if it was, the rule was objectively justified. The Court of Appeal would have held that the disability premium was not within the scope of art.1 of Protocol No.1 of the ECHR (notwithstanding the decision of the European Court of Human Rights (ECtHR) in Stec considering itself bound by its earlier decision in Campbell v South Northamptonshire District Council were in not for the fact that the Secretary of State had conceded that it was within the material scope of the Convention. However, this concession was withdrawn before the House of Lords.

Key issues

Article 14 of the ECHR provides that:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

In this section we look at how a number of key issues concerning the interpretation of this article were considered in the recent case law and the possible implications thereof. Some of the key issues here were considered only in one case (such as the material scope which was discussed only in RJM).

5 As Lord Walker pointed out (RJM [2008] UKHL 63 at [4]), "for an individual to be 'without accommodation' does not mean simply that he or she is homeless for the purposes of the Housing Acts (a legal classification which can include persons living in overcrowded or unsanitary accommodation). It means sleeping rough in doorways or on benches, often in a sleeping- bag or a large cardboard box, in the sort of conditions described by Baroness Hale of Richmond in R (Limbuela) v Secretary of State for the Home Department [2006] 1 AC 396, [78]."

6 Lord Mance in RJM [2008] UKHL 63 at [9].


However, most—in particular the issues of status and objective justification—were at issue in both cases.

The material scope of the European Convention on Human Rights

As is well known, art.14 does not include a free standing nondiscrimination or equality clause. The ECtHR has consistently held that art.14,

"complements the other substantive provisions of the Convention and the protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by these provisions. Although the application of Article 14 does not presuppose a breach of these provisions—and to this extent it is autonomous—there can be no room for its application unless the fact at issue falls within the ambit of one or more of them."\(^{10}\)

In order for art.14 to come into play, it is, therefore, necessary for one of the substantive provisions of the Convention to be engaged. However, this has become much less of an issue in the social security field since the decision by the ECtHR in *Stec* to take a very broad approach to the scope of art.1 of Protocol No.1 of the Convention, which concerns property rights.\(^{11}\) The Court in *Stec* held that:

"In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid—subject to the fulfilment of the conditions of eligibility—as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable."\(^{12}\)

In that particular case the Court had ruled that a UK non-contributory benefit funded from general taxation was within the scope of art.1 of Protocol No.1 ECHR. In the light of that judgment it was clear that disability premium (or the non-payment of disability premium on an alleged discriminatory ground) did fall within the scope of art.1 of Protocol No.1 of the Convention and that, therefore, art.14 was engaged. However, the English courts, considering themselves bound by their own earlier

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11 This states that: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."
(pre-\textit{Stec}) decisions, had yet to adopt this broader understanding of the scope of art.1 of Protocol No.1.13

Perhaps surprisingly, in \textit{RJM} counsel for the Secretary of State invited the House of Lords not to follow the \textit{Stec} decision. Unsurprisingly Lord Neuberger (with whom the other members agreed) declined to accept this invitation. Lord Neuberger pointed out that \textit{Stec},

\begin{quote}
``was a carefully considered decision, in which the relevant authorities and principles were fully canvassed, and where the Grand Chamber of the ECtHR came to a clear conclusion, which was expressly intended to be generally applied by national courts'',14
\end{quote}

It would require ``the most exceptional circumstances'', in Lord Neuberger’s view, before a national court should refuse to apply the decision. The decision has confirmed that the \textit{Stec} decision means that the vast majority of social security payments now fall within the scope of art.1 of Protocol No.1 ECHR—thereby engaging the non-discrimination provisions in art.14.

A subsidiary issue in \textit{RJM} was whether the Court of Appeal should have been able to come to this decision itself. Here Lord Neuberger struck a middle ground between allowing the lower courts to interpret the law of the ECHR without being bound by national precedent and the (somewhat unrealistic) view of the Court of Appeal that it was bound by national rules of precedent regardless of what the ECtHR said. He held that:

\begin{quote}
``Where the Court of Appeal considers that an earlier decision of this House, which would otherwise be binding on it, may be, or even is clearly, inconsistent with a subsequent decision of the ECtHR, then (absent wholly exceptional circumstances) the court should faithfully follow the decision of the House, and leave it to your Lordships to decide whether to modify or reverse its earlier decision.''
\end{quote}

However, where the issue involved the previous decisions of the Court of Appeal itself different considerations applied and the Court was freer to depart from those decisions. Accordingly Lord Neuberger held that,

\begin{quote}
``where it concludes that one of its previous decisions is inconsistent with a subsequent decision of the ECtHR, the Court of Appeal should be free (but not obliged) to depart from that decision''.
\end{quote}

13 See, for example, the Social Security Commissioners’ decision in \textit{CPC/3396/2006} April 3, 2008; \textit{CSPC/677/2007} April 4, 2008.
14 \textit{RJM} [2008] UKHL 63 at [31].
15 \textit{RJM} [2008] UKHL 63 at [64].
16 \textit{RJM} [2008] UKHL 63 at [66].
This decision does at least loosen the bounds of precedent to a certain extent. It obviously does not address the issue as to how the lower courts (including the judges of the Upper Tribunal) are to address similar conflicts. However, the logic of the approach may be that such courts are free to depart from their own precedents but not from those of the Court of Appeal (nor obviously those of the House of Lords).

*Is “status” necessary to bring a claim under article 14 of the European Convention on Human Rights?*

As we have seen art.14 prohibits discrimination on any ground, including “other status”. The wording of art.14 raises the issue as to whether such “other status” should be confined to a specific ground such as those listed in the Article (sex, race, etc. as noted above) or whether it can cover any type of status at all (and, if so, what “status” involves). The House of Lords has previously taken the view (somewhat narrowly) that in order to show discrimination under art.14, a person must show that he or she being discriminated against on the grounds of a “personal characteristic”. Counsel for RJM argued that this was not consistent with the approach adopted by the ECtHR which had taken a more flexible approach.

Their Lordships adopted a somewhat inconsistent approach on this point. On the one hand, Lord Neuberger (who delivered the main judgment) stated that he was, “content to adopt the approach which has been consistently taken in article 14 cases by this House, when the issue has arisen” which meant that it was, “necessary to decide whether homelessness can fairly be described as a ‘personal characteristic’”. On the other, however, their Lordships moved some way to weakening the reliance on the “personal characteristics” requirement.

Lord Neuberger rejected RJM’s argument that it was not necessary to show that discrimination arose on the basis of status, but he accepted

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17 In French, this is rendered as, “sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l’origine nationale ou sociale, l’appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation”.


19 *RJM* [2008] UKHL 63 at [41]. In a similar vein, Lord Mance (with whom Lord Neuberger agreed) stated that, “‘Personal characteristics’ is not a precise expression and to my mind a binary approach to its meaning is unhelpful” at [5]. Both of their Lordships referred approvingly to the analysis of Baroness Hale in *AL (Serbia)* v Secretary of State for the Home Department [2008] UKHL 42; [2008] 1 W.L.R. 1434 at [20]-[35].
that some of the judgments of the EctHR, “could be read as suggesting a rather less structured approach” than that adopted by the House of Lords.\textsuperscript{20} However, it is arguable that the ECtHR has shown very little interest in whether status is necessary and, if so, what it might involve. Lord Neuberger, fairly, pointed out that the EctHR’s frequent failure to establish whether a status exists may be on the basis that it is unnecessary to consider the point, as the claim failed on other grounds.\textsuperscript{21} However, he subsequently, turning to whether homelessness should be considered as a status, cites a number of cases where, he says, various factors have all been held by the EctHR to fall within “other status” in art.14.\textsuperscript{22} If one examines these cases, one finds that the Court did not, in fact, discuss whether or not the relevant factors fell within the notion of “other status” at all and it is only by implication that one can say that it so held. So there is just as little analysis when the Court finds a breach of art.14 (on the basis of some assumed status) as when it rejects a claim.

The question as to whether “status” is a necessary component of an art.14 claim has now been clarified by the ECtHR in \textit{Carson}. The UK Government again argued that “status” within art.14 meant, “a personal characteristic . . . by which persons or groups of persons are distinguishable from each other” (referring to \textit{Kjeldsen})\textsuperscript{23} and that the place of residence was not such a personal characteristic. The applicants, to the contrary argued that the narrow interpretation of the term “status” in \textit{Kjeldsen} had been superseded by subsequent decisions of the Court. The Court confirmed that it had, “established in its case-law that only differences in treatment based on an identifiable characteristic, or ‘status’, are capable of amounting to discrimination within the meaning of Article 14”.\textsuperscript{24}

However, the Court went on to point out that the list of grounds set out in art.14 is “illustrative and not exhaustive”, as is shown by the words “any ground such as” (in French “\textit{notamment}”).\textsuperscript{25} It further recalled that it had previously given the words “‘other status’” (and a fortiori the French “\textit{toute}

\textsuperscript{20} RJM [2008] UKHL 63 at [39].
\textsuperscript{21} RJM [2008] UKHL 63 at [36].
\textsuperscript{24} \textit{Carson v United Kingdom} (2009) 48 E.H.R.R. 41 at [73].
\textsuperscript{25} \textit{Carson} (2009) 48 E.H.R.R. 41 at [75].
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autre situation”) a wide meaning so as to include, in certain circumstances, a distinction drawn on the basis of a place of residence. 26

What constitutes a status?

Having held that it was still necessary to show that homelessness could be described as a status, the House of Lords in RJM took a much more flexible approach to this issue than had the Court of Appeal. First, Lord Neuberger agreed that “a generous meaning should be given to the words ‘or other status’”.27 Secondly, he ruled that “other status” should not be too closely limited by the grounds which are specifically prohibited in the article.28 Thirdly, he did not accept that the fact that a condition has been adopted by choice (and making the point that homelessness was not always adopted by choice) is, “of much, if any, significance” in determining whether that condition is a status for the purposes of art.14 ECHR.29 He also did not consider that whether or not homelessness was a legal status was a “telling point”, again rejecting the approach of the Court of Appeal on this point. The House unanimously held that homelessness (at least as raised in that case) was a status for the purposes of art.14.

Likewise, as we have seen, the Court of Human Rights in Carson, having held that status was a necessary component of discrimination under art.14 then went on to emphasise its flexible approach to what might constitute status. In relation to the issue of residence, the Court ruled that, in the circumstances of the case,

“ordinary residence, like domicile and nationality, is to be seen as an aspect of personal status and that the place of residence applied as a criterion for the differential treatment of citizens in the grant of State pensions is a ground falling within the scope of Article 14”.30

This raises the question as to the potential scope of “other status” in UK social security law. The House of Lords has, for example, previously (and

26 Citing as examples the legitimacy of alleged discrimination based, inter alia, on domicile abroad in App. No.9697/82, Johnston v Ireland (1986) 9 E.H.R.R. 203 at [59]–[61] and registration as a resident in App. No.11581/85, Darby v Sweden (1990) 13 E.H.R.R. 774 at [31]–[34]. Of course, as sometimes happens with the Court’s use of precedent, when one examines these cases one finds that the Court simply applied art.14 without any discussion as to why residence fell within the notion of “other status”.


28 RJM [2008] UKHL 63 at [43].

29 RJM [2008] UKHL 63 at [47].

unsurprisingly) accepted age as a status in a social security case,\textsuperscript{31} while the Court of Appeal had suggested that mental capacity would also be considered to fall within the scope of art.14.\textsuperscript{32} One might therefore ask whether a concept such as socio-economic disadvantage would constitute a status for the purposes of art.14. In fact the concept of “social origin” is one of the grounds listed in art.14 of the ECHR and one might, therefore, argue that at least some aspects of socio-economic disadvantage fall within the concept of “social origin”\textsuperscript{33}.

One of the difficulties, however, is that socio-economic disadvantage is itself a rather vague concept. The concept of socio-economic status (or related concepts) features in equality or human rights law in Belgium, a number of Canadian provinces and territories and in South Africa.\textsuperscript{34} The concept of social origin is not defined in Belgian law and does not yet appear to have been defined by the courts. The proposal for the law indicates that term is intended to refer to membership of a specific social class.\textsuperscript{35} In Quebec the related concept of “social condition” has been defined by the courts as a person’s standing in society, determined by his or her occupation, income or education level or family background and the perceptions that are drawn from these various objective points of reference.\textsuperscript{36} Social condition is defined in the New Brunswick Human Rights Act 1973 as,

“the condition of inclusion of the individual in a socially identifiable group that suffers from social or economic disadvantage on the basis of his or her source of income, occupation or level of education”\textsuperscript{37}.

In the Northwest Territories the term “social condition” is defined as,

“the condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social

\textsuperscript{31} R. v Secretary of State for Work and Pensions Ex p Reynolds [2005] UKHL 37.
\textsuperscript{33} The Court of Human Rights does not appear to have defined this concept and it is rarely relied on in the art.14 ECHR case law.
\textsuperscript{34} The concept of “social origin” is also to be found in the ILO Discrimination (Employment and Occupation) Convention 1958. The ILO Committee of Experts has stated that, “discrimination on the basis of social origin arises when an individual’s membership in a class, a socio-occupational category or a caste determines his or her occupational future”.
\textsuperscript{35} “Project de loi”, October 26, 2006.
\textsuperscript{36} Commission des droits de la personne du Quebec v Gauthier 1993 CanLII 2000. See also Whittom v Commission des droits de la personne du Quebec 1997 CanLII 10666 in which the Quebec court of appeal ruled that refusal to rent housing to a person on social assistance due to concerns about inability to pay the rent (which had not been checked in any way) involved discrimination on the grounds of social condition.
\textsuperscript{37} New Brunswick Human Rights Act 1973 s.2.
or economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance’.38

Finally, in South Africa socio-economic status is defined in the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 as including, ‘a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications’.39

These varying definitions suggest that the UK courts might be reluctant to extend recognition of an (undefined) notion of socio-economic disadvantage as a specific ground. However, the fact that ‘social origin’ is specifically mentioned as a ground in art.14 combined with the House of Lords’ willingness to recognise a specific example of socio-economic disadvantage (i.e. homelessness) would suggest that it may be possible to have aspects of socio-economic disadvantage (if not the concept itself) recognised as a status for the purposes of art.14.

Standard of review

A critical issue in the application of equality provisions is the standard of review which is applied by the adjudicating court.40 The approach adopted by the European Court of Human Rights is that art.14 does not, in itself, prohibit a member state from treating groups differently in order to correct ‘factual inequalities’ between them.41 Indeed in certain circumstances a failure to attempt to correct inequality through different treatment may itself give rise to a breach of art.14. A difference of treatment is, however, discriminatory if it has no objective and reasonable justification, i.e.,

‘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’.42

38 Human Rights Act 2002 s.1. In a recent decision the Human Rights Adjudication Panel held that a seasonal worker fell within the category of persons protected from discrimination on the basis of social condition: Mercer v Workers Compensation Board Unreported August 3, 2007.

39 Promotion of Equality and Prevention of Unfair Discrimination Act 2000 s.1(xxvi) of the Act. However, this ground is not listed as a ‘prohibited ground’ under the Act and s.34 of the PEPUDA provided that the Equality Review Committee was to review whether this should be added as a ground. The Committee reported in favour of its inclusion but this has not yet been implemented in law.

40 The importance of the standard adopted is not, of course, confined to equality issues as shown in the recent House of Lords decision in Zalewska v Department of Social Development [2008] UKHL 67; [2008] 1 W.L.R. 2602. The House split 3:2 in rejecting the appeal, differing largely as to the standard to be applied to the principle of proportionality under EU law.

41 See, for example, the discussion in Stec v United Kingdom (2006) 43 E.H.R.R. 47.

The ECtHR allows a ‘‘margin of appreciation’’ in assessing whether and to what extent differences in otherwise similar situations justify different treatment. The scope of this margin of appreciation will vary according to the circumstances, the subject-matter and the background. In general, the Court has stated that very weighty reasons would have to be put forward before it could regard a difference in treatment based exclusively on the ground of sex or nationality 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. The Court takes the view that, ‘‘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’’.

As Livingstone points out, the Court’s approach suggests a three stage process to the examination of discrimination. First, it is necessary to identify whether there has been a difference in treatment; secondly, the Court must establish whether this is objectively justified which, in itself, involves two separate steps: (i) to establish whether the difference in treatment pursues a legitimate aim; and (ii) whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Of course, the Court does not always distinguish clearly between these different steps.

Somewhat different approaches are adopted in other jurisdictions. In the case of the equal protection guarantees in the US Constitution, the courts must ask whether the legislation at issue affects a ‘‘suspect’’ or ‘‘quasi-suspect’’ class. If the law affects a suspect class (such as race, religion or national origin) or affects the exercise of a constitutional right, then courts must apply strict scrutiny and ask whether the law...
serves a compelling governmental interest. If the law affects a quasi-suspect classification (such as gender) the courts then apply intermediate scrutiny and ask whether the statute is substantially related to an important governmental interest. In all other cases, a “rational basis” review applies in which the courts must ask whether the law is rationally related to a legitimate government interest. In practice, rational basis review involves a very loose level of scrutiny whereby legislation is upheld if the state can show any reasonable rational basis for its existence.

The approach adopted by the Canadian Supreme Court to the interpretation of the equality clause of the Charter of Rights (s.15(1)) focuses upon three central issues: (a) whether a law imposes differential treatment between the claimant and others, in purpose or effect; (b) whether one or more of the enumerated grounds of discrimination under the Charter (or analogous grounds) are the basis for the differential treatment; and (c) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.49 Accordingly, the Canadian courts make the following three broad inquiries.

(1) Does the law: (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics; or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
(2) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds? and
(3) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

If a provision is found to be discriminatory under s.15 of the Charter it may still be upheld under s. 1 if its’ objective is “pressing and substantial” and the means of achieving it are proportional.

A wide margin of appreciation

In the light of the House of Lords’ decision that homelessness was a status for the purpose of art.14, the case, therefore, rested on whether or not the treatment of RJM, viz the denial of the disability premium because he was homeless, could be objectively justified. The Secretary of State sought to justify the treatment on two grounds. First, the disability premium is intended to cover additional expenses incurred by the disabled, such as additional heating costs, which, the Secretary of State considered, were less likely to be incurred by those without accommodation. Secondly, the Secretary of State did not wish to provide money to keep disabled people in their vulnerable position, albeit that it would potentially make that vulnerable position slightly more manageable and preferred to target resources and assistance towards getting them out of that position.50

These justifications were challenged by RJM. As to the purpose of the disability premium, it was pointed out that disabled people with accommodation may not incur any additional or abnormal expenses while disabled people without accommodation may have additional needs—e.g. for blankets, extra clothing, laundry, washing facilities or eating out or buying pre-made food—which those with accommodation do not. As to the second justification, it was argued that steps to move disabled people into accommodation could not justify a failure to look after their needs properly while they are without accommodation, and that the resource implications could not be significant given the small numbers involved.

Lord Mance accepted that, “any idea that shortage of funds will incentivise many if any disabled rough sleepers to move into accommodation seems unrealistic”, but also found that there was force in the point made by the Secretary of State,

“that further monies given to rough sleepers would be quite likely to be spent on purposes which were detrimental, rather than in satisfying such additional needs as they may be identified as having by reason of their disability”.51

The key issue was the standard of review to be applied by the House. The Court of Appeal had been prepared to find justification if the executive was entitled to form the view that there were better ways of assisting disabled homeless people.52 Their Lordships pointed out that the discrimination

51 RJM [2008] UKHL 63 at [13].
in question in this case did not involve one of the "core" grounds. Lord Mance stated that the courts' scrutiny of the justification advanced will not have the same intensity as when a core ground of discrimination is in issue. Similarly, Lord Neuberger argued that policy concerned with social security payments must inevitably be something of a blunt instrument, and that social policy is an area where a wide measure of appreciation is accorded by the ECtHR to the contracting state. He echoed the Court of Appeal's view that, "[i]t is not for the courts to form a view on what is or is not appropriate policy", provided that the, "executive was . . . entitled to form the view that there are better ways of assisting disabled homeless people than by providing money, which may be spent in ways which may do them more harm than good".

Overall he was satisfied that, "the discrimination in the present case was justified, in the sense that the government was entitled to adopt and apply the policy at issue".

In Carson, the Court considered first whether the applicants were in an analogous situation to British pensioners who have chosen to remain in the United Kingdom. It noted that the United Kingdom's social security system is intended to provide a minimum standard of living for those resident within its territory (and this is all that is required under the International Labour Organisation and Council of Europe Conventions on Social Security). For this reason, the Court considered that individuals ordinarily resident within the contracting state are not in a relevantly analogous situation to those residing outside the territory insofar as concerns the operation of pension or social security systems. The Court also ruled that the applicants were not in an analogous position to British pensioners resident in countries outside the United Kingdom where up-rating is available, taking the view that differences in social security

53 Identified by Lord Hoffmann in Carson [2005] UKHL 37 at [15]–[17].
54 RJM [2008] UKHL 63 at [14]. See also Lord Neuberger at [56].
55 RJM [2008] UKHL 63 at [54].
56 RJM [2008] UKHL 63 at [55].
57 RJM [2008] UKHL 63 at [56]. It should be noted that Lord Mance agreed with "some residual doubt" at [15] while both Lords Walker and Mance suggested that the policy might seem callous at [4], [8] and [14].
59 The Court referred with approval to the earlier Commission decision in App. No.9776/82, J.W. and E.W. v United Kingdom Unreported October 3, 1983 which had taken the view that persons changing from one social security system to another would almost inevitably find that entitlements differ.
provision, taxation, rates of inflation, interest and currency exchange make it difficult to compare the respective positions of such residents.

Finally, the Court (Judge Garlicki dissenting) held that any difference in treatment had an objective and reasonable justification. It pointed out that place of residence is a characteristic which can be changed as a matter of choice and, therefore, agreed with the Government and the national courts that the individual does not require the same high level of protection against differences of treatment based on this ground as is needed in relation to differences based on an inherent characteristic, such as gender or racial or ethnic origin.\(^60\) The Court also accepted the finding of the House of Lords that the pattern of reciprocal agreements was the result of history and perceptions in each country as to perceived costs and benefits of such an arrangement and represented whatever the contracting state has from time to time been able to negotiate without placing itself at an undue economic disadvantage. In the Court’s view, the state did not exceed the “very wide margin of appreciation” which it enjoys in matters of macro-economic policy by entering into such reciprocal arrangements with certain countries but not with others.\(^61\)

Thus we have a somewhat variable list of statuses which require “very weighty reasons” to justify differential treatment. Those mentioned by the Court of Human Rights—in Carson and previous judgments—include gender, nationality, sexual orientation, and racial or ethnic origin. Outside that sphere a (very wide) margin of appreciation is to be allowed.

The most disappointing aspect of the House’s approach in RJM is the very limited extent to which it applies the criteria for objective justification to the circumstances of the case. As we have seen, objective justification involves: (i) establishing whether the difference in treatment pursues a legitimate aim; and (ii) whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Given the Government’s two stated objectives, the first—targeting resources on the basis of need—is clearly a legitimate objective. However, the evidence did not suggest that there was, in fact, any close relationship between a homeless person’s needs and the non-payment of the premium. Looking at the second justification, again it is clearly legitimate for the Government to wish to target resources at prevention of homelessness rather than at supporting people in a state of homelessness. But is the non-payment of the premium a proportional means to achieve this aim? On the one hand, as Lord Mance suggested, any idea that shortage of

\(^60\) RJM [2008] UKHL 63 at [80].

\(^61\) RJM [2008] UKHL 63 at [81].
funds will incentivise many if any disabled rough sleepers to move into accommodation seems unrealistic. On the other, it is difficult to argue with the view that,

"‘further monies given to rough sleepers would be quite likely to be spent on purposes which were detrimental, rather than in satisfying such additional needs as they may be identified as having by reason of their disability’." 63

Given the wide margin of discretion allowed to state action in such a case, the policy may well be within the state’s remit but it would have been helpful if the House had explored this in a more rigorous manner.

The approach of the House of Lords in RJM is worrying similar to the “rational review” standard adopted by the US courts in somewhat similar cases. For example, the US Circuit Courts of Appeal have consistently upheld the exclusion of disabilities arising from alcohol or drug addiction from US disability benefits on the basis that there was a rational basis for this exclusion, i.e. that Congress wished to discourage alcohol and drug abuse and that the exclusion was rationally related to this objective in that it withheld benefits from persons likely to use the funds to purchase drugs and alcohol, but without examining any evidence as to whether or not this policy was likely to achieve its objectives. 64 In contrast, the Ontario Social Benefits Tribunal has held that a provision in the Ontario Disability Support Programme Act, which denied benefits to otherwise qualified persons on the basis that they were dependent on an (unprescribed) alcohol, drug or chemically active substance, was in breach of the Ontario Human Rights Code. 65 Applying the Law test (above), the tribunal found that the provision denied income support and imposed restrictions because of,

62 RJM [2008] UKHL 63 at [12].
63 RJM [2008] UKHL 63 at [12]. See also Lord Walker at [4].
64 Mitchell v Commissioner SSA 182 F3d 272 (4th Circuit, 1999), cert. denied 528 US 944; Grigoby v Barnhart 294 F3d 1215 (10th circuit, 2002); Ball v Massanari 254 F.3d 817 (9th Circuit, 2001). Although there is evidence from North America that payment of social security is related to substance abuse (e.g. in that an increase in substance abuse is temporally related to receipt of welfare payments), there is a lack of clear evidence that non-payment of welfare is an effective method of reducing substance abuse overall: K.E. Watkins and D. Podus, "The impact of terminating disability benefits for substance abusers on substance abuse and treatment participation" (2000) 51(11) Psychiatric Services 1371; C. Dobkin and S.L. Puller, "The effect of government transfers on monthly cycles in drug abuse, hospitalization and mortality" (2007) 91 Journal of Public Economics 2137; Xin Li et al., “Impact of welfare cheque issue days on a service for those intoxicated in public” (2007) 4 Harm reduction Journal 12.
65 Tribunal file nos 9910-07541R, 0005-04579, November 30, 2006. This case had previously been to the Canadian Supreme Court on a jurisdictional issue (Transchamontagne v Ontario (Director, Disability Support Program) 2006 SCC 14) and is, at the time of writing, under appeal to the Ontario Divisional Court.
assumed or unjustly attributed characteristics and therefore denies the essential human worth of the Appellants and those like them and is therefore discriminatory”.66

The outcome in Carson is perhaps unsurprising. It is not unreasonable for the courts to hold that a person living abroad cannot directly compare herself to a person who has remained within the state.67 However, one might be somewhat less convinced by the ruling dismissing a comparison between those who have gone abroad. The outcome of this case should surely be based on objective justification. From the point of view of the individual pensioner it must appear anomalous that payment of an increase should depend on whether she lives in a country which does or does not have a reciprocal agreement with the United Kingdom. However, from a policy perspective, this outcome is perfectly reasonable and as Lord Hoffman said,

“[i]t would be very strange if the government was prohibited from entering into such reciprocal arrangements with any country . . . unless it paid the same benefits to all expatriates in every part of the world” (a statement implicitly approved by the ECtHR).68

Conclusion

Overall, the RJM judgment, albeit unsuccessful from the point of view of the appellant, is certainly a marked improvement on that of the Court of Appeal. The House has clarified that disability premium (and by implications a range of other benefits) fall within the scope of the ECHR. Similarly, the House has held that homelessness (at least in the narrow sense used in RJM) is a status for the purposes of art.14. The approach to the scope of art.14 suggests that the House of Lords will take a somewhat more flexible approach to this issue than it had in earlier cases. Both of these points are important steps forward.

67 Although even here, as Lord Carswell (dissenting) pointed out, it is arguable that this is also, in reality, a question of justification rather than non-comparability: Carson [2005] UKHL 37 at [96]–[99]. See A. Baker, “Comparison tainted by justification: against a ‘compendious question’ in Art.14 discrimination” (2006) Public Law 476. Recent case law of the ECtHR (including Carson and App. No.13378/05, Burden v United Kingdom (2008) 47 E.H.R.R. 38) indicates that: (i) the ECtHR will decide cases on comparison rather than justification grounds; and (ii) the Court is no clearer as to the distinction than have been national courts. However, rather than trying to establish a somewhat artificial distinction between the two concepts, courts perhaps need to bring proportionality (explicitly) into their assessment of comparison.
Their Lordships might, however, have made a more decisive step forward in moving away from their “personal characteristics” approach to art.14. There can be no doubt that the previous approach of the House found little support in the case law of the ECtHR. The term “personal characteristics” is not, of course, to be found in art.14 and, although the term has been used by the Court from time to time, it features in a rather small proportion of its art.14 case law. While the English language version of the Convention does refer to “other status” as Lord Neuberger accepted the French version (“ou toute autre situation”) suggests a much wider scope. One might hope that RJM will also be seen as a step towards bringing the UK approach into line with the broader approach which has been taken by the ECtHR.

In terms of the standard of review, it is only to be expected that there will be some differences in the standard of review which is to be applied in relation to, for example, race, compared to some statuses considered to be less important (or less in need of protection). However, there are a number of difficulties about the approach being adopted by the ECtHR. First, the Court (correctly) is not taking all those statuses listed in art.14 as requiring core protection and is seeking to develop its own categorisation. However, the precise statuses which are considered to require a high level of protection and (more importantly) the precise rationale for that categorisation remain somewhat unclear. The Court’s reference in Carson to place of residence not being an “inherent characteristic” is less than satisfactory. Height and (for some of us) hair colour are inherent characteristics but few would suggest that discrimination on either ground was a matter of great importance.

A second problematic issue is the potential development of a binary standard whereby some grounds receive strong protection and others very little. As is well known this was one outcome of the US approach with the result that cases in which the grounds of discrimination were classified as “suspect” were almost always successful while laws subject to rational basis review were almost always upheld. In the case of the

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69 Baker has highlighted this issue in depth in a number of important articles: A. Baker, “Comparison tainted by justification: against a ‘compendious question’ in Art.14 discrimination” (2006) Public Law 476; Baker, “Proportional, Not Strict, Scrutiny: Against a US ‘Suspect Classifications’ Model under Article 14 ECHR in the UK” (2008) 56 American Journal of Comparative Law 847. One might, however, suggest that he attributes to the European Court of Human Rights a level of awareness of this issue which, unfortunately, is not always shown by that Court and, conversely, is rather too critical of the UK courts (as, for example, in the description of the Lords’ decision in Carson [2005] UKHL 37 as an act of “legal luddism”).

70 It was because of this dichotomy that the intermediate “quasi-suspect” class was developed but this has remained largely under-inhabited so that most issues are still subject to rational basis review only.
ECHR we are potentially seeing a somewhat similar approach although the Court has been somewhat less rigid to date in that it has sometimes (if rarely) found a breach of art.14 outside the core grounds while it has not infrequently upheld differential treatment on grounds of gender (as for example, in Runkee and White) if rarely in relation to nationality.\textsuperscript{71}

Overall, the result of recent case law is that there is now a broad power of review under the ECHR and the Human Rights Act 1998 as most social security payments now fall within the scope of the Convention. Secondly, the impact of the recent decisions tends towards a more flexible approach to the grounds upon which discrimination can be challenged under art.14. The case law has also developed different standards of review to be applied to different types of discrimination. However, this article suggests that the courts in Europe may wish to learn from the experience of the US courts in relation difficulties of a binary approach to standards of review. In particular there may be a need to adopt a more nuanced (or proportionate) approach to the review by the courts rather than a binary approach.

\textsuperscript{71} Application Nos 42949/98 and 53134/99, Runkee v United Kingdom (Runkee and White) [2007] 2 F.C.R. 178.
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AQ1: Please check that the correct citation has been used for the Carson reference in fnn.24 and 25.

AQ2: Please check the case reference in fn.31 (Reynolds).

AQ3: Please check the case reference in fn.59 (J.W. and E.W.).