Mobility allowance and the law

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The Irish government has recently announced the abolition of the mobility allowance and motorised transport grant.¹ It appears that this decision was heavily influenced by the Government’s view that ‘the schemes are illegal in the context of the Equal Status Acts’. Although the reform options considered and legal advice received have not been specified, the impression has been created that reform would be very complex and that it would be impossible to reform the existing scheme to make it legally compliant without a major increase in its budget.² This note discusses the legal issues concerning the operation of the mobility allowance scheme. It argues that it would be possible to put the scheme on a legal basis by way of primary and secondary legislation that would then avoid any breach of the Equal Status Acts.

Mobility allowance

Mobility allowance was established in 1979. It provides financial support, subject to a means-test, to persons who are unable to walk or use public transport and is intended to enable them to benefit from a change in surroundings. It appears that the allowance may operate under section 61 of the Health Act 1970 under which the HSE ‘may make arrangements to assist in the maintenance at home’ of a ‘sick or infirm person’.³ A means test applies to the allowance but this is not set out in law nor in any publically available HSE guidelines. Mobility allowance is paid monthly at a rate of €208.50.⁴ There are in excess of 4,700 recipients of mobility allowance at an annual cost of over €9m.

Age discrimination

The scheme provides that persons must be between the ages of 16 and 66 (although where payment of the allowance commences before pension age it may be continued thereafter). The Ombudsman ruled in 2011 that the upper age limit is in breach of the Equal Status Act, 2000 although – as with all Ombudsman’s rulings - this decision is not legally binding.⁵ In the course of that investigation, the Department of Health chose not to make any comment on whether or not the inclusion of an age condition in the mobility allowance scheme was contrary to the

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¹ Department of Health, Press Release, 26 February 2013. This note focuses on issues concerning the mobility allowance.

² See, for example, the discussions at the Joint Committee on Public Service Oversight and Petitions, 6 February 2013.

³ The details of the payment are set out in Department of Health Circular 15/79 which is not published but which is available in the Ombudsman’s report: Too Old to be Equal? An Ombudsman investigation into the illegal refusal of Mobility Allowance to people over 66 years of age, 2011. The Circular has not been updated which means that much of the terminology is now outdated (e.g. references to the means test for disabled person’s maintenance allowance). The Circular does not refer to the legal basis of the scheme.

⁴ A lower rate (€104.25) is payable to people who are availing of the Disabled Drivers and Disabled Passengers Scheme (which relates to tax rebates in respect of the use of a modified car).

⁵ Too Old to be Equal? An Ombudsman investigation into the illegal refusal of Mobility Allowance to people over 66 years of age, 2011.
Equal Status Act 2000. More recently, however, the Department and Minister of Health have accepted that the Ombudsman’s ruling is correct. In contrast, in the UK a Judge of the Upper Tribunal has ruled that the upper age limit for the mobility component of disability living allowance was not in breach of article 14 of the European Convention on Human Rights (discussed below). The Ombudsman recently commented on the Department of Health’s failure to implement a recommendation from the Ombudsman to remove this upper age limit and upheld further complaints.\(^6\)

**Disability discrimination**

The ‘mobility’ criteria for the allowance are as follows:

1. Is the applicant unable to walk, even with the use of artificial limbs or other suitable aids? (Interpret “unable” as the effective physical incapacity to walk)
2. Is the applicant in such a condition of health that the exertion required to walk would be dangerous?
3. (Where the answer to “A” or “B” is “Yes) Is the incapacity permanent?
4. (Where the answer to “C” is “No”). Is the capacity likely to persist at least one year?
5. Is the applicant forbidden for medical reasons from being moved?
6. Is the applicant in a condition to benefit from a change in his surroundings?\(^7\)

In two cases, an equality officer held that these conditions were in breach of the disability ground in the Equal Status Act, 2000. The applicants suffered from intellectual disability (schizophrenia and Down’s syndrome). The equality officer ruled that

Having considered the wording of the actual Circular 15/79 and the evidence in relation to the assessment process, I note that there is an obvious failure to assess the intellectual capacity of the applicant in relation to their mobility. I find that the current clinical assessment does not, in its current format, allow for assessment that is compatible with the broad definition of disability as set out in the Equal Status Acts. The concept of mobility in the circular is construed in such a narrow manner that it fails to recognise that in some severe cases a person’s intellectual and/or psychological health may restrict their mobility as effectively as some physical disabilities do. I find that this is a clear omission and it is obvious that the mobility allowance has not been updated to comply with the requirements set out in the Equal Status Acts (enacted in October 2000). The complainant, in order for her not to have been less favourably treated than a person with a physical disability, should have had her intellectual ability in relation to her mobility assessed. This ability should be assessed alongside the physical assessment procedures based on the clinical judgment of a medical officer.\(^8\)

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\(^6\) Too Old to be Equal? – A Follow-up, 2012.

\(^7\) As set out in the equality officer’s decision in DEC-S2009-011. Again this reflects a slight modification of the wording of the Circular.

\(^8\) DEC-S2009-011 at 5.8. See also the similar decision in DEC-S2009-012 which concerned a person with Down’s Syndrome (overturned on appeal on a separate issue).
The equality officer ordered the HSE to reassess the complainant’s entitlement to the mobility allowance by taking also into consideration her intellectual condition. However, the Department of Health/HSE do not appear to have modified the wording of the qualification conditions in the light of these decisions.

The UK ruling on the upper age limit

In R(DLA) 1/09 the Upper Tribunal (Judge Levenson) considered the compatibility of the upper age limit of the mobility component of DLA with article 14 of the European Convention on Human Rights (ECHR). The Irish mobility allowance appear to have been based on the UK mobility allowance which was, in turn, replaced by the mobility component of DLA and, therefore, this decision is very relevant. The claimant had been in receipt of lower rate mobility component and middle rate care component from before reaching the age of 65. After reaching that age, she fell and fractured her knee and subsequently had to use a wheelchair. At the time, Section 75(1) of the Social Security Contributions and Benefits Act 1992 provided that

Except to the extent to which regulations provide otherwise, no person shall be entitled to either component of a disability living allowance for any period after [s]he attains the age of 65, otherwise than by a virtue of an award made before [s]he attains that age.

On that basis, the Secretary of State refused to supersede the previous decision on the basis that the claimant was over 65 when her mobility needs increased.

It was common ground that there was no entitlement to higher rate mobility component as the law stood unless it was found to be in breach of the ECHR. Article 14 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.

Article 14 is not a free standing non-discrimination or equality clause and the Court of Human Rights has consistently held that Article 14

complements the other substantive provisions of the Convention and the protocols. It is 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.

Therefore, it is necessary to show that the benefit in question fell within the scope of some other provisions of the Convention. Counsel for the appellant argued that the mobility component fell within the scope of Protocol 1, paragraph 1 of the ECHR (P1-1 – which concerns the right to possessions) and the Secretary of State conceded that this was the

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9 The Upper Tribunal is a specialist administrative court at High Court level.
In order to show a breach of Article 14 the discrimination must involve some ‘status’ but it was not disputed that age was such a status.

Therefore, the critical issue was whether the difference in treatment could be justified. The long-standing case law of the Court of Human Rights has established that in order to provide objective justification for a difference in treatment, the policy adopted must (i) pursue a legitimate aim; and (ii) there must be a reasonable relationship of proportionality between the means employed and the aims sought to be realised.

The Secretary of State emphasised the ‘interlocking nature of the social security scheme as a whole’ and pointed out that the cut-off age of 65 was the point at which one becomes entitled to a range of other benefits (including retirement pension). It was argued that Government policy behind the introduction of mobility allowance in 1975 was designed to help primarily those of working age with mobility problems on the basis that

the overall structure should give priority for additional help to those disabled earlier in life for whom disability is more financially disruptive in terms of the lost opportunity to earn and save.\(^\text{12}\)

The Secretary of State argued that at that time the average net equivalent weekly income of a disabled non-pensioner family unit was 73 per cent of the average for the general (non-pensioner) population. In contrast, the average net equivalent weekly income of a disabled pensioner family unit was 98 per cent of the average for the general (pensioner) population. This, the Secretary of State argued, provided a rational justification for the difference in treatment.

Although a wide range of statuses have been considered to fall within the scope of Article 14, the House of Lords in Carson argued that it was necessary … to distinguish between those grounds of discrimination which \textit{prima facie} offend our notions of respect due to the individual and those which merely require some rational justification … .\(^\text{13}\)

In this case, Judge Levenson considered that age

is not one of the “suspect” grounds listed by Lord Hoffman … . To treat a person differently on grounds of age does not inevitably “offend our notions of respect due to the individual” although it is capable of so doing. It depends on the circumstances and the nature of the difference in treatment. To treat a small child differently from a mature and experienced adult does not really require much justification. To treat mature adults differently from each other because they are of different ages requires more justification. Demeaning treatment may well be impossible to justify. However, a difference of treatment in entitlement to one particular social security monetary benefit in a complex and sophisticated benefit system when the complainant has reached the age of entitlement to other benefits is not demeaning. It does not deprive the claimant of “entitlement to equal respect and to be treated

\(^{11}\) Judge Levenson opined that the mobility component (and probably the whole of DLA) also came within the ambit of Article 8 (respect for private and family life)


\(^{13}\) Carson v Secretary of State for Work and Pensions [2005] UKHL 37 (at para 15).
as an end and not a means” (per Lord Hoffman in Carson). However, it does require rational justification.\textsuperscript{14}

Judge Levenson found that the Secretary of State had provided a rational explanation for the policy of the law in this case and that the method of achieving the objectives of that policy was proportionate.\textsuperscript{15}

Arguably, the Upper Tribunal was prepared to accept the justification advanced by the Secretary of State without submitting it to a rigorous review. The argument as to the ‘interlocking nature’ of benefits was largely irrelevant given that DLA is not an income support payment. A desire to provide more support to working age persons cannot in itself provide justification since this is just a restatement of a desire to discriminate against older people. There needs to be some rationale for such a policy for it to be legitimate (such as greater need where disability arises early in life). The Upper Tribunal should have asked whether persons disabled at a younger age have greater needs (or whether some other legitimate justification existed) and, if so, whether establishing a cut-off point at 65 was a proportionate manner of achieving such a legitimate objective. However, the ruling does provide support for the argument that an upper age limit on mobility allowance is not necessarily in breach of the ECHR.

\textbf{What could be done?}

As set out above, the Minister for Health appears to have taken the view that the mobility allowance scheme, as currently operated, is illegal in the context of the Equal Status Acts. Reference has been made in subsequent discussions to various options having been considered and the legal issues involved but these have not been made public. However, the impression that nothing can be done to reform the existing scheme without significant additional expenditure.\textsuperscript{16} This is not correct.

The first point is that the practice of operating social security benefits on the basis of (unpublished) administrative guidelines, which are either based on a vague provision of the Health Acts or which have no specific statutory basis at all, is clearly undesirable both as a matter of law and good governance. Arguably the entire mobility allowance scheme may be ultra vires the Minister. Such a scheme should in any case be put on a sound statutory basis through the introduction of primary and secondary legislation. Given that the scheme is based on the UK mobility allowance, a starting point for such legislation exists in the UK law.\textsuperscript{17}

Putting the scheme on a statutory basis would immediately resolve the Equal Status Act issue as s. 14 of the Equal Status Act provides that the Act does not prohibit ‘the taking of any action that is required by or under ... any enactment’.\textsuperscript{18} In other words, if legislation

\textsuperscript{14} R(DLA) 1/09 at para 38.

\textsuperscript{15} This decision has been followed by Judge Lane in \textit{CS v Secretary of State for Work and Pensions} [2009] UKUT 257.

\textsuperscript{16} The method of calculation of the additional costs advanced by the Minister for Health is not explained.

\textsuperscript{17} Social Security Act, 1975, s. 37A and the Social Security (Mobility Allowance) Regulations 1975.

\textsuperscript{18} S. 14 (a)(i).
specified that mobility allowance was not payable to persons over age 66, this could not be challenged under the Equal Status Act. It could still be argued that this was contrary to Article 14 of the European Convention on Human Rights but, as outlined above, a similar argument has been rejected in the UK.\textsuperscript{19} The outcome in Ireland would depend on the rationale for the difference in treatment of older people, which could not rely solely on financial issues.\textsuperscript{20}

Persons with intellectual disabilities could also be excluded from entitlement by primary legislation and this would again remove the issue from challenge under the Equal Status Act. However, it would be more difficult to defend such a categorisation from challenge under article 14 of the ECHR. If mobility allowance were put on a statutory basis, it would be a possession for the purposes of the ECHR and disability is clearly a status for the purposes of article 14. It is difficult to identify any rationale (other than cost) for a blanket exclusion of one form of disability and arguably such an exclusion could not be sustained under the ECHR.\textsuperscript{21} However, it seems likely that the costs involved in such an extension would be much less significant than those which might arise from an extension to those over pension age.

\textsuperscript{19} A constitutional challenge could also be made under the equality provisions of the Irish Constitution (article 40) but generally the protection provided by the Constitution is weaker that that of the ECHR.

\textsuperscript{20} This is not made any easier by the Department of Health’s failure to justify the scheme to date. Presumably there was some rationale for the age limits when the scheme was introduced in 1979 but none has been advanced. Nor has the Department suggested any reason (other than cost) why one might treat those under pension age more favourably (although, as in the UK case, there are a number of possible justifications).

\textsuperscript{21} See DEC-S2009-011 and, by analogy, Martin v. Workers’ Compensation Board of Nova Scotia 2003 SCC 54 in which the Canadian Supreme Court found that the exclusion of persons with chronic pain from the workers’ compensation scheme was in breach of the Canadian Charter of Rights.