



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF B. v. THE UNITED KINGDOM

(Application no. 36571/06)

JUDGMENT

STRASBOURG

14 February 2012

FINAL

14/05/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of B. v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President*,

Nicolas Bratza,

Päivi Hirvelä,

Ledi Bianku,

Zdravka Kalaydjieva,

Nebojša Vučinić,

Vincent A. De Gaetano, *judges*

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 24 January 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 36571/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Ms B. (“the applicant”), on 31 August 2006. The Vice-President of the Section acceded to the applicant’s request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant, who had been granted legal aid, was represented by Ms S. Clarke of Child Poverty Action Group, a lawyer practising in London. The United Kingdom Government (“the Government”) were represented by their Agent, Ms H. Upton of the Foreign and Commonwealth Office.

3. On 18 March 2009 the Vice-President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1964 and lives in Middlesex.

5. The facts of the case, as submitted by the applicant, may be summarised as follows.

6. The applicant, who has a severe learning disability, has three children. From May 1990 she was in receipt of two non-contributory state benefits administered by the Secretary of State for Work and Pensions: child benefit and means-tested income support. Her income support personal allowance was assessed on the basis that she was a lone parent. She received an additional amount of personal allowance for each child who was a member of her family and a family premium. The benefits were paid by order book.

7. Pursuant to regulation 32(1) of the Income Support (General) Regulations 1987 (“the 1987 Regulations”), the applicant was under a duty to report any change of circumstance which might affect her entitlement to benefit to the Department of Work and Pensions (“DWP”). A note on the back of her order book advised her that she might break the law if she did not notify the DWP if a dependent or someone living with her moved to a different address. She had also received a Form INF4, which advised her that she should immediately inform the DWP if, *inter alia*, children that she had claimed for were taken into care.

8. In October 2000 the applicant’s three children were taken into care. She did not report this fact to the DWP. At the time, however, the applicant did not have the services of a social worker and she did not receive any practical help from the local authority disability team. It was accepted that she did not realise that this was a fact which she was required to report.

9. In November 2001 the applicant began to receive support from the Owl Housing Link Project, a charity which provides a range of support services to people with learning difficulties.

10. In December 2001 Owl Housing notified the DWP that the applicant’s children had been taken into care. There followed four separate decisions. First, the Secretary of State decided, pursuant to section 71(5A) of the Social Security Administration Act 1992 (“the 1992 Act”), to supersede her award of income support to reflect the fact that she had been receiving benefit to which she was not entitled. Secondly, a decision was made that the requirements of section 71(1) were satisfied so that the Secretary of State was entitled to recover the overpayment. Thirdly, the Secretary of State decided to exercise his discretion so as to recover the overpayment. Fourthly, the Secretary of State decided to recover the overpayment by reducing the applicant’s future payments of income support by the amount permitted by regulation 16 of the Recovery Regulations.

11. The amount of income support that the applicant had received in respect of her children after they had been taken into care was GBP 6,561.76. However, this amount was reduced by approximately 30 percent to GBP 4,626.74 because during the relevant period the applicant could have claimed, but did not claim, an income support disability premium.

12. The applicant appealed to the Social Security Appeal Tribunal (“the Tribunal”) against the Secretary of State’s decision that she had to repay

GBP 4,626.74. She relied on previous decisions of the Social Security Commissioners, in which they held that there would be no failure to disclose unless disclosure was reasonably to be expected. If there was no failure to disclose, the question of recovery of an overpayment would not arise at all. The Tribunal allowed the applicant's appeal, finding that the relevant test was not what a reasonable man would have thought it appropriate to disclose, but rather what a reasonable man knowing the particular circumstances of the claimant would have expected her to disclose. The Tribunal accepted that the applicant did not understand that the placing of her children in care was a material fact which she needed to disclose to the DWP, and that it was not reasonable to expect her, in the particular circumstances of her case, to have disclosed that fact.

13. The Secretary of State appealed to the Social Security Commissioners ("the Commissioners"). The Commissioners allowed the appeal, holding that if a claimant was aware of a matter which he or she had been required to disclose, there would be a breach of that duty even if, because of mental incapacity, the claimant was unaware of the materiality or relevance of the matter or did not understand an unambiguous request for information. Notwithstanding the settled case-law of the Commissioners, the "reasonableness test" was not a requirement under section 71 of the 1992 Act and did not represent a possible construction of section 71. Capacity was not relevant to the issue of failure to disclose and the applicant was in breach of the obligations imposed on her under the first limb of regulation 32(1) of the 1987 Regulations.

14. The applicant appealed to the Court of Appeal. She submitted that there had been a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. I in that the State's interference with her possessions discriminated unjustifiably between people who were unable to report facts because they were not aware of them and people who, like the applicant, were unable to report them for some other reason. It was argued in the alternative that the law treated identically people who were capable and people who were incapable of understanding that there was a fact which they were required to report.

15. The Court of Appeal held that the argument fell at the first fence because there were no possessions of the applicant at stake: what the Secretary of State was claiming was an entitlement to recover money which should not have been paid to the applicant in the first place. Although the decision of the Court of Appeal in the case of *R. (Carson and Reynolds) v. the Secretary of State for Work and Pensions* to the effect that a non-contributory benefit such as income support was not a possession within the meaning of Article 1 was taken as correct by the House of Lords, the underlying issue of principle awaited the decision of the Grand Chamber of the Court in the case of *Stec*. The recovery of overpaid benefits, however,

stood outside this question and by parity of reasoning outside Article 1 of Protocol No. 1.

16. The Court of Appeal went on to reject in any event the applicant's first alleged ground of discrimination as it did not consider people who were unable to report facts because they were not aware of them to be in an analogous, or relevantly similar, situation to people who were unable to report them for some other reason. The proposition that you could not report something that you did not know was a simple proposition of logic, whereas the proposition that you could not report something you did not appreciate you had to report depended on difficult questions of cognitive capacity and moral sensitivity which varied from person to person.

17. As to the latter ground relied upon by the applicant, namely that the law treated identically people who were capable and people who were incapable of understanding that there was a fact which they were required to report, the Court of Appeal found it unnecessary to determine what was considered to be a difficult question, since the recovery of overpaid benefits could not in any event amount to a deprivation of possessions.

18. On 6 March 2006 the applicant was refused permission to appeal to the House of Lords.

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. At the relevant time, regulation 32(1) of the 1987 Regulations provided that:

“Except in the case of a jobseeker's allowance, every beneficiary and every person by whom or on whose behalf sums payable by way of benefit are receivable shall furnish in such a manner and at such times as the Secretary of State ... may determine such certificates or other documents and such information and facts affecting the right to benefit or its receipt as the Secretary of State ... may require (either as a condition on which any sum or sums shall be receivable or otherwise) and in particular shall notify the Secretary of State ... of any change of circumstances which he might reasonably be expected to know might affect the right to benefit, or to its receipt, as soon as reasonably practicable after its occurrence, by giving notice in writing (unless the Secretary of State ... determines in any particular case to accept notice otherwise than in writing) of any such change to the appropriate office.”

20. Pursuant to section 10 of the Social Security Act 1998, the Secretary of State for Work and Pensions had power to supersede an award of income support, where there had been a relevant change in circumstances, with retrospective effect from the date when the change occurred.

21. Where there was a failure to disclose a relevant change in circumstances, section 71 of the 1992 Act provided that:

“(1) Where it is determined that, whether fraudulently or otherwise, any person has misrepresented, or failed to disclose, any material fact and in consequence of the misrepresentation or failure—

(a) a payment has been made in respect of a benefit to which this section applies; or

...

the Secretary of State shall be entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose.

(2) Where any such determination as is referred to in subsection (1) above is made on an appeal or review, there shall also be determined in the course of the appeal or review the question whether any, and if so what, amount is recoverable under that subsection by the Secretary of State.

(3) An amount recoverable under subsection (1) above is in all cases recoverable from the person who misrepresented the fact or failed to disclose it.

(5) Except where regulations otherwise provide, an amount shall not be recoverable under subsection (1) above unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review or has been revised under section 9 or suspended under section 10 of the Social Security Act 1998.

(8) Where any amount paid is recoverable under—

(a) subsection (1) above;

it may, without prejudice to any other method of recovery, be recovered by deduction from prescribed benefits.

(10) Any amount recoverable under the provisions mentioned in subsection (8) above—

(a) if the person from whom it is recoverable resides in England and Wales and the county court so orders, shall be recoverable by execution issued from the county court or otherwise as if it were payable under an order of that court; and

...

(11) This section applies to the following benefits—

(b) income support; ”

22. Regulations 13, 15 and 16 of the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988 (“the 1988 Regulations) provide as follows:

“Sums to be deducted in calculating recoverable amounts

13. In calculating the amounts recoverable ... where there has been an overpayment of benefit, the adjudicating authority shall deduct—

(a) any amount which has been offset under Part III;

(b) any additional amount of income support which was not payable under the original, or any other, determination, but which should have been determined to be payable—

(i) on the basis of the claim as presented to the adjudicating authority, or

(ii) on the basis of the claim as it would have appeared had the misrepresentation or non-disclosure been remedied before the determination;

but no other deduction shall be made in respect of any other entitlement to benefit which may be, or might have been, determined to exist.

...

Recovery by deduction from prescribed benefits

15.—(1) Subject to regulation 16, where any amount is recoverable ... that amount shall be recoverable by the Secretary of State from any of the benefits prescribed by the next paragraph to which the person from whom it is determined the amount to be recoverable is entitled.

(2) The following benefits are prescribed for the purposes of this regulation—

...

(d) subject to regulation 16, any income support.

Limitations on deductions from prescribed benefits

16.—

...

(4) Regulation 15 shall apply to the amount of income support to which a person is presently entitled only to the extent that there may, subject to paragraphs 8 and 9 of Schedule 9 to the Claims and Payments Regulations, be recovered in respect of any one benefit week—

(a) in a case to which paragraph (5) applies, not more than the amount there specified; and

(b) in any other case, 3 times 5 per cent. of the personal allowance for a single claimant aged not less than 25, that 5 per cent. being, where it is not a multiple of 5 pence, rounded to the next higher such multiple.

(5) Where the person responsible for the misrepresentation of or failure to disclose a material fact has, by reason thereof, been found guilty of an offence under section 55 of the Act or under any other enactment, or has made a written statement after caution in admission of deception or fraud for the purpose of obtaining benefit, the amount mentioned in paragraph (4)(a) shall be 4 times 5 per cent. of the personal allowance for a single claimant aged not less than 25, that 5 per cent. being, where it

is not a multiple of 10 pence, rounded to the nearest such multiple or, if it is a multiple of 5 pence but not of 10 pence, the next higher multiple of 10 pence.

(6) Where, in the calculation of the income of a person to whom the income support is payable, the amount of earnings or other income falling to be taken into account is reduced by paragraphs 4 to 9 of Schedule 8 to the Income Support Regulations (sums to be disregarded in the calculation of earnings) or paragraphs 15 and 16 of Schedule 9 to those Regulations (sums to be disregarded in the calculation of income other than earnings) the weekly amount applicable under paragraph (4) may be increased by not more than half the amount of the reduction, and any increase under this paragraph has priority over any increase which would, but for this paragraph, be made under paragraph 6(5) of Schedule 9 to the Claims and Payments Regulations.

(7) Regulation 15 shall not be applied to a specified benefit so as to reduce the benefit in any one benefit week to less than 10 pence.

...”

23. The Secretary of State’s policy on the recovery of overpaid benefit is set out in the Overpayment Recovery Guide, which contains guidance for decision-makers to adjudicate in overpayment cases. Section 12 of the Guide addresses “abatement by notional entitlement”, which is the exercise of discretion to recover a lower amount on account of the fact that a claimant could have claimed, but did not claim, some other social security benefit during the same period. In those circumstances, recovery is made of the net loss to public funds. Section 12 also addresses the exercise of discretion to waive recovery of overpayments, which is normally considered where there is reasonable evidence available that the recovery of an overpayment would be detrimental to the health and/or welfare of the debtor or their family or that recovery would not be in the public interest.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1

24. The applicant complained that contrary to Article 14 of the Convention read together with Article 1 of Protocol No.1 persons unable to report facts because they were unaware of them were treated differently under section 71 of the 1992 Act from those who were unable to report facts for some other reason. In the alternative, she complained that the law treated identically persons who were capable and persons who were incapable of understanding that there was something which they were required to report.

25. Article 1 of Protocol No. 1 provides as follows:

“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.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

26. Article 14 of the Convention provides as follows:

“The enjoyment of the rights and freedoms 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.”

27. The Government contested that argument.

A. Admissibility

1. *The Government’s preliminary objection on incompatibility ratione materiae*

(a) The Government’s submissions

28. The Government submitted that the application should be dismissed on account of its incompatibility *ratione materiae* with the Convention because there was no interference with any “possessions” of the applicant. The Government submitted that there was no interference with the applicant’s possessions first and foremost because she never satisfied the conditions of entitlement to the amounts of income support which were overpaid to her (see, for example, *Rasmussen v. Poland*, no. 38886/05, 28 April 2009). She had never had any enforceable right to receive the disputed sums and could not have complained under Article 14 read together with Article 1 of Protocol No. 1 if the Secretary of State had refused to pay those sums in the first place. Indeed, the applicant had accepted that she was not entitled to child additions to her income support once she was no longer responsible for looking after her children and had not sought to challenge the Secretary of State’s decision to supersede her award of income support once he became aware of her changed circumstances.

29. The Government further submitted that as the overpaid sums were recovered by reducing the applicant’s future benefits, the case could be distinguished from *Tsironis v. Greece*, no. 44584/98, 6 December 2001, which concerned the seizure of existing possessions to enforce a debt.

(b) The applicant's submissions

30. The applicant submitted that a determination under section 71 of the 1992 Act created a chose in action enforceable by the Secretary of State against the possessions of those subject to it. The possessions from which the Secretary of State could recover overpaid benefits included prescribed benefits to which the recipient was entitled and any other possessions that the recipient might have. Consequently, the applicant submitted that the creation of such a chose in action interfered with her peaceful enjoyment of possessions for the purposes of Article 1 of Protocol No. 1.

31. The applicant disputed the Court of Appeal's finding that no "possession" was involved as the amount in question should not have been paid to the applicant in the first place. Instead, she submitted that laws regulating the recovery of debt or damages from the possessions of a person and the resulting recovery of such sums from those possessions fell within the ambit of Article 1 of Protocol No. 1 since they authorised an interference with that person's possessions. Thus, the Court held in *Tsironis v. Greece*, no. 44584/98, § 38, 6 December 2001 that the sale of a person's possessions to satisfy debts owed to a bank constituted an interference with his possessions.

32. In any event the applicant submitted that a person who was overpaid benefit owed no debt until the benefit was set aside with retrospective effect. Until then, she was entitled to payment of it. Setting aside her rights with retrospective effect had itself engaged Article 1 of Protocol No. 1 (see, for example, *Kopecký v. Slovakia* [GC], no. 44912/98, ECHR 2004-IX). Replacing the right to payment an individual might have had retrospectively with a liability to repay an amount involved an interference with the peaceful enjoyment of her possessions (*Brumărescu v. Romania* [GC], no. 28342/95, § 74, ECHR 1999-VII).

(c) The Court's assessment

33. The Court recalls that Article 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 those provisions (see, amongst many authorities, *Şahin v. Germany* [GC], no. 30943/96, § 85, ECHR 2003-VIII). The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 71; *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, § 22; and *Petrovic v. Austria*, judgment of 27 March 1998, *Reports* 1998-II, § 22).

34. The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and its Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law. It was expressed for the first time in the *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Merits)* (judgment of 23 July 1968, Series A no. 6, § 9), when the Court noted that the right to obtain from the public authorities the creation of a particular kind of educational establishment could not be inferred from Article 2 of Protocol No. 1, and continued as follows:

"... nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14."

35. The Court must decide, therefore, whether the interests of the applicant which were adversely affected by the impugned legislative scheme fell within the "ambit" or "scope" of Article 1 of Protocol No. 1. In this regard, the Court accepts that if the present case concerns a "possession" belonging to the applicant, then it would fall within the "ambit" or "scope" of Article 14 of the Convention.

36. The Court has consistently held that "possessions" within the meaning of Article 1 of Protocol No. 1 can be either "existing possessions" (see *Van der Musselle v. Belgium*, 23 November 1983, § 48, Series A no. 70, and *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, § 69, ECHR 2002-VII) or assets, including claims, in respect of which an applicant can argue that he has at least a "legitimate expectation" that they will be realised (see, for example, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 31, Series A no. 332, and *Ouzounis and Others v. Greece*, no. 49144/99, § 24, 18 April 2002). In particular, the Court has held that where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should be reflected by holding Article 1 of Protocol No. 1 to be applicable (*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 51, ECHR 2005-X). Moreover, the Court has held that the reduction or discontinuation of a benefit may constitute an interference with possessions which requires to be justified in the general interest (*Kjartan Ásmundsson v. Iceland*, judgment of 12 October 2004, ECHR 2004-IX, and *Moskal v. Poland*, no. 10373/05, 15 September 2009).

37. The applicant primarily complained that a determination under section 71 of the 1992 Act created a chose in action enforceable by the Secretary of State against any possessions which she might have. However, it is clear to the Court that the Secretary of State decided, apparently pursuant to an invariable policy, to recover the overpaid benefit by

deducting it from future prescribed benefits. There does not appear to have been any question of his interfering with the applicant's existing possessions. Consequently, the Court considers that the present case can be distinguished from that of *Tsironis v. Greece* (cited above), which concerned the sale of an applicant's actual possessions to satisfy a debt.

38. In the alternative, the applicant complained that the overpaid benefit was itself a "possession" for the purposes of Article 1 of Protocol No. 1 because she had remained entitled to the increased award until the Secretary of State formally decided to supersede it. Consequently, the decision to recover the overpaid benefit amounted to an interference with her possessions, regardless of how it was to be achieved. The applicant relied on the Court's approach in *Moskal v. Poland*, cited above, in which it held that the discontinuation of a benefit wrongly awarded to the applicant interfered with her possessions for the purposes of Article 1 of Protocol No. 1.

39. However, the Court considers that the decision in *Moskal v. Poland* can be distinguished in one important respect. Unlike the situation in *Moskal*, where the relevant mistake was that of the Polish Social Security Board, in the present case the payment of benefit to which the applicant was not entitled was the result of her own failure to report the fact that her children had been taken into care. Where a benefit system relies on recipients to report any change in their circumstances, the Court considers that it would be perverse if they could acquire an assertable right to overpaid benefit where they have failed to report such a change. To hold otherwise would enable recipients of benefits to profit from their own omissions and, in some cases, fraud.

40. Consequently, the Court concludes that the applicant did not have an assertable right to the overpaid benefit. It does not, therefore, accept that it amounted to a possession for the purposes of Article 1 of Protocol No. 1.

41. That being said, the Court observes that in order to recover the overpaid benefit the Secretary of State reduced the applicant's future award of income support. Even after the increased award was superseded, the applicant continued to meet the criteria for the basic award (without the child allowance and family premium). She therefore had an assertable right to the receipt of income support at this reduced rate. The Court has previously accepted that the reduction of a benefit to which an applicant is entitled may amount to an interference with a possession (see, for example, *Moskal v. Poland* and *Ásmundsson v. Iceland*, both cited above). Consequently, the Court considers that the reduction of the award to which the applicant was entitled, albeit to recover overpaid benefits, could be said to have interfered with a "possession" for the purposes of Article 1 of Protocol No. 1 of the Convention.

42. It therefore follows that the applicant's interests fall within the scope of Article 1 of Protocol No. 1, and of the right to property which it guarantees. This is sufficient to render Article 14 applicable.

43. The Court therefore rejects the Government's submission that the application is incompatible *ratione materiae*. It further notes that the application is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

44. The applicant submitted that the basis upon which the Secretary of State could recover overpaid benefit from her possessions involved discrimination contrary to Article 14 because it treated persons in analogous situations differently and it treated in the same manner those whose situations were significantly different.

45. First, she submitted that those who could not reasonably be expected to report a material fact because they were not aware of it were treated differently from those who could not reasonably be expected to report it because they were unaware of the requirement to report it. These two groups were in an analogous situation because neither could reasonably be expected to report the fact and they were equally not to blame for not reporting it. Secondly, she complained that those who were incapable of understanding that they were required to report a fact were treated the same as those who were capable of understanding the requirement to report. The capacity or incapacity to report a fact was a personal characteristic for the purposes of Article 14 of the Convention.

46. The applicant complained that in neither case was there any objective and reasonable justification for such treatment, especially as the basis for liability to repay overpaid benefit was personal fault. Moreover, she complained that the discriminatory treatment demonstrated a failure to recognise the particular difficulties experienced by persons with learning disabilities.

2. The Government's submissions

47. With regard to the alleged difference in treatment between those who could not reasonably be expected to report a material fact because they were not aware of it and those who could not reasonably be expected to report it because they were unaware of the requirement to report it, the Government relied on the findings of the Court of Appeal, which held that there was no proper analogy between the two situations because the former involved a straightforward proposition of logic while the latter involved very different questions of cognitive capacity and moral sensitivity. Whereas it was reasonable to expect decision-makers to assess whether a claimant was aware of a fact, it was a much more difficult and complicated matter for

them to decide whether a claimant's cognitive capacity and moral sensitivity rendered them able or unable to understand the materiality of that fact, and whether any such claimant could reasonably be expected to report it.

48. Further, the Government submitted that such a distinction was not based upon any "personal characteristic or status", which was an essential requirement of Article 14 of the Convention (*Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23). In particular, they submitted that this was not a distinction on grounds of disability, as a claimant could be aware of a fact but unable to report it for a reason entirely unrelated to disability, such as a failure to understand instructions.

49. With regard to the applicant's alternative formulation, the Government contended that section 71 did not seek to attribute blame. The underlying policy was to permit recovery, regardless of whether the failure to disclose was excusable or not. In any case, the Government argued that the distinction suggested by the applicant was again not one which was based on a personal characteristic.

50. Alternatively, the Government contended that if the applicant succeeded in establishing that there had been discrimination, then justification had clearly been made out. It was well-established that Contracting States had a broad margin of appreciation in determining features of their social security systems and that decisions taken in this context would be respected by the Court unless they were "manifestly without reasonable foundation" (see, for example, *Carson and Others v. the United Kingdom*, no. 42184/05, § 73, 4 November 2008).

51. Against the backdrop of the wide margin of appreciation, the Government submitted that section 71 manifestly pursued the legitimate aim of ensuring that claimants for certain social security benefits were not permitted to retain sums of money to which they were not entitled because they did not fulfil the conditions of entitlement at the material time. The recovery of overpaid benefits served to maximise the resources available within the social security system for the payment of benefits to claimants who did meet the conditions of entitlement. The sums involved were significant across the social security system as a whole. Overpayments of Income Support identified in 2008/9 totalled almost GBP 280 million, of which approximately GBP 173 million was considered to be recoverable by the Secretary of State.

52. Moreover, the Government pointed out that the relatively broad test of liability under section 71 was counter-balanced by a number of other features of the social security system which served to reduce its adverse impact on benefit claimants. For example, a claimant would only be liable to repay overpaid benefit if she had acted in breach of a legal obligation to disclose; domestic law provided for the appointment of a third party to act on behalf of a claimant who might otherwise have difficulty complying with their obligations; section 71 did not permit the Secretary of State to charge

interest on overpaid sums; and finally, there was a limit on the maximum amount which could be recovered each week and the Secretary of State could, in certain circumstances, apply his policies on abatement or waiver.

53. The Government therefore submitted that the applicant was not required to bear an “excessive burden” (see, for example, *Moskal v. Poland*, cited above, § 73).

3. *The Court’s assessment*

54. The Court has 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 (*Kjeldsen, Busk Madsen and Pedersen*, cited above, § 56). Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007; *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008-). Such a difference of treatment is 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.

55. Article 14 does not prohibit a Contracting 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 (see *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* (merits), 23 July 1968, pp. 34-35, § 10, Series A no. 6, and *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV).

56. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Burden v. the United Kingdom*, cited above, § 60). The scope of this margin will vary according to the circumstances, the subject-matter and the background. 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” (*Stec and Others v. the United Kingdom*, [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006).

57. In the present case the applicant has claimed that the difference in treatment between persons who could not reasonably be expected to report a material fact because they were not aware of the fact and those who could

not reasonably be expected to report a fact because they were not aware of its materiality was discriminatory. However, the Court agrees with the Court of Appeal that these two groups could not be said to be in analogous, or relevantly similar, situations. On the contrary, although neither could be said to be “to blame” for the failure to report, the Court considers the situation of persons who are not aware of a fact to be qualitatively of a different nature to that of persons who are aware of a fact but who are not aware of its materiality. As the Court of Appeal found, the proposition that you cannot report something that you do not know is a simple proposition of logic, whereas the proposition that you cannot report something you do not appreciate you have to report depends on difficult questions of cognitive capacity and moral sensitivity which vary from person to person.

58. The Court considers the applicant’s alternative formulation, namely that, as someone who did not have the capacity to understand the obligation to report, she should have been treated differently from someone who did, to be somewhat more persuasive. It appears to the Court that the situation of these two groups is sufficiently different to require the respondent State to objectively and reasonably justify its failure to treat them differently.

59. That being said, the Court accepts that requiring decision-makers to assess levels of understanding or mental capacity before deciding whether or not overpaid benefits were recoverable would hinder their recovery and thereby reduce the resources available within the social security fund. It therefore considers that the decision not to treat the applicant differently from someone who had the capacity to understand the requirement to report pursued a legitimate aim, namely that of ensuring the smooth operation of the welfare system and the facilitation of the recovery of overpaid benefits.

60. With regard to the question of proportionality, the Court recalls that in the context of Article 1 of Protocol No. 1 it has held that public authorities should not be prevented from correcting mistakes in the award of benefits, even those mistakes resulting from their own negligence. Holding otherwise would be contrary to the doctrine of unjust enrichment, would be unfair to other individuals contributing to the social security fund, and would amount to sanctioning an inappropriate allocation of scarce public resources. However, the Court has observed that the above general principle cannot prevail in a situation where the individual concerned is required to bear an excessive burden as a result of a measure divesting him or her of a benefit (*Moskal v. Poland*, cited above, § 73).

61. In the present case the Secretary of State took a number of steps to ensure that the applicant was not required to bear an excessive burden. In particular, the Court observes that she was not required to pay interest on the overpaid sums, there was a statutory limit on the amount that could be deducted each month from her award of income support, and the amount to be repaid was in fact reduced to reflect the fact that during the material time she was entitled to, but had not been in receipt of, a disability allowance.

Indeed, the Court observes that it would have been open to the applicant to request that the Secretary of State waive his right to recover the overpaid benefit if there was evidence that recovery would be detrimental to her health or welfare. As she did not make any such request, the Court cannot accept that the recovery would have had such a detrimental impact.

62. The foregoing considerations are sufficient to enable the Court to conclude that any failure to treat the applicant differently from persons who understood the reporting requirement was objectively and reasonably justified.

63. There has accordingly been no violation of Article 14 of the Convention read together with Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 14 of the Convention read together with Article 1 of Protocol No. 1.

Done in English, and notified in writing on 14 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President