EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2015] CSIH 82
XA83/14

Lady Smith
Lord Brodie
Lady Clark of Calton

OPINION OF THE COURT

delivered by LORD BRODIE

in the appeal

under

section 13 of the Tribunals Courts and Enforcement Act 2007

by

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Appellant;

against

YVETTE ROBERTSON

Respondent:

Act: Johnston QC, Gill; Office of the Solicitor to the Advocate General

Alt: Mitchell QC, Cobb; Drummond Miller LLP

Ailsa Wilson QC, Amica Curiae

24 November 2015

Parties to the appeal and issue to be determined

[1] This is an appeal to the Court of Session under section 13 of the Tribunals Courts and

Enforcement Act 2007 at the instance of the Secretary of State for Work and Pensions against a decision of the Upper Tribunal dated 7 February 2014. The respondent is Ms Yvette Robertson. Because of its doubts as to the competency of an appeal by the appellant against a decision which, in its result, finds for the appellant, the court appointed an *amica curiae* in the person of Ms Wilson QC. In the hearing before us on 23 October 2015 the appellant was represented by Mr Johnston QC and Mr Gill. The respondent was represented by Mr Mitchell QC and Mr Cobb. Ms Wilson QC also appeared.

[2] The hearing on 23 October 2015 was restricted to the issue of the competency of the appeal and so, accordingly, is this opinion. While the issue is a relatively narrow one, in order to give it context it is necessary to say something about the decision that the appellant wishes to bring under appeal and the factual and procedural history leading up to that decision.

The respondent's entitlement to the higher rate of the mobility component of Disability Living Allowance as at the date which is relevant for the purposes of this appeal

[3] The respondent suffers from a condition known as retinitis pigmentosa. She is virtually, albeit not completely, blind.

[4] Visual acuity may be measured on the Snellen Scale. The Snellen Scale is a measure by reference to a test in which a person reads rows of letters of decreasing size on a chart from a distance of 6 metres. The lower the row on the chart that a person can read, the better his visual acuity. Normal vision is denominated as 6/6 and lesser degrees of visual acuity are denominated by lower numerators and higher denominators. Thus, a person whose visual acuity is denominated as 6/36 can only read from 6 metres what a person with normal vision can read from 36 metres. On the relevant date for the purposes of this appeal the respondent had a visual acuity of a maximum of 6/36 in both eyes. At all relevant dates she has been in receipt of Disability Living Allowance (DLA).

[5] A feature of the respondent's condition is that she is photophobic in bright light. This difficulty in coping with bright light means that her visual acuity outdoors is materially less than when she is indoors in artificial ambient lighting. It is only possible to take a measurement on the Snellen Scale in an indoor clinical setting. Accordingly, the level of the respondent's visual acuity outdoors cannot and has not been measured by reference to the Snellen Scale.

[6] As provided by section 71 of the Social Security Contributions and Benefits Act 1992, DLA has two components, a care component and a mobility component. Entitlement to the mobility component of DLA is determined by section 73 of the 1992 Act, as amended by section 14 of the Welfare Reform Act 2009. As is provided by section 73 (10) and (11) there are two weekly rates at which the mobility component of DLA may be paid, the higher rate and the lower rate.

[7] Among the conditions of eligibility for the mobility component of DLA is that provided by section 73(1AB), which is that a person "has such severe visual impairment as may be prescribed." Subsection (1AB) is one of several provisions of section 73 which create conditions under which a person who (despite other disabilities) is physically capable of walking, may nevertheless be entitled to the mobility component of DLA at the higher rate: 1992 Act section 73(1)(ab).

[8] What amounts to "severe visual impairment" for the purposes of section 73(1AB) of the 1992 Act is prescribed by regulation 12(1A)(a) of the Social Security (Disability Living Allowance)

Regulations 1991. Regulation 12(1A) was inserted into the 1991 Regulations by the Social Security (Disability Living Allowance) (Amendment) Regulations 2010. It prescribes "severe visual impairment" as follows:

> "(1A) (a) For the purposes of section 73 (1AB) (a) of the Act (mobility component for the severely visually impaired) a person is to be taken to satisfy the condition that he has a severe visual impairment if—
> (i) he has visual acuity, with appropriate corrective lenses if necessary, of less than 3/60; or
> (ii) he has visual acuity if 3/60 or more, but less than 6/60……

....

> (b) For the purposes of section 73 (1AB) (a), the conditions are that he has been certified as severely sight impaired or blind by a consultant ophthalmologist.
>
> (c) In this paragraph—
> (i) references to visual acuity are to be read as references to the combined visual acuity of both eyes in cases where a person has both eyes;
> (ii) references to measurements of visual acuity are references to visual acuity measured on the Snellen Scale;
> (iii) references to visual field are to be read as references to the combined visual field of both eyes in cases where a person has both eyes."

Accordingly, the entitlement to the higher rate of the mobility component of DLA of a visually impaired person who is physically capable of walking, such as the respondent, is dependent on her visual acuity, as measured on the Snellen Scale, being less than 3/60.

[9] As indicated above, at the relevant date, when the respondent's visual acuity was measured indoors by reference to the Snellen Scale, it was denominated as 6/36. So measured the respondent did not have "severe visual impairment" as that expression is to be understood for the purposes of section 73(1AB) of the 1992 Act and, therefore, the respondent did not meet any of the relevant statutory criteria for entitlement to the higher rate of the mobility component of DLA, notwithstanding that her visual acuity outdoors was materially less than that indoors .

Later developments

[10] Without conceding their relevance to the issue of whether the appeal was competent, parties drew the attention of the court to two developments which have occurred subsequent to the relevant date.

[11] The first development is that by reason of a deterioration of the respondent's visual acuity she has been awarded the higher rate of the mobility component of DLA with effect from 31 March 2014 by virtue of a supersession decision dated 2 June 2014.

[12] The second development is that with effect from 8 April 2013, by virtue of section 77 of the Welfare Reform Act 2012, DLA has been in the process of replacement by a new benefit known as Personal Independence Payment (PIP). Eligibility for PIP is determined by the Social Security (Personal Independence) Regulations 2013. Over time the majority of those currently in receipt of DLA will be in receipt of PIP.

Procedural history prior to the appeal to this court

[13] The respondent applied to the appellant for a review of the assessment of her entitlement to DLA. An assessment had been previously made on 29 June 2010 when it had been determined that she was entitled to the mobility component but at the lower rate. By decision dated 7 December 2011 the appellant decided, *inter alia*, that although she remained entitled to the mobility component at the lower rate, having regard to her level of visual acuity measured by reference to the Snellen Scale, the respondent was not entitled to the higher rate. The respondent appealed the decision of 7 December 2011 to the First-tier Tribunal (Social Entitlement Chamber). Following a hearing at Irvine on 19 September 2012, by decision dated 29 October and issued on 31 October 2012, the First-tier Tribunal upheld the respondent's appeal and revised the decision of the appellant by finding the respondent entitled to the higher rate of the mobility component of DLA. The First-tier Tribunal felt able to arrive at this conclusion while not disputing "the arithmetic in relation to Snellen" and "notwithstanding the exact terms of regulation 12 (1A)", because having regard to the evidence from the respondent and the consultant ophthalmologist's report which had been produced, the respondent's visual acuity outdoors would be "less than 6/36 and, on the balance of probabilities, also 'less than 6/60'".

[14] The appellant appealed to the Upper Tribunal on the ground that the tribunal had no discretion under Regulation 12(1A) and that, as the claimant had a visual acuity of 6/36 as measured in the Snellen test, she did not qualify for the higher rate of the mobility component. That this was an objective test had been confirmed by the decision of Judge Bano in *Secretary of State for Work and Pensions* v *MS (DLA)* (2013] UKUT 0267 (AAC) [CDLN1899/2012].

[15] The Upper Tribunal (as constituted by Upper Tribunal Judge Sir Crispin Agnew of Lochnaw Bt QC) directed that there should be an oral hearing and had raised the question, if Judge Bano's decision was correctly decided, did this raise an issue of discrimination in the application of the test:

> "to a person such as the claimant who has *Retinitis Pigmontosa* which is sensitive to light and therefore that in bright light the visual acuity is affected in circumstances [where] other persons suffering from visual impairment would not be affected."?

Sir Crispin had given directions in which he had asked for submissions to be made, at the oral hearing, on the following issues:

> "1. Is the regulation, as construed by Judge Bano in CDLA/1899/2012, compatible with the claimant's rights under Article 14 of the ECHR?
>
> 2. Does the regulation comply with the Secretary of State's equality duties under the Equality Act 2006?
>
> 3. If the regulation, as construed by Judge Bano in CDLN1899/2012, is not compatible with the claimant's rights under Article 14, can the regulation be construed in a manner that is compatible - section 3(1) of the Human Rights Act 1998?

4. If the regulation, as construed by Judge Bano in CDLN1899/2012, is not compatible with the Secretary of State's equality duty, is that something to which [the Upper Tribunal] can have regard or can the regulation only be challenged in a judicial review? The jurisdiction point should be answered, whatever view the parties might take of whether or not the equality duty has been complied with."

[16] Having heard submissions at the oral hearing, on 7 February 2014 Sir Crispin issued the following decision of the Upper Tribunal:

"The appeal is allowed.

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

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

1. the appeal is refused
2. the appellant remains entitled to the care component at the middle rate with effect from 10/08/2011 for an indefinite period
3. the claimant has no entitlement to the higher rate of the mobility component, but remains entitled to the lower rate from 10 August 2011 for an indefinite period."

[17] The decision of 7 February 2014 was accompanied by written reasons. Having summarised the earlier procedure, the relevant regulations and the factual position, Sir Crispin continued:

"18. Judge Bano allowed the Secretary of State's appeal saying:
'11. As the tribunal in this case recognised, it may equally be difficult to see why entitlement to a benefit which is concerned with mobility out of doors leaves out of account the claimant's visual acuity in an outdoor environment. However, I have come to the conclusion that regulation 12(1A)(a)(i) must be read as applying only to an actual and not a hypothetical, Snellen Scale measurement.
12. Unlike the previous functional tests of visual disablement, it seems to me that the test in the new regulation 12(1)(a) of the 1991 Regulations is intended to provide an objective and consistent yardstick of entitlement. At the cost of penalising some claimants for whom the test does not provide an accurate indication of their visual impairment when out of doors, the new test relies on a scientific measurement of visual acuity carried out in controlled and standardised conditions. I agree with Mr Heath that it cannot have been intended that the provision should apply to the results of a hypothetical test carried out in conditions in which the test cannot in practice be performed. For those claimants like the appellant in this case, whose visual acuity varies according to the brightness of the surrounding light, it would in any case be impossible to say what measurement should be used for the purposes of determining the claim.

13. The new regulation 12(2A) of the 19891 DLA regulations specified in precise detail the conditions which have to be satisfied in relation to both visual acuity and visual field defects in respect of one or both eyes in order for a claimant to qualify as severely visually impaired. If the regulation were taken as applying to anything other than actual Snellen Scale measurements, it would in my view introduce into the test elements of judgment and interpretation which the very prescriptive terms of the new regulation were intended to exclude. '

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

There then follows , thereafter, a discussion of what was canvassed before the Upper Tribunal Judge on the four issues which he had identified. Among his conclusions on these matters are the following: he agrees with the decision of Judge Bano that the intention of regulation 12(1A) is to have an objective yardstick to measure visual acuity (paragraph 19); a claimant therefore either qualifies or does not qualify for the higher rate of mobility component depending on the Snellen test result alone (paragraph 19); the effect of the regulation relying solely on the Snellen test is discriminatory for the purposes of article 14 of ECHR and unless there is an objective and reasonable justification for the discrimination regulation 12(1A) is *ultra vires* (paragraphs 22 and 24); regulation 12(1A) has no reasonable or objective justification and is accordingly *ultra vires* (paragraph 37); regulation 12(1A) cannot be read in a way which is compatible with Convention rights as provided by section 3(1) of the Human Rights Act 1998 (paragraph 39); in making the regulation the appellant did not have due regard to his equality duty as provided by section 49A of the Disability Discrimination Act 1995, read with the Equality Act 2006 and therefore the regulation is separately *ultra vires*, because it was enacted without regard to that equality duty (paragraphs 40 to 42); holding the regulation *ultra vires* does not benefit the respondent in that it is regulation 12(1A) which confers entitlement to higher right mobility component for those who qualify, holding it *ultra vires* would not give rise to an additional entitlement (paragraphs 43 and 44); the Upper Tribunal Judge makes no formal decision that the regulation is a nullity because he has no jurisdiction to reduce or set it aside (paragraph 44); it is for the appellant to consider what action is to be taken to amend the regulation so as not to discriminate against persons such as the respondent (paragraph 44); and in these circumstances the respondent has no entitlement to the higher rate of mobility component and accordingly the appeal has to be allowed and the decision of the tribunal set aside, the respondent being only entitled to the lower rate of mobility component (paragraph 45).

[18] On 7 May 2014 Sir Crispin granted permission to appeal his decision of 7 February 2014 to the Court of Session.

The appellate jurisdiction of the Court of Session

[19] A right to appeal from a decision of the Upper Tribunal to this court on a point of law is provided by section 13 of the 2007 Act. Section 13 provides, *inter alia*, as follows:

"**13 Right to appeal to Court of Appeal etc**.

(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal...

(3) That right may be exercised only with permission (or, in Northern Ireland, leave).

(4) Permission (or leave) may be given by—

(a) the Upper Tribunal, or

(b) the relevant appellate court,

...

(11) Before the Upper Tribunal decides an application made to it under subsection (4), the Upper Tribunal must specify the court that is to be the relevant appellate court as respects the proposed appeal.

(12) The court to be specified under subsection (11) in relation to a proposed appeal is whichever of the following courts appears to the Upper Tribunal to be the most appropriate —

(a) the Court of Appeal in England and Wales;

(b) the Court of Session;

(c) the Court of Appeal in Northern Ireland."

[20] The powers of this court when deciding an appeal from the Upper Tribunal are as provided by section 14 of the 2007 Act. Section 14 provides, *inter alia*, as follows:

"**14 Proceedings on appeal to Court of Appeal etc**.

(1) Subsection (2) applies if the relevant appellate court, in deciding an appeal under section 13, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The relevant appellate court—

(a) may (but need not) set aside the decision of the Upper Tribunal, and

(b) if it does, must either—

(i) remit the case to the Upper Tribunal or, where the decision of the Upper Tribunal was on an appeal or reference from another tribunal or some other person, to the Upper Tribunal or that other tribunal or person, with directions for its reconsideration, or

(ii) re-make the decision.

....

(7) In this section "the relevant appellate court", as respects an appeal under section 13, means the court specified as respects that appeal by the Upper Tribunal under section 13(11)."

Procedure in the Court of Session

[21] On 19 June 2014 the appellant lodged an appeal against the Upper Tribunal's decision of 7 February 2014. Put shortly the grounds of appeal are as follows:

(1) The Upper Tribunal failed to give adequate and comprehensible reasons for its decision that regulation 12(1A) of the Social Security (Disability Living Allowance) Regulations 1991 is *ultra vires* because it has no reasonable or objective justification and, separately, because it was enacted without regard to an equality duty.(2) The Upper Tribunal, separately, erred in law in its decision that regulation 12(1A) has no reasonable or objective justification, by failing to take material matters into account and giving weight to immaterial matters. In particular, it erred in law in its consideration of whether regulation 12(1A) is manifestly without reasonable foundation in [specified respects]

(3) The Upper Tribunal, separately, erred in law in its decision that regulation 12(1A) was enacted without regard to an equality duty, by failing to take material matters into account and giving weight to immaterial matters. In particular, it erred in law in its consideration of whether regulation 12(1A) was enacted without regard to an equality duty in [specified respects]

[22] In her answers, the respondent has taken issue with each of the appellant's grounds of appeal.

[23] As required by the court, the appellant lodged a written Note of Argument on 30 January 2015. In accordance with section 14(2) of the 2007 Act it invited the court to:

"i) find that the making of the Upper Tribunal's decision involved the making of an error on a point of law;

ii) set aside the decision of the Upper Tribunal

iii) re-make the decision of the Upper Tribunal and refuse [the respondent's] appeal against [the appellant's] decision of 7 December 2011, on the basis that (a) regulation 12(1A) of the Social Security (Disability Living Allowance) Regulations was lawfully enacted and (b) as at the date of [the appellant's], she did not have a severe visual impairment of the kind that it prescribes"

[24] Although the point was not taken by the respondent, who now accepts that as at the relevant date she was not entitled to the higher rate of the mobility component of DLA in terms of regulation 12(1A), over what has been an extended procedure in the Inner House, the court has become concerned as to whether it is competent for the appellant to appeal under section 13(1) of the 2007 Act against a decision in his favour. The appeal called by order on 20 March 2015 when the court directed that the parties should address it at a hearing on the issue of competency under reference to the following issues:

(1) the competency of an appeal where the appellant was successful before the Upper Tribunal;

(2) the extent to which the Court may be used to resolve an academic question;

(3) whether it is in the public interest that an appeal such as this should proceed and what will be the repercussions if it is allowed to do so;

(4) what other remedies are available to each party.

[25] On 22 April 2015 the court appointed Ms Wilson QC as *amica curiae* to assist the court on these questions.

[26] At a hearing on 29 April 2015 the respondent stated to the court that in the event that the decision of the Upper Tribunal of 7 February 2015 was not re-made by this court the appellant would respect Sir Crispin's reasoning on the *vires* of the regulation and act accordingly.
[27] On 10 April 2015 the appellant lodged a supplementary note of argument directed to the competency issue and on 16 October 2015, lodged a second supplementary note of argument. The respondent lodged a supplementary note of argument and a second supplementary note of argument on 17 April 2015 and 16 October 2015 respectively. The *amica curiae* lodged a note of argument on 16 October 2015.

Submissions of parties

Appellant

[28] On behalf of the appellant Mr Johnston QC adopted what appeared in his supplementary note of argument. In his submission, the starting point in addressing the first question posed by the court on 20 March 2015 was section 13(1) of the 2007 Act which gave a right of appeal on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision: cf *Secretary of State for Work and Pensions* v *Morina* [2007] 1 WLR 3033, Maurice Kay LJ at para 11, Re *C and others' Application for Judicial Review (No 2)*, [2008] NI 287. What was under consideration was not an excluded decision. Thus, the only limitation was that the appeal was on "any point of law arising from a decision". Here the appellant's position is that the Upper Tribunal made an error of law and that error arises from the decision made by the Upper Tribunal. The Upper Tribunal's decision is therefore amenable to appeal: cf *Morina*. Nothing in the 2007 Act renders an appeal incompetent. As in *Morina* the appellant was seeking to change "the decision".
[29] The decision of the Upper Tribunal was that:

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

The basis of that decision could be seen in paragraphs 37, 43 and 44 of the reasons for decision. There the Upper Tribunal Judge states that the regulation is *ultra vires*, recognises that he cannot make a declaration to that effect, but, regarding the regulation as *ultra vires*, it therefore does not give rise to a claim. In essence what the Upper Tribunal had done was to conclude, with regret, that it could not find a basis upon which a higher rate award could be made and that was because regulations are *ultra vires*. The Upper Tribunal Judge had not addressed the merits at all; his reasons depended entirely on the *vires* of the regulations. The appellant envisaged that, if it accepted the appellant's contentions, the court, in exercise of its section 14 powers, would set aside the Upper Tribunal's decision, reconsider the *vires* of the regulation, find it *intra vires* and then remit to the Upper Tribunal to consider the merits of the respondent's claim. In response to questioning from the court counsel accepted that on one view the object was to have this court re-make what was of the nature of a backdoor declarator. *Morina* was helpful to the appellant's submission that the appeal was competent in that a wish to change a decision was sufficient for there to be jurisdiction even where what was in issue was the correctness of a subsidiary finding: *Re C and others' Application* Kerr CJ at 289. There were some "winners' appeals" which this court could and should entertain.

[30] According to Mr Johnston, allowing the appeal to go forward would give a voice to those who are currently in receipt of the relevant benefit. How else would that voice be heard? It is to be borne in mind that the Upper Tribunal has stated that regulation 12(1A) is *ultra vires* as regards all retinitis pigmentosa claimants. Moreover, adopting an expansive approach to the question of the competency of this appeal would be consistent with the recent decision of this court in *Secretary of State for Work and Pensions* v *Brade* 2014 SC 742.

[31] As for the second question, whether the court could be used to resolve an academic question, Mr Johnston submitted that the present appeal did not raise what was simply an academic question. Rather, it involved a live point of law that was of general public importance. That was because the real practical effect of the Upper Tribunal's decision was not limited to this particular case. Other tribunals were wrestling with the problem that it had thrown up. The appeal was therefore a competent matter for decision; other cases depended on the point raised and this case was not fact-sensitive: *Macnaughton* v *Macnaughton's Trustees* 1953 SC 387 at 393, *R* v *Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 at 456-7, and *R (Zoolife International Limited)* v *Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995, at para 36.

[32] For much the same considerations as were put forward in relation to the second question the appellant submitted that it is in the public interest that the appeal should proceed. While formally correct that the appellant seeks to appeal a decision in his favour, the reality is that he is faced with an authoritative decision (binding on First-tier Tribunal judges throughout Great Britain and persuasive in Northern Ireland) on the legality of regulation 12(1A) which has an adverse impact on the clarity of the law and is already creating uncertainty. It was therefore important that this appeal should be determined with a view to the court providing tribunal judges with authoritative guidance about the legality of the regulation. For the court to hear this appeal would be unlikely to encourage other winners' appeals.

[33] As for alternative remedies, the appellant did not see it as appropriate to amend regulations which he considers to be *intra vires*. Judicial review of the Upper Tribunal's decision at the instance of the appellant might be available, although that was not clear given the availability of a statutory appeal. However, such application would be seeking to review the reasons given by the Upper Tribunal rather than the decision itself and therefore, were this appeal to have been held incompetent, the same logic might apply in relation to the competency of an application for judicial review. Alternatively, the respondent might apply for judicial review of the appellant's refusal to amend the regulations on the basis that his doing so represented a refusal to act so as to give effect to the requirements of article 14 of the European Convention on Human Rights and the equality duty. That would involve bringing before the Outer House (with the possibility of a subsequent reclaiming motion) essentially the same question which was already before the Inner House. Apart from the delay and additional expense, this would mean adopting a procedure whereby parties were not able to raise points of law of general public importance directly before the Inner House by way of statutory appeal but to do so only indirectly, following (i) a letter asking the Secretary of State to amend regulations; (ii) a decision refusing to do so; (iii) judicial review of that refusal; and (iv) reclaiming to the Inner House the decision made at first instance.

Respondent

[34] On behalf of the respondent, Mr Mitchell QC expressed agreement with the appellant's position on the competency of the appeal. He recognised however that there was a question as to whether the respondent had standing to participate given that Mr Mitchell accepted as correct the decision of the Upper Tribunal that the respondent had not qualified for the higher rate of the mobility component as at the relevant date. Her position had become, if anything, more questionable on her being awarded the higher rate on 2 June 2014 in consequence of deterioration in her visual acuity subsequent to the relevant date. There was, however, in Mr Mitchell's view, a position to be represented. The First-tier Tribunal had held that the regulation could be interpreted so to give the respondent the mobility component at the higher rate. The Upper Tribunal had decided that this was not so but that the regulation, while giving benefit to the vast majority of blind people, discriminated against someone with the respondent's condition. The regulation was aimed at those who were functionally blind but the regulation had missed its mark. Mr Mitchell had concluded that the decision of the First-tier Tribunal was not sound but that the drafting of the regulation was discriminatory. From the beginning of his involvement in the case, Mr Mitchell had seen the respondent as having no personal interest but, as he had explained to the court at the earliest opportunity, that did not mean that there was not a question of discrimination that should be addressed if the appeal were to proceed. The Equality and Human Rights Commission had been approached with the suggestion that it would be best placed to take the matter forward but the Commission had declined to become involved. The Scottish Legal Aid Board had been kept informed but whether the respondent had cover for the appeal was not clear. However, leaving that aside, there was a practical interest to be represented in this appeal, that being the interest of a class of claimants for the mobility component of DLA, of which the respondent had formerly been one. There was a live issue. Effectively the appellant was arguing for declarator that the regulation was good. In *R* v *Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450, the House of Lords had held that it had discretion to hear an appeal on an issue of public law involving a public authority even if there was no longer a *lis* between the parties. The absence of purely private interest was not determinative of standing: *Axa* v *Lord Advocate* 2012 SC (UKSC) 122 and *RM* v *Scottish Ministers* 2013 SC (UKSC) 139. If the appeal was to go ahead the appellant needed a proper contradictor. The court could of course appoint an *amicus curiae* but in practice an *amicus* would "come out of the government system". Mr Mitchell intended no disrespect to anyone in saying this but there was something less than satisfactory about counsel appointed by the executive arguing that the executive did not have power to act in a particular way.

[35] Mr Mitchell reminded the court of the undertaking on behalf of the appellant that, if the appeal goes no further, he would respect the finding of the Upper Tribunal. That, as Mr Mitchell had submitted in the Supplementary Note of Argument for the respondent, under reference to *M* v *Home Office* [1994] 1 AC 377 at 382C, *R (JM)* v *Croydon London Borough Council* [2010] 1 WLR 1658 at para 12, *Alleyne* v *Attorney General of Trinidad and Tobago* [2015] UKPC 3 and *R (Evans)* v *Attorney General* [2015] UKSC 21 at para 52, was an entirely proper position to take but no more than an observance of the rule of law. The rule of law requires respect for declarators as well as decrees.

[36] As far as other remedies were concerned, agreeing with what had been advanced on behalf of the appellant, Mr Mitchell did not dispute that a party with standing could bring the matter of the *vires* of the regulation before the court by way of an application for judicial review but, in

addition to the associated difficulties put forward on behalf of the appellant, there would be the practical problem of obtaining legal aid.

Amica curiae

[37] Ms Wilson QC recognised that the second and third questions posed by the court related to the policy as to what cases might be heard where parties were no longer at issue. While her Note of Argument had touched on all four of the questions posed by the court, she confined her oral submission to a reply on Mr Johnston's submission on competency.

[38] There was, Ms Wilson explained, no Scottish authority and, indeed, no direct authority on the matter but the extent of the court's jurisdiction under section 13 of the 2007 Act came down to what is a "decision". A distinction can be drawn as between that part of a determination which provides for the disposal of an issue, on the one hand, and the reasons adopted for that particular disposal on the other. A decision is a disposal, in other words the order that disposes of the issue. The reasons explain why a particular disposal has been adopted. Thus, in the present case the decision of the Upper Tribunal is comprehended by that part of the determination where the Judge of the Upper Tribunal re-makes the decision that the First-tier Tribunal ought to have given by (1) refusing the appeal, (2) stating that the now respondent remains entitled to the care component at the middle rate and (3) stating that the now respondent has no entitlement to the higher rate of the mobility component but remains entitled to the lower rate.

[39] While an appeal might be competent against a favourable decision where the decision is tied to unfavourable reasons, if it is not proposed that the outcome should change then something else about the decision must change as a result of a successful appeal if the appeal is to be competent.

[40] One way to test the matter in this case was to ask whether the Upper Tribunal needed to consider the *vires* of the regulation at all. The answer to that was no. Having decided that he agreed with the decision of Judge Bano in *Secretary of State for Work and Pensions* v *MS (DLA)* that it was not open to the First-tier Tribunal to apply a hypothetical Snellen test and that the regulation had to be given its natural meaning with the result that the respondent was not entitled to the higher rate, the Upper Tribunal Judge could have stopped at the end of paragraph 19 of his reasons for decision. The decision that the respondent was not entitled to the higher rate was based on a proper interpretation of the regulation rather than the *vires* of the regulation.

[41] Mr Johnston had taken more from decisions that he had cited than was warranted. In *Morina* the Secretary of State wished to appeal the decision of the social security commissioner that the commissioner had jurisdiction to hear an appeal from a subordinate appeal tribunal (albeit that the decision of the commissioner on the merits of that appeal was favourable to the Secretary of State). The Secretary of State sought to change that decision by establishing that the claimants' appeals to the commissioner should have been rejected for want of jurisdiction rather than dismissed on the merits. Allowing the appeal, Maurice Kay LJ explained that it was significant that the subject matter was a ruling by the commissioner on a fundamental legal issue. His suggestion, at paragraph 12 of his judgment that the jurisdiction of the Court of Appeal might rest on an exercise of discretion was not adopted by either of the other members of the court. In making his submissions Mr Johnston had conflated the question of whether the court had jurisdiction to entertain an appeal and the separate question of whether, assuming it did have jurisdiction, the court should entertain an appeal. *Re C and Ors Application* concerned the latter question. What was

in issue there was whether it was appropriate to certify a case as involving a point of general public importance for the purposes of section 41 of the Judicature (Northern Ireland) Act 1978 in respect of a proposed appeal to the House of Lords, where the applicants for certification had substantially succeeded in their application. It was of interest to note that when that case got to the House of Lords Lord Carswell, having noticed *Morina*, reserved his opinion as to whether a successful party can properly appeal against a "decision" of the Divisional Court in Northern Ireland in a criminal matter: *McE* v *Prison Service of Northern Ireland* [2009] 1 AC 908 at paras 76 and 77. What really mattered, submitted Ms Wilson was the framework provided by the statute. In *Sheltered Housing Management Ltd* v *Jack* 2009 SC 109 a question had arisen as to what was comprehended by "decision" for the purpose of computing the time within which a party must appeal from a decision of the Lands Tribunal, having regard to the terms of rule of court 41.20 (1) (b) (i). In that case the matter was determined by the express terms of section 10(6) of the Tribunals and Inquiries Act 1992. However in delivering the opinion of the Court, Lord Osborne expressed the view that the "decision" is the decision of the suit by the tribunal, as opposed to its separate statements of reasons: *supra* at 118. This was not to say that reasons could never be part of a decision, at least if the court was inclined to adopt a wide definition of "decision", but even with a wide definition, to be part of a decision, the reasons being challenged would need to have been necessary for the decision.

Decision

[42] Potentially, the question as to whether the court should entertain this appeal has a number of aspects but, as each of the counsel who appeared before us agreed, irrespective of other considerations, the court can only entertain the appeal if it has power to do so and therefore, the first question to be addressed by the court is one of competency in the sense of its fundamental jurisdiction. If the court does not have jurisdiction the other questions do not arise.

[43] The Upper Tribunal is a creature of statute (2007 Act section 3). Accordingly, if a decision made in terms of its statutory power is to be challenged by way of appeal (as opposed to judicial review) then provision for such an appeal and, therefore, the powers of the relevant appellate body to hear such an appeal must be found in a statutory measure conferring appellate jurisdiction. The only such statutory measure suggested in the present case is the 2007 Act and, in particular, sections 13 and 14 of that Act. Section 13 (1) delineates the right of appeal conferred by the section as "a right to appeal to [the Court of Session] on any point of law arising from a decision made by the Upper Tribunal." Thus, the right is limited to appeal on point of law but it is further limited to point of law "arising from" a "decision" made by the Upper Tribunal.

[44] Conceptually, the decision of a judicial body such as the Upper Tribunal can be distinguished from a statement of reasons for that decision. As Lord Osborne explained in *Sheltered Housing Management* v *Jack* at para 26, the "decision" is the decision of the suit by the tribunal, the operative act which, by exercise of its jurisdiction, it resolves the issues before it. Reasons, on the other hand, comprise the rational underpinning of the decision, the explanation, which any judicial body is bound to give, why it decided and therefore exercised its jurisdiction as it did. Thus, a decision of, for example, the Upper Tribunal, and the reasons for that decision are separate things but, at least if the reasons are truly the reasons *for* the decision, they are linked; a decision cannot be fully understood unless one can consider the reasons. We therefore accept that in considering

what is comprehended by the right of appeal conferred by section 13 of the 2007 Act "on any point of law arising from a decision" one must have regard to the reasons for the decision. It could hardly be otherwise. To take the present case as an example, the decision of the Upper Tribunal was to (1) refuse the appeal, (2) state that the respondent remained entitled to the care component at the middle rate from the specified date and (3) state that she was not entitled to the higher rate of the mobility component but remained entitled to the lower rate from the specified date. That was the whole decision. It was an exercise of jurisdiction to which effect could be given. It informed parties who had won and who had lost and therefore who at first blush might have an interest to appeal. However, it gives little or no information as to whether "any point of law [arises] from [the] decision". In order to ascertain that, one must understand why the tribunal came to its decision. That in turn requires consideration of the reasons and if it turns out that there is a right of appeal its exercise will inevitably involve criticism of the substance or adequacy of these reasons.

[45] We therefore accept that, by its nature, an appeal on any point of law arising from a decision is likely to involve an attack on the soundness of the reasons underpinning the decision. We further accept that there can be, from the perspective of jurisdictional competency, what Mr Johnston described as "winners' appeals". However, irrespective of whether the would-be appellant was the winner or the loser for he or she to have a right of appeal, and therefore for this court to have jurisdiction to hear the appeal the point of law must be one which truly arises from the decision in the sense of there being a sufficient causal connection between them. Whether there is such a connection will depend on the circumstances of the individual case but where the point of law that a party wishes to take does not comprise a necessary part of the reasons for the decision it is unlikely that it could be said to arise from the decision.

[46] In the present case the *vires* of the regulation was a matter raised by the Upper Tribunal Judge. Neither of the parties had an interest in pursuing the point because both were relying on the regulation and, therefore, on its validity. For present purposes we are not concerned as to whether the doubts of the Upper Tribunal Judge about the legality of the regulation were well or ill founded. However, while it was necessary for the Judge to arrive at the proper construction of regulation 12(1A), an exploration of whether or not it had been lawfully enacted was never going to help him to decide the appeal before him. The issue raised by the appeal was whether the respondent, given her particular disability, was entitled to be paid the mobility component of DLA at the higher rate. In terms of section 73(1AB) of the 1992 Act as amended, a claimant such as the respondent is so entitled if, but only if, she "has such severe visual impairment as may be prescribed". Until a particular degree of severe visual impairment is prescribed there is no entitlement to payment of the particular rate of benefit. A particular degree of severe visual impairment was prescribed and that was by the 1991 Regulations as amended, and in particular by regulation 12(1A). Thus if, as at the relevant date, on a proper construction of that regulation the respondent did have the degree of severe visual impairment which the regulation prescribed, she was entitled to payment of the higher rate. If the respondent did not, she was not, and that was the only basis upon which the Upper Tribunal Judge could decide the appeal. (We note that was the only basis upon which he did decide the appeal.) His views as to the legality of the regulation were irrelevant when it came to deciding what was the respondent's entitlement to benefit. As the Upper Tribunal Judge correctly observed he did not have a jurisdiction to reduce or set aside the

regulation. Had the respondent qualified under the regulation, as properly construed, she would then have been entitled to succeed in her appeal irrespective of the Upper Tribunal Judge's views on *vires*.

[47] We return then to the terms of section 13(1) of the 2007 Act and the question of whether the matter which the appellant wishes to make subject of appeal, that being that the conclusion of the Upper Tribunal Judge that the regulation is *ultra vires* because it is discriminatory without there being objective and reasonable justification (reasons for decision paragraphs 24,37 and 42) is an appeal "on any point of law arising from a decision made by the Upper Tribunal". The answer to that question is in the negative. As the judge acknowledged, he had no jurisdiction to make a decision, in the sense of an operative act or decision of the suit as referred to in *Sheltered Housing Management* v *Jack*, as to the *vires* of the regulation and he did not do so. What he did have jurisdiction to do was to decide the appeal and he did that. His views on the *vires* of the regulation formed no part of the reasoning which brought him to that decision. As was pointed out by Ms Wilson, the Judge had completed his reasoning once he had arrived at the end of paragraph 19 of the reasons for decision (see paragraph [17] above in this opinion).Paragraphs 38 and 39 of the reasons for decision can be seen as reinforcing the conclusion in paragraph 19 in that, on the hypothesis that the natural meaning of paragraph 12(1A) gives rise to incompatibility with Convention rights, in these paragraphs the Upper Tribunal Judge confirms that the regulation can only be construed in the way that he has previously indicated in paragraph 19. Otherwise, what follows paragraph 19 of the reasons for decision under the headings "Is the regulation discriminatory?", "Is the discrimination justified?", and "Did the Secretary of State comply with the equality duty?" are *obiter dicta*, in other words things said by the way or incidental remarks. It is at what appears in the reasons for decision after paragraph 19 that the appellant wishes to direct his appeal. None of it, apart perhaps from paragraphs 38 and 39, can be said to arise from the Upper Tribunal's decision.

[48] One way of testing whether the appellant truly wishes to appeal a "point of law arising from a decision made by the Upper Tribunal" is to consider how the appellant proposes that this court should exercise its jurisdiction under section 14 of the 2007 Act, should the appeal be permitted to proceed. The appellant proposes that the court should find, in terms of section 14(1), that "the making of the decision concerned involved the making of an error of law". That is despite the fact that the appellant does not suggest that there is anything whatsoever wrong with the decision in the sense of the operative act. It is the appellant's position that the decision is correct. Nevertheless, the appellant wishes the court to find that the "making" of the decision "involved" the making of an error of law. It is of course the case that the appellant argues that the exposition of the law in paragraphs 20 to 37 and 40 to 42 of the reasons for decision was erroneous and perhaps it would be said that that exposition involved the making of an error of law. However, and this may be no more than reiterating the point that this part of the reasons for decision was *obiter*, it is difficult to see how the Upper Tribunal Judge's unnecessary and uninvited excursion into the question of the *vires* of the regulation, in some way became "involved" in "the making of the decision". Accordingly, we do not accept that the court could find that the making of the decision by the Upper Tribunal "involved the making of an error on [the] point of law" which the appellant wishes to bring under appeal. It is only if the court is able to find that the making of the decision concerned "involved the making of an error on a point of law" that section 14(2) of the

2007 Act empowers the court to do something about it by setting aside and either remitting the case or re-making the decision . In our opinion, for the reasons we have set out, the court could not get to that point irrespective of its views as to the correctness of the Upper Tribunal Judge's exposition of the law in relation to the *vires* of the regulation.

[49] On behalf of the appellant, Mr Johnston presented a rather different analysis of the process of the Upper Tribunal's decision making than that which has commended itself to us. In essence, submitted Mr Johnston, what the Upper Tribunal had done was to conclude, with regret, that it could not find a basis upon which a higher rate award could be made and that was because regulations are *ultra vires*. As Mr Johnston put it, the Upper Tribunal Judge had not addressed the merits at all; his reasons depended entirely on the *vires* of the regulations.

[50] As will be apparent, we have not accepted Mr Johnston's analysis. As far as "the merits" are concerned we do not see that more needed to be done by the Upper Tribunal. The issue in the appeal was whether the respondent's degree of severe visual impairment was such that it met the criterion for payment of mobility component at the higher rate, that criterion being set out in regulation 12(1A). The evidence led before the First-tier Tribunal and that tribunal's findings of primary fact were not in dispute and are set out by the Upper Tribunal in paragraphs 5 to 9 of the reasons for decision. The question then became whether, on these findings, the criterion was met and that depended on interpretation of the regulation. It is true, as Mr Johnston said, that the Upper Tribunal concluded, with regret, that it could not find a basis upon which a higher rate award could be made, but that was not because the regulation was *ultra vires*, it was because the respondent's condition, as measured in the only relevant manner, did not meet the criterion which the regulation set out. Irrespective of whether a regulation in these terms is *ultra vires* or *intra vires*, as at the relevant date the respondent did not meet the condition for payment of the higher rate.

[51] Something emphasised particularly by Mr Mitchell was that, in obedience to the Rule of Law, the appellant has stated to the court that if this appeal is not permitted to go forward he will feel bound by the Upper Tribunal Judge's expression of view as to the *vires* of the regulation. We note that but, without in any way dissociating ourselves from what was said, for example, by Lord Neuberger in *R (Evans)* v *Attorney General*, how the appellant chooses to act is a matter for him. His decision cannot confer on this court a jurisdiction that it does not otherwise have.

[52] As we have recorded, parties addressed us on each of the four questions on which the court invited submissions. We were grateful for these submissions but the issues raised in the second, third and fourth questions only arise once the court is satisfied that it has jurisdiction, in other words a (statutorily conferred) power to entertain an appeal. Once that is established the court may wish to consider whether it is appropriate to hear a particular appeal. At that stage the fact that the appellant was the successful party in the court below or that the point in issue has become academic will be relevant. However, if there is no jurisdiction that is an end to the matter. That is the state of affairs here.

[53] The appeal is accordingly dismissed as being incompetent.