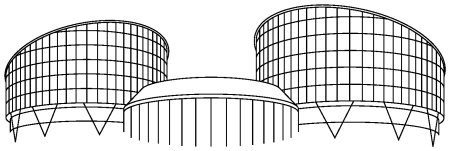

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Applications nos. 40356/10 and 54466/10
S.S. against the United Kingdom
and F.A. and Others against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 21 April 2015 as a Chamber composed of:

Guido Raimondi, *President,*
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Paul Mahoney,
Krzysztof Wojtyczek,
Yonko Grozev, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having regard to the above applications lodged on 19 July 2010 and 9 September 2010 respectively,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicants in the two applications in this case are all British nationals. They are SS (born in 1978), FA (born in 1967), who lodged the first application, HB (born in 1948), EM (born in 1946) and ALF (born in 1971). The first applicant was represented before the Court by Mr P. Mahy of Howells Solicitors, a lawyer practising in Sheffield. The remaining applicants were represented before the Court by Ms M. Paterson of Scott Moncrieff Harbour and Sinclair, a lawyer practising in London.

2. The United Kingdom Government ("the Government") were represented by their Agent, Ms A. Sornarajah, of the Foreign and Commonwealth Office.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. The applicants are all convicted, sentenced prisoners who served, or are serving, part of their sentences in psychiatric hospitals under the relevant provisions of the Mental Health Act 1983 ("the 1983 Act").

5. For the purposes of this case, persons detained in psychiatric hospitals may be divided into several categories. The first is composed of persons detained under section 3 of the 1983 Act ("civil patients"). The second category comprises persons convicted of a criminal offence who, as an alternative to a prison sentence, were ordered by the trial court to be detained for psychiatric treatment under section 37 of the 1983 Act ("section 37 patients"). This is the applicants' chosen comparator group. The third category is made up of persons who have been convicted of criminal offences and sentenced to a term of imprisonment and who, at a later date, were transferred from prison to a psychiatric hospital for treatment under sections 47 and 49 of the 1983 Act ("section 47 patients"). In the fourth category are persons who, though convicted of and sentenced for crimes, were not sent to prison but instead placed directly in a psychiatric hospital ("section 45A patients"). The difference between this group and section 37 patients is that the former, in the event that the criteria for detention in hospital are no longer met, will be transferred to prison to serve the remainder of their sentence, with their time in hospital being taken into account. The same applies to those transferred under section 47.

6. The first four applicants are (or were) in the third category.

7. The first applicant was transferred to hospital in May 2005, from where he was released in November 2007 at the completion of his 12-year sentence.

8. The second applicant was convicted of murder in July 1995 and given a mandatory life sentence with a tariff period of 22 years. He was transferred to hospital in January 1996, where, that same month, he tried to kill another patient. He was convicted of attempted murder and made subject to a hospital order under section 37 of the 1983. This did not alter his status as a Section 47 patient however.

9. The third applicant received a mandatory life sentence in February 2001 for murder, with a tariff of 19 years. He was transferred to hospital in October 2002.

10. The fourth applicant received an automatic life sentence in June 2003 for the offence of grievous bodily harm, his second serious offence. The tariff set was 5 years and 23 days. He was subsequently transferred to hospital.

11. The last applicant is part of the fourth category. He was convicted of serious sexual offences in March 1999, receiving a life sentence with a

minimum term of 10 years. He did not go to prison, but was immediately placed in hospital.

12. The legal basis for a person's detention under the 1983 Act has consequences for their social security entitlements.

13. As a general rule dating back many years and now contained in section 113 of the Social Security Contributions and Benefits Act 1992, prisoners are not entitled to social security benefits during the time that they are serving their sentence of imprisonment. This exclusion does not apply to civil patients or to section 37 patients, since these are not subject to a sentence of imprisonment. Previously, patients in these two categories were entitled to receive all those benefits for which they were otherwise eligible, both non means-tested and means-tested. Regarding the latter type (the relevant benefits for present purposes being Income Support and, for those over the age of 60, Pension Credit), the position was that patients received the relevant benefit at the full rate for up to 52 weeks. Beyond that point, benefit was considerably reduced, or down-rated, to the "pocket money" rate (for example, in April 2006 the full weekly rate of Income Support was GBP 56.20 and the lower rate was GBP 16.40). The down-rating rule was abolished on 10 April 2006 when the Social Security (Hospital In-Patients) Regulations 2005 (the "2005 Regulations") entered into force. Both categories of patient now receive the relevant means-tested benefit at the full rate throughout their stay in hospital, whatever the duration. The change was made because the Government recognised the positive therapeutic effect of preserving patients' social security entitlements in full.

14. The 2005 Regulations also affected section 47 patients. They were already excluded from receiving non means-tested benefits for the duration of their term of imprisonment. However, until 2006 they received the pocket money rate from the moment of their transfer from prison to hospital. Under the 2005 Regulations, they are now excluded from all social security benefits until they reach the earliest date on which they would be entitled to release from prison.

15. As for Section 45A patients, they were previously treated in the same way as section 37 patients in relation to both non means-tested and means-tested benefits. This followed from the fact that although sentenced, they had not acquired the status of a prisoner, being placed directly in a psychiatric hospital. The effect of the 2005 Regulations was to treat them in the same way as section 47 patients, it being considered that they were in a conceptually similar position.

16. Patients excluded from benefits can instead receive weekly payments at the discretion of the Secretary of State, at a rate similar to the pocket money rate previously payable (section 122 of the 1983 Act). The applicants stated that in practice there was some variation, from one hospital to another, in the exact amount paid. The first applicant had been in receipt of GBP 16.40 until his release. The second, third and fifth applicant were in

receipt of GBP 17.90 per week. The fourth applicant, being over the age of 60 and thus otherwise eligible for Pension Credit, received GBP 21 per week.

17. The applicants were among thirteen persons who brought judicial review proceedings under section 7 of the Human Rights Act 1998, relying on Article 1 of Protocol No. 1 read together with Article 14 of the Convention. They contended that the 2005 Regulations were discriminatory and therefore unlawful.

18. With one exception that is not relevant to this case, their claims were dismissed by the Administrative Court in a judgment of 13 March 2009. In the proceedings, it was common ground that the case fell within the ambit of Article 1 of Protocol No. 1 and that Article 14 of the Convention therefore applied. The Secretary of State accepted for the sake of argument, but without conceding the point, that the applicants could be said to have "other status" within the meaning of Article 14. The parties further accepted that this status was not one of those that, under the case-law of this Court, called for very weighty reasons to justify differential treatment. The judge, however, considered that since the case concerned prisoners and patients suffering from serious mental illness, stronger justification was needed than in ordinary social welfare cases. He stated:

> "...[T]ransferred patients have all been sentenced to a term of imprisonment by a court, by contrast with those made subject to a hospital order or those who are civil detainees. That means that in such cases a court has determined a minimum period of loss of liberty in respect of each of the categories of transferred patient represented by the claimants, amongst whom there are prisoners serving life sentences, determinate sentences and who are subject to section 45A directions. To that extent the prisoners have been found to be culpable for their crimes. In cases of non-determinate sentences, the Court has additionally decided that the loss of liberty should endure until it is safe to release the person concerned back into society. The Secretary of State has decided as a matter of policy that whilst a prisoner is deprived of his liberty in consequence of a sentence of imprisonment, he shall be treated for benefits purposes in exactly the same way wherever he happens to be detained.
>
> Thus, for the purposes of benefits it matters not whether the detainee is in a penal establishment, a psychiatric hospital or an ordinary hospital. A prisoner may be transferred to an ordinary hospital if he needs treatment for a physical illness, condition or injury. The question is not whether he is being punished at any given moment but whether he remains subject to the sentence of the court. Were it not for the mental disorder, the person concerned would be in prison serving the sentence imposed by the court."

19. The judge then considered the additional arguments put forward by the Secretary of State for the difference in treatment – removing the anomaly between the different types of benefit, administrative efficiency and cost savings, public confidence in the fairness of the benefits system, and clarity and ease of application of the rules that promoted legal certainty. He did not consider that these added anything to the central argument in favour of the rule. He stated:

> "In the course of submissions made by both parties there was a tendency to argue that transferred patients were the same as patients, on the one hand, or prisoners, on the other. The reality is that they share some characteristics of both, as was eventually accepted by both parties. That reality demonstrates that the Secretary of State was confronted with a policy choice in deciding how to treat them for the purposes of benefits. He could, without legitimate objection from serving prisoners, have equated them with ordinary patients but equally he was justified in treating them in the same way as prisoners. There is, in my view, a relevant similarity between prisoners and transferred patients, and thus a relevant difference from civil/section 37 patients ... In short, they have been sentenced to a term of imprisonment to which they remain subject. Furthermore, that similarity (or difference) is sufficient to justify different treatment for the purposes of Article 14."

He concluded:

> "There is ... an obvious, relevant difference between the claimants as a group and those with whom they seek to compare themselves, so that their position cannot be regarded as analogous. For these reasons the general challenge under Article 1 of Protocol 1 read with Article 14 fails."

20. The applicants were granted leave to appeal to the Court of Appeal, which was unanimous in dismissing the appeal in a judgment dated 27 January 2010, delivered by Carnwath LJ ([2010] EWCA Civ 18).

21. He noted that the applicants' argument rested on the obvious similarity between the different categories of patients who had been placed in psychiatric care via the criminal system. The main difference was that for section 37 patients the hospital order was made instead of sentence, whereas for the other two groups, it was made in addition to sentence. Save for the fact that section 47 and section 45A patients are liable to be returned to prison following treatment, in all other respects they were treated for the purposes of the 1983 Act in the same way as section 37 patients. He concurred with the reasoning of the High Court, and added two points. First, he regarded as irrelevant the argument that the denial of benefits was tantamount to punishing persons of unsound mind. The applicants had all been determined to have sufficient mental capacity to be held guilty of crimes and sentenced accordingly. Second, he distinguished the case from that of *Glor v. Switzerland*, no. 13444/04, ECHR 2009, since it did not concern different treatment based on disability or degree of disability, but the difference between prisoners and non-prisoners. The judgment continued:

> "... I am not persuaded that the appropriate test is affected by the fact that those concerned are mentally vulnerable. There is no threat to their basic living or treatment needs. The debate concerns solely the claim to additional payments, allowed to civil patients to aid their rehabilitation. Whether and in what circumstances such payments should be made to prisoners seems to me essentially a matter of social policy, on which the decision of the State is to be respected, short of irrationality (or in the terms of *Stec*, a decision which is "manifestly without reasonable foundation")."

22. The court then considered the position of those serving life sentences who had already served their tariff. It was argued on their behalf that since

they had already completed the punitive element of their sentence, and were now detained on the basis of the risk that they continued to represent to the safety of others, their situation had become materially indistinguishable from section 37 patients. Accordingly, there was no longer any justification for treating the two groups unequally. Moreover it was likely that these patients would never return to prison, but be rehabilitated through the mental health system. The judgment stated:

> "I accept that the practical differences between the section 45A/47 and the section 37/41 regimes may seem even narrower when one is dealing with post-tariff lifers. However, as was recognised by Lord Neuberger, social policy may be 'something of a blunt instrument' (...). The line has to be drawn somewhere. Once it is accepted that the distinction between prisoners and non-prisoners is in itself justifiable, I see nothing irrational in the line drawn in this case."

23. The applicants' appeal was joined to another case about social security entitlements, brought by transferred prisoners (who are not party to the present application) who had served the tariff period of their life sentences. This raised an issue of statutory construction, namely whether, as they contended, the appellants were entitled to receive benefits as from the completion of the tariff period. The Court of Appeal ruled that this was the correct interpretation of the law. In consequence of this, the Social Security (Persons Serving a Sentence of Imprisonment Detained in Hospital) Regulations 2010 (the "2010 Regulations") were introduced. The effect of these is that section 45A and section 47 patients subject to a life sentence or other indeterminate sentence do not have their entitlement to benefits restored until the date on which the Parole Board directs their release.

24. By letter of 8 September 2010 the Legal Services Commission informed the lawyer of the second to fifth applicants that it would not make funding available for an appeal to the Supreme Court as it considered that it had poor prospects of success.

B. Relevant domestic law

25. The Mental Health Act 1983 provides as relevant:

> "**Section 37**
>
> (1) Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, and the conditions mentioned in subsection (2) below are satisfied, the court may by order authorise his admission to and detention in such hospital as may be specified in the order or, as the case may be, place him under the guardianship of a local social services authority or of such other person approved by a local social services authority as may be so specified.
>
> ...
>
> (2) The conditions referred to in subsection (1) above are that -

(a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from mental disorder and that either -

(i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and appropriate medical treatment is available for him; or

(ii) in the case of an offender who has attained the age of 16 years, the mental disorder is of a nature or degree which warrants his reception into guardianship under this Act; and

(b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section."

In the case of *R v. Birch* (1989), the Court of Appeal explained the purpose of this provision as follows:

"In general the offender is dealt with in a manner which appears, and is intended to be, humane by comparison with a custodial sentence. A hospital order is not a punishment. Questions of retribution and deterrence, whether personal or general, are immaterial. The offender who has become a patient is not kept on any kind of leash by the court, as he is when he consents to a probation order with a condition of inpatient treatment. The sole purpose of the order is to ensure that the offender receives the medical care and attention which he needs in the hope and expectation of course that the result will be to avoid the commission by the offender of further criminal acts"

The other relevant provisions of the 1983 Act are:

"**Section 45A**

(1) This section applies where, in the case of a person convicted before the Crown Court of an offence the sentence for which is not fixed by law -

(a) the conditions mentioned in subsection (2) below are fulfilled; and

(b) the court considers making a hospital order in respect of him before deciding to impose a sentence of imprisonment ('the relevant sentence') in respect of the offence.

(2) The conditions referred to in subsection (1) above are that the court is satisfied, on the written or oral evidence of two registered medical practitioners -

(a) that the offender is suffering from mental disorder;

(b) that the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment; and

(c) that appropriate treatment is available for him.

(3) The court may give both of the following directions, namely -

(a) a direction that, instead of being removed to and detained in prison, the offender be removed to and detained in such hospital as may be specified in the direction (in this Act referred to as a 'hospital direction'; and

(b) a direction that the offender be subject to the special restrictions set out in section 41 above (in this Act referred to as a 'limitation direction'.

...

Section 47

(1) If in the case of a person serving a sentence of imprisonment the Secretary of State is satisfied, by reports from at least two registered medical practitioners -

(a) that the said person is suffering from mental disorder; and

(b) that the mental disorder from which that person is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment; and

(c) that appropriate medical treatment is available for him;

the Secretary of State may, if he is of the opinion having regard to the public interest and all the circumstances that it is expedient so to do, by warrant direct that that person be removed to and detained in such hospital as may be specified in the direction; and a direction under this section shall be known as 'a transfer direction'.

...

(3) A transfer direction with respect to any person shall have the same effect as a hospital order made in his case."

Where a transfer direction is made, the Secretary of State may make a 'restriction direction' imposing the same 'special restrictions' as under section 41: s 49. By section 50, where following a transfer direction and restriction direction under 47 (or the equivalent under s 45A) the Secretary of State is notified by the responsible clinician before his 'release date' that he no longer requires treatment, he may direct his remittal to prison for the sentence to continue as before. For this purpose 'release date' is defined as -

'...the day (if any) on which he would be entitled to be released (whether unconditionally or on licence) from any prison or other institution in which he might have been detained if the transfer direction had not been given; and in determining that day there shall be disregarded -

(a) any powers that would be exercisable by the Parole Board if he were detained in such a prison or other institution, and

(b) any practice of the Secretary of State in relation to the early release under discretionary powers of persons detained in such a prison or other institution."

COMPLAINT

26. The applicants complained that their exclusion from the relevant benefits amounted to unjustified discrimination.

THE LAW

I. JOINDER

27. Given their similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 14

28. The applicants argued that denying them the social security benefits that are paid to other patients being treated under the 1983 Act was contrary to Article 14, taken with Article 1 of Protocol No. 1.

29. Article 14 provides:

> "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."

30. Article 1 of Protocol No. 1 provides, so far as relevant:

> "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."

A. Submissions of the parties

31. The Government first observed that the fourth and fifth applicants, whose ineligibility for means-tested benefits derives from the 2010 Regulations rather than the 2005 Regulations, had not exhausted domestic remedies, since they had not sought judicial review of the later regulations. However, in view of the Court of Appeal's ruling on the 2005 Regulations, it was likely that a similar challenge to the 2010 Regulations would have failed too. For this reason, the Government did not intend to raise an objection based on the non-exhaustion of domestic remedies.

32. Rather, the Government considered the applicants' complaint to be manifestly ill-founded. Their disqualification from benefit did not, as they claimed, arise out of their status as persons suffering from mental disability, since other patients under the 1983 Act, suffering from a similar disability, were entitled to payment of benefit. As the domestic courts had stated, the exclusion from benefits was due to their status as prisoners. It could not therefore be said that the applicants were in an analogous position to other patients, and thus entitled to similar treatment.

33. The Government argued in the alternative that the fact that the applicants were under sentence provided an objective justification for treating them differently from other mental patients. A distinction on this ground was not contrary to Article 14. Since the status of prisoner was not an especially sensitive one, in contrast to race or ethnic origin, a difference in treatment based on it did not require weighty justification. Furthermore, a wide margin of appreciation should be allowed, given that the issue of social security entitlements was part of the country's economic and social strategy. The Government pointed to two overarching reasons for excluding serving prisoners from the social security system. The first was that to allow a prisoner to continue in receipt of benefits would amount to double provision, since their essential material needs were already met. The second was that loss of benefits was an aspect of punishment. The policy was that wherever the prisoner served sentence – in prison, in a psychiatric hospital or another clinical establishment – entitlement to benefits was lost during the currency of sentence. That was a reasonable policy choice. It was not unreasonable to treat the applicants differently from section 37 patients, for while the latter were subject to compulsory treatment for their illness, they were not subject to punishment. The applicants, in contrast, were offenders. A section 47 transfer could take place years after the crime and have no connection to it. As for section 45A, the very purpose of the provision was to permit a hybrid disposal of the case, combining psychiatric treatment with a sentence that reflected the offender's degree of culpability. There was also a difference in effect between a hospital order under section 37 and a custodial sentence. In the former case, the person was not subject to any minimum term and so had to be released as soon as they no longer fulfilled the conditions for detention under the 1983 Act. Those who had been sentenced normally spent a specified minimum time in prison, and could be returned to prison following treatment to serve the remainder of sentence. This justified treating the applicants in the same way as serving prisoners and differently from other patients under the 1983 Act. There were legitimate objectives behind the 2005 Regulations, namely promoting administrative efficiency and reducing costs. The abolition of the down-rating rule had been justified in that it simplified the administration of patients' welfare entitlements. To have maintained the down-rated level for transferred prisoners would have been very complex and therefore disproportionately expensive. To have paid them the full rate would have increased costs and led to administrative complications as prisoners were moved into and out of hospital. The Government had therefore acted proportionately in pursuing both objectives. Moreover, the applicants were in receipt of a modest sum each week to cover their personal expenses, and were maintained in hospital at public expense.

34. The applicants submitted, and the Government did not dispute, that as the case concerned social security, it came within the ambit of Article 1

of Protocol No. 1 and thus Article 14 applied. Recalling that this Court had already recognised the status of prisoner for the purposes of Article 14, the applicants argued that, as transferred prisoners, they had the additional features of mental illness and being subject to a specific statutory regime that curtailed their liberty and other rights. The difference in treatment was based on this to a decisive extent. They acknowledged that they were not in a totally identical situation to section 37 patients, given that the applicants were liable to be returned to prison if and when their treatment came to an end. However, in practice many if not all transferred patients would not return to prison; their eventual release would be directly from hospital. Apart from this, under the 1983 Act their situation was the same as that of other detained patients, including the same enforceable right to aftercare. In other words, the situations were relevantly similar, and the differences were not such as to prevent the analogy being drawn. While a comparison could also be made with prisoners, it would not be relevant to their complaint of discrimination *vis-à-vis* fellow patients. They had in common with section 37 patients the fact that both groups had been found guilty of crimes. The application of section 37 or section 47 to a person could be a mere matter of timing, depending on whether the symptoms of their condition manifested themselves at the time of trial or later on in prison. While prisoners lost the right to benefit as part of their punishment, such a consideration was neither relevant nor appropriate with respect to a person recognised as suffering from serious mental disorder, for as long as that disorder persisted. The importance of preserving welfare entitlements with a view to the patient's eventual discharge was no less important for those transferred from prison. Withholding benefits was thus disproportionately prejudicial for the applicants.

35. Since the difference in treatment was partly based on mental disability, that is to say concerned a disadvantaged and vulnerable minority characterised by their sense of inferiority and powerlessness, the respondent State's margin of appreciation must accordingly be narrower, and the difference in treatment called for strong justification. It was of no consequence that the time the applicants spent in hospital was deducted from their sentence. It would be inequitable to do otherwise, and that fact could not confer a punitive character on the applicants' stay in hospital, which was curative only. The applicants rejected the double provision argument – it could not justify denying them payments when section 37 patients, whose basic material needs were also covered, retained their entitlements. They also rejected the argument that the 2005 Regulations were intended to correct an anomaly regarding entitlement to means-tested and non means-tested benefits; they considered that Article 14 entitled them to receive both kinds on the same footing as other patients. Considerations of administrative efficiency could not in themselves justify discrimination. As for considerations of cost, the number of persons concerned (which

official figures place at approximately 800) meant that allowing them to receive social security benefits could not be regarded as very costly. Nor could the situation be defended by reference to public confidence in the benefits system, since this could not justify an inherently unfair practice. The provision of pocket money to the applicants did not alter the fact that they had been excluded from the social security system and thus placed in a worse situation than other patients.

36. Concerning the fourth and fifth applicants specifically, it was argued that their status as post-tariff life prisoners was a distinct one. There was even less justification for denying them benefit. Having served the punitive part of their sentence, their continuing detention was based on the risk they represented to society. Yet the danger they posed arose out of their mental illness; in this respect their situation was materially indistinguishable from that of section 37 patients. Moreover, the overwhelming likelihood was that they would not return to prison - their eventual release would be directly from hospital.

B. The Court's assessment

37. As a preliminary point, the Court observes that application no. 54466/10 was lodged on 9 September 2010. In submitting their application on that date, which is outside of the six-month time-limit set down in Article 35 of the Convention, the applicants concerned referred to earlier correspondence with the Court's Registry, which occurred within the six-month period. However, as there is no trace in the case-file of such earlier correspondence and as the date of filing must therefore be taken to be the date indicated above, the question arises whether the application in question was lodged within the six-month period. Nevertheless, the Court does not consider it necessary to give a specific ruling on this question since, in any event, both applications are inadmissible for another reason.

38. It was not in dispute between the parties that social security benefits fall within the ambit of Article 1 of Protocol No. 1, so that Article 14 is applicable to this case (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 39, ECHR 2005-X, and *Carson and Others v. the United Kingdom* [GC], no. 42184/05, §§ 63-65, ECHR 2010). Nor did they disagree that, in view of the relevant case-law, the status of prisoner is covered by the term "other status" in Article 14 (*Shelley v. the United Kingdom*, no. 23800/06, 4 January 2008; *Clift v. the United Kingdom*, no. 7205/07, §§ 55-63, 13 July 2010; *Stummer v. Austria* [GC], no. 37452/02, §90, ECHR 2011).

39. As the Court observed in *Shelley*, although prisoners are deprived of their liberty they do not forfeit the remainder of their Convention rights. However, the manner and extent to which they may enjoy those other rights will inevitably be influenced by the prison context. The Court has accepted

that, for the purpose of complaints of discrimination, prisoners may seek to compare themselves to other categories of the population. The exact context will be important, however. Thus in *Stummer*, the Court accepted that a working prisoner was in a relevantly similar position to the rest of the working population as regards affiliation to the old-age pension scheme. Yet it did not allow the comparison in relation to health and accident insurance, nor between a prisoner of pensionable age and other pensioners (at § 95). Whether or not a prisoner can claim to be in an analogous position will therefore depend on the subject-matter of his complaint.

40. While the applicants asserted that the correct comparison to be drawn in this case was with other detained patients, the Court considers that, as was observed by the High Court, in reality the applicants have significant elements in common both with other patients and other prisoners. A meaningful comparison can be made in each direction. Like section 37 patients, the applicants require treatment for relatively severe mental disability or disorder, and have been placed in hospital via the criminal process. At the same time, and in common with serving prisoners, the applicants have not only been convicted of very serious criminal offences but also found to be deserving of the punishment of a substantial period of incarceration. While their stay in hospital undoubtedly serves a curative purpose, and not a punitive one, as a matter of domestic law they remain under sentence of imprisonment. For the Court, it is not without significance that time spent in hospital counts towards service of the sentence of imprisonment. It regards this as not only a matter of elementary fairness, but as following logically and consistently from the patient's position in law. That persons in this group might in the end spend the greater part of their sentence in hospital, and ultimately be released from there instead of ever returning to prison, does not alter their prisoner status. Even accepting, as the applicants argued, that in all other respects they are under the same legal regime as section 37 patients, the difference between the two groups in terms of criminal-law status cannot be regarded as insignificant or irrelevant.

41. That does not preclude a comparison with other patients, though. As submitted by the applicants, it is sufficient for the purpose of comparison that the two groups be in an analogous situation - the two groups need not be identical (*Clift v. the United Kingdom*, no. 7205/07, § 66, 13 July 2010). Accordingly, in view of the relevant similarities noted above, the applicants may compare their situation to that of the other group of patients. However, as stated in the *Shelley* case, the status of prisoner is "very relevant" to the assessment of compliance with the other requirements of Article 14.

42. As for the other status referred to by the applicants, that of disability, the Court observes that while this is indeed a personal characteristic of each of them, it cannot be regarded as the basis for the difference of treatment at issue in this case. Accordingly, as stated by the Court of Appeal, this case is

to be distinguished from that of *Glor v. Switzerland*, no. 13444/04, ECHR 2009.

43. It is established in the Court's case-law that a difference in treatment between persons in relevantly similar situations will be regarded as discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, and this margin is usually wide 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" (*Stummer*, §§ 87-89). The Court has as well recognised a wide margin of appreciation in questions of prisoner and penal policy (*Clift*, § 73, also *Stummer*, § 101).

44. As already noted above, the difference between the applicants and their chosen comparators is a significant one. Moreover, the Court confirms that in the instant case the margin of appreciation due to the respondent State should be a broad one. It notes in this regard that the most relevant European standard in this field, the 2006 European Prison Rules of the Council of Europe, does not envisage the payment of subsistence benefits of prisoners but only refers to those prisoners who perform work (Rule 26.17, also considered in *Stummer*, § 132).

45. The Court considers that the two justifications put forward by the Government – the avoidance of double provision and the fact that the non-payment of benefits is an aspect of punishment – are each of a certain weight. In particular, the latter must be regarded as inextricably bound up with the applicants' prisoner status which, as already indicated, is a very relevant consideration. The Court accepts as being within the respondent State's margin of appreciation, both as a matter of penal and social policy, the decision to apply a general rule disqualifying convicted prisoners from social security benefits. It follows that the aim of the 2005 regulations, which was to apply this exclusionary rule consistently and to correct the anomaly that saw section 47 patients excluded from some benefits but entitled to others, cannot be said to be manifestly without reasonable foundation. It cannot be said either that fully assimilating these two categories - serving prisoners and section 47 patients - for the purposes of social security is lacking in justification. Rather, it is to be regarded as falling within the range of permissible choices open to the domestic authorities and compatible with Article 14 of the Convention.

46. Nor does the Court discern any failure to respect the requirement of proportionality. The exclusion is no broader than necessary, being coterminous with the sentence of imprisonment. In the case of a determinate sentence, those detained beyond what would normally have been the date of release have their entitlements restored, placing them on the same footing as other detained patients. Until such time, the applicants' essential needs, material and medical, are met in any event; the non-payment of subsistence benefits does not leave them without any means of subsistence. Also relevant is the fact that the applicants receive an allowance to meet their incidental expenses. Even if this is a discretionary payment, the applicants did not suggest that it had ever been withheld. That there may be some slight variation between hospitals in the exact amount paid out weekly does not diminish the relevance of this measure.

47. As for the specific submissions made on behalf of the fourth and fifth applicants, who are subject to a life sentence and have each already served out the minimum term imposed, the Court considers that the significance of their status in criminal law is no less than it is for the other applicants. Their legal position stems directly from the judgment of a criminal court as to the appropriate sentence for the crimes they were found guilty of. As the Court has held in another context, the Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes (*Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, §§ 104-16, ECHR 2013 (extracts)). Accordingly, while the circumstances of the fourth and fifth applicants are different, the Court does not consider that a different analysis is required.

48. The considerations set out above lead the Court to conclude that the difference of treatment complained of does not constitute discrimination contrary to Article 14 of the Convention. Accordingly, the applications must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 21 May 2015.

Françoise Elens-Passos
Registrar

Guido Raimondi
President