



**Ruling on the Reference of Points of law by the
Supplementary Benefits Appeal Tribunal**
Royal Court
11th December 2018

**JUDGMENT
48/2018**

Ruling on the Reference of Points of law by the Supplementary Benefits Appeal Tribunal

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Ruling on the Reference of Points of law by the Supplementary Benefits Appeal Tribunal

Hearing: 7th November 2018

Decision handed down: 11th December 2018

Before: Richard James McMahon, Esq., Deputy Bailiff

The Appellant before the Tribunal did not appear

Counsel for the Administrator: Advocate R. Gist

Cases, Texts & Legislation referred to:

The Social Insurance (Guernsey) Law, 1978

The Income Support (Guernsey) Law, 1971

The Income Support (Implementation) Ordinance, 1971

The Supplementary Benefit (Appeals and References) (Guernsey) Order, 1971

The Income Support (Guernsey) Law, 2017

The Supplementary Benefit (Guernsey) (Amendment) Law, 2014

Owen v Chief Adjudication Officer (unreported, 24 April 1999)

The Income Support (General) Regulations 1987

Matheson v States Housing Authority (1998) 26.GLJ.82

The Law Relating to Social Security

The Human Rights (Bailiwick of Guernsey) Law, 2000

Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms

Human Rights Practice

Steck v United Kingdom (2005) 41 EHRR SE18

R (HC) v Secretary of State for Work and Pensions [2018] 2 All ER 1

Introduction

1. The Supplementary Benefit Appeals Tribunal is currently hearing an appeal against a decision of the Administrator to the Committee for Employment and Social Security (an office-holder appointed pursuant to section 94 of the Social Insurance (Guernsey) Law, 1978, as amended). It has exercised the power conferred upon it by section 14(2) of the Income Support (Guernsey) Law, 1971, as amended (“*The tribunal may refer to the Royal Court for decision*”).

any question of law arising in connection with the determination of an appeal by the tribunal under this section in such manner and within such period as shall be directed by Order of the Royal Court"). Having done so, the appeal proceedings before the Tribunal are currently stayed in accordance with section 18(3) of the Income Support (Implementation) Ordinance, 1971, as amended.

2. The Tribunal has submitted a statement of case dated 24 September 2018, prepared in accordance with para. 1 of the Supplementary Benefit (Appeals and References) (Guernsey) Order, 1971. (It seems that the effect of the Income Support (Guernsey) Law, 2017 has not resulted in the citation of this measure being changed prospectively in the same way as it has for what was previously the suite of legislation relating to supplementary benefit, and which is now known as income support.)
3. The statement of case explains that the Appellant before the Tribunal is aggrieved at a decision of the Administrator to calculate the Appellant's entitlement to supplementary benefit by reference to what the Appellant received from the Department for Work and Pensions (DWP) following the Appellant leaving the United Kingdom and re-locating, and so returning after a number of years, to Guernsey on 12 January 2018. It relates to a Personal Independence Payment ("PIP") received on 25 January 2018 of £463.61. The Appellant contends in the notice of appeal to the Tribunal that this should not have been treated as a payment in advance for the four weeks following its receipt and, in any event, it should be equated to a payment of severe disability benefit in Guernsey, which is expressly disregarded when calculating the entitlement to supplementary benefit. The appeal is made pursuant to section 14(1)(c) of the 1971 Law, being from "*a decision of the Administrator as to the amount of any supplementary benefit to be paid*" to the Appellant. The statement of case summarises these grounds of appeal as:

"1. *The PIP, which was paid on 15th January 2018, was in respect of the period from 25th December 2017 to 15th January 2018, and should not have been treated by the Administrator as income for the period after 15th January 2018.*

2. *Alternatively, the PIP should have been disregarded in calculating [the Appellant's] entitlement to Supplementary Benefit, since it was effectively the same as Severe Disability Allowance in Guernsey, which would be disregarded."*

4. The reference raises three questions (adopting the paragraph numbering used in the statement of case):

"11. *On the first ground of appeal, the Tribunal seeks a declaration from the Royal Court as to whether the practice of treating income received in arrears as resources for the period ahead should be considered by the Tribunal as binding the Administrator in all circumstances. ...*

16. *On the second ground of appeal, the Tribunal refers to the Royal Court the question whether the decision made by the Administrator, namely to refer to the Committee his decision regarding the Appellant's entitlement to Supplementary Benefit, has taken the Appellant's complaint outside the jurisdiction of the Tribunal.*

17. *Alternatively, if the result of the Committee's meeting was such that the Appellant still has a valid appeal against a decision of the Administrator, whether the Tribunal would be able to find that the Administrator was wrong in referring the decision to the Committee without making a recommendation that they should increase the Appellant's award of benefits."*

These issues largely involve questions of statutory interpretation in respect of which the scheme of the legislative regime as it operated at the relevant time falls to be considered.

5. The hearing of this reference took place on 7 November 2018. The Appellant before the Tribunal did not attend. However, I proceeded to hear from Advocate Gist, who appeared on behalf of the Administrator, because I was satisfied that the Appellant was aware of the hearing and of the fact that para. 6 of the 1971 Order afforded the Appellant the right to attend and potentially to be heard and so had chosen not to exercise that right. In the light of the submissions made by Advocate Gist, I then adjourned the hearing to enable him to lodge further written submissions on some issues I raised with him. In doing so, I also directed that any written submissions from the Appellant on these points, or generally, could be made by 3 December 2018. In the event, the Appellant has chosen not to make any submissions on this reference at all.
6. This is my reserved judgment on the questions referred by the Tribunal. Paragraph 8 of the 1971 Order requires it to be in writing, sealed by the Greffier and then transmitted to the Registrar of the Tribunal.

Overview of legislative framework

7. The language of the 1971 Law has been changed by the 2017 Law. However, at the time of the claim made by the Appellant and determined by the Administrator, it was still a claim for a supplementary benefit and so I will refer to the provisions before their amendment by the 2017 Law. Accordingly, section 1 of the 1971 Law afforded a right to receive supplementary benefit if a person's "*resources are insufficient to meet his requirements*" and (as amended by the Supplementary Benefit (Guernsey) (Amendment) Law, 2014, as it was at the time of its enactment) section 3 provided:

"(1) The question whether an applicant for a supplementary benefit is a person to whom this Law applies, whether a person to whom this Law applies is in need of a supplementary benefit, and the amount of any such supplementary benefit to be paid to him, shall, subject to the provisions of this Law or of any Ordinance made hereunder, be decided by the Administrator.

(2) The States shall, from time to time, make provision by Ordinance for the computation of requirements and resources for the purposes of this Law. ...

(4) An Ordinance made under the provisions of this section may provide that certain assets set out therein shall, to the extent and subject to the conditions set out therein, be disregarded in computing resources."

Accordingly, it is the 1971 Ordinance that deals with the way the Administrator shall compute the amount of a supplementary benefit.

8. Section 1 of the Ordinance provided at the material time:

"Subject to the succeeding provisions of this Ordinance, the question of the amount of any supplementary benefit to be paid to an applicant shall be determined by the

Administrator on a weekly basis and shall be so determined in accordance with the provisions of the First Schedule to this Ordinance.”

The role of the Committee in this regard is set out in section 2:

“The Committee may, notwithstanding the provisions of the last preceding section, direct the Administrator to increase or reduce the amount of any supplementary benefit which would otherwise be payable if the Committee is satisfied that such an increase or reduction would be just and equitable in all the circumstances.”

9. Section 7 of the 1971 Law contains a different type of direction that can be given by the Committee to the Administrator if it is of the opinion that the claimant’s need of a supplementary benefit is the result of incapacity due to his own misconduct or that the person has failed without good cause to improve his physical or mental condition or has refused or neglected to apply for or to take steps to enforce any matrimonial order or affiliation order which that person is entitled to apply for or to take steps to enforce or has refused or neglected to take such other steps towards the improvement of his financial circumstances as the Committee may reasonably direct. I doubt, though, that this provision is of relevance to the present proceedings and mention it only because the statement of case is not specific as to the reason the Administrator referred his decision to the Committee. However, by virtue of section 13 of the Law, *“There shall be no appeal from any direction, determination, or decision of the Committee made under any of the provisions of this Law or of any Ordinance made thereunder.”*

10. Pursuant to section 1, para. 1 of the First Schedule to the 1971 Ordinance then provided:

“Subject to the following provisions of this Part of this Schedule, the amount of supplementary benefit to which a person is entitled shall be the amount by which his resources fall short of his requirements, and for the purpose of ascertaining that amount –

- (a) the weekly requirements of any person shall be taken to be the aggregate of such of the amounts specified in Part II of this Schedule as are applicable to his case, provided that the weekly requirements of a person shall be nil where the person’s capital resources exceed the amount of capital resources which may be wholly disregarded under paragraph 13, and*
- (b) the resources of any person shall be calculated in accordance with Part III of this Schedule.”*

It is in para. 11, within that Part III, that the resources to be wholly disregarded are set out as follows:

“There shall be wholly disregarded –

- (a) any sums payable to any person as holder of the Victoria Cross or of the George Cross,*
- (b) any grant by the Committee for Education, Sport & Culture in respect of a person who would be treated as a child for the purposes of the Family Allowances (Guernsey) Law, 1950,*
- (c) the cash value of any free board or free lodging or both which a person may enjoy, not being board or lodging or both which that person is enjoying under and in pursuance of a contract of service,*

- (d) any severe disability benefit granted under the Severe Disability Benefit and Carer's Allowance (Guernsey) Law, 1984,
- (e) any payment made by a third party to a residential home, a nursing home or the Guernsey Cheshire Home on behalf of a person residing in the home in respect of the home's fees to the extent that such payment would otherwise cause that person's income to exceed the limit for the time being prescribed by paragraph 3(2),
- (f) any fostering allowance, other than the contractual element, paid by the Committee for Health & Social Care,
- (g) any relevant allowance,
- (h) any sum payable under the terms and conditions of the employment initiative operated by the Committee and known as the "Back to work bonus",
- (i) any compensation payment made under the *ex gratia* payment scheme administered by the Skipton Fund Limited for the benefit of certain persons suffering from hepatitis C and other persons eligible for payment in accordance with the scheme's provisions,
- (j) the weekly earnings of any person who would be treated as a child for the purposes of the Family Allowances (Guernsey) Law, 1950,
- (k) maternity grant or adoption grant granted under the Social Insurance (Guernsey) Law, 1978."

For the purpose of para. 11(g), "relevant allowance" is defined in section 26 as "a residence order allowance or adoption allowance paid under any scheme for payment of such allowance approved by the States of Guernsey Committee for Health & Social Care". By virtue of para. 12, some capital resources "may be disregarded for such period as the Administrator in his discretion so directs", but this is not relevant to the decision the Appellant has appealed.

11. Paragraph 15 of the First Schedule deals with weekly earnings, but sub-para. (2) clarifies that the "net weekly earnings shall be the net remuneration or profit calculated on a weekly basis, derived by him from any occupation". The PIP received by the Appellant is not derived from an occupation and so is not covered by this paragraph. Sub-paragraph (3) includes certain aspects (which perhaps might not otherwise ordinarily be treated as "earnings") and includes (at para. 15(3)(b)) "any carer's allowance payable in accordance with the Severe Disability Benefit and Carer's Allowance (Guernsey) Law, 1984". Sub-paragraph (2) (dealing with net weekly earnings) is expressly subject to sub-para. (4), which provides:

"Where a person's earnings for any week are not immediately ascertainable, sub-paragraph (2) shall not apply and his net weekly earnings for that week shall be calculated or estimated in such manner and on such basis as the Administrator considers appropriate, having regard to all the circumstances of the case."

12. For the sake of completeness, I will refer to the other elements of Part III. Paragraph 16 provides for £20 a week of certain forms of income to be disregarded. They relate to payments derived from military service or industrial disablement benefit and so are not relevant to the Appellant's case. Paragraph 17 provides:

"(1) There shall be disregarded, subject to sub-paragraph (2), £10 a week of the income taken into account except so far as it consists of earnings or of any of the following, that is to say –

- (a) any weekly benefit, other than industrial disablement benefit, payable under the Social Insurance (Guernsey) Law, 1978,

- (b) *any weekly benefit payable under the social insurance legislation of any country, other than Guernsey,*
- (c) *any maintenance payable to a person in respect of himself or a child by that person's spouse or former spouse,*
- (d) *any payment by a man in respect of a child of whom he is the putative father and any payment by that man to the mother of that child,*
- (e) *any allowances payable under the Family Allowances (Guernsey) Law, 1950.*

(2) *Where any amount is to be disregarded under paragraph 16 then, if that amount equals £20 a week no further amount shall be disregarded under this paragraph and, if it is less than £20 a week, the amount disregarded under this paragraph shall not, together with that amount, exceed £20 a week."*

Paragraph 18 provides:

"If a person has –

- (a) *deprived himself of any resources, or*
 - (b) *neglected to claim, waived or abandoned any right or benefit to which he is or may be entitled*
- and the effect of the deprivation, neglect, waiver or abandonment, as the case may be, is to secure a supplementary benefit or increase the amount thereof, those resources and that right or benefit may be taken into account as if they were still his or he were in receipt of any sum of money due under or pursuant to or representing that right or benefit."*

Administrator's submissions

13. It is against that legislative backdrop that the Administrator argues that he has properly determined the amount of the supplementary benefit payable to the Appellant. Whilst he recognises that there is nothing express in the legislation that earnings or benefits received are treated as a resource for the week or weeks ahead, the approach is one of long-standing custom and practice to compute resources in that fashion. He offers the example of how, if pay is received in arrears, it gets used for the weeks after it is received even though paid in respect of the weeks prior to receipt for the simple reason that the resource was not in the hands of the recipient any earlier. The Administrator does not accept the Appellant's contention that the PIP in question can be equated to receipt in Guernsey of a Severe Disability Allowance, believing them to be payable subject to different criteria.
14. As explained in the statement of case, the Administrator has referred to *Owen v Chief Adjudication Officer* (unreported, 24 April 1999), a decision of the Court of Appeal of England and Wales. The transcript explains that the effect of the Income Support (General) Regulations 1987 was to treat the benefit claimant as having a continuing income for another four weeks after receipt of the last payment relating to his employment before it was terminated. Mummery LJ noted that *"Even though the sick pay was paid in arrears it is projected forwards for the purpose of determining entitlement to income support"*, before adding *"the fact that the regulation produces a hard case or an anomaly does not necessarily make it irrational."* The decision turned on whether or not the relevant statutory provision

was ultra vires the enabling power under which it was made. The Court of Appeal shared the view of the Commissioner to whom the appeal had initially gone and by whom it had been rejected that the state of affairs was unsatisfactory, although Advocate Gist informed me that the 1987 Regulations have not since been amended in a way that may have addressed the concerns of the judiciary.

15. In the further written submissions received from Advocate Gist he has provided his comments on the two points I raised with him. In particular, he has undertaken helpful research on the impact of human rights principles to questions of social security benefit, to which I will refer in more detail in due course. In his submission, none of the new material affects the answers to the questions referred by the Tribunal proposed by the Administrator.

The first question

16. There is, in my view, a simple answer to the question posed by the Tribunal in para. 11 of the statement of case. No policy can be regarded as binding, in the sense of producing an outcome from which a decision-maker cannot move. A decision-maker must always be prepared to listen to a contention that the outcome that would be reached through applying a policy should not be reached and decide whether that contention offers good reason to reach a conclusion other than that normally dictated by following settled policy. Whether or not this has happened in this case is a matter for the Tribunal to determine. Although Advocate Gist submitted that the Tribunal has not asked the Court for its view on the policy of the Administrator and so has no power to comment on it, I take the view that to accept that submission would be an unduly restrictive interpretation of the Tribunal's referral power, especially if there were something in the policy that would be objectionable in law. Consequently, I will explain more fully the approaches in law that can be taken in relation to the Administrator's policy.
17. One of the issues on which I invited Advocate Gist's further submissions relates to what the Court of Appeal had to say about policies in *Matheson v States Housing Authority* (1998) 26.GLJ.82 (at page 70E per Beloff JA):

"... I recognise that it is a well established principle of public law, applicable to Guernsey, that a public authority such as the Respondent Housing Authority, can have a policy as long as two conditions are satisfied. The first is that the policy conforms with the law; a policy cannot modify, extend, still less contradict such law. The second is that those who apply the policy are prepared to listen to reasons why it should not be applied in a particular case and in consequence, in appropriate circumstances, to make exceptions to it."

In order to ascertain whether the Administrator's policy conforms with the law, it is necessary to consider how, if at all, the legislative regime deals with calculating the resources of a claimant for this benefit.

18. There are two ways in which to read the provisions of the 1971 Law and the 1971 Ordinance. The first involves giving them a narrow interpretation and the second a broader interpretation. Advocate Gist argues in favour of the broader interpretation.
19. Section 3(2) of the 1971 Law imposes an obligation on the States of Deliberation to make provision by Ordinance for the computation of resources for its purposes and section 3(4) enables such an Ordinance to provide that certain assets as prescribed are to be disregarded in computing resources. Section 1 of the 1971 Ordinance provided at the material time that the

amount of any supplementary benefit is for the Administrator to determine on a weekly basis “*and shall be so determined in accordance with the provisions of the First Schedule*”. The narrow interpretation would mean that if the First Schedule is silent about any matter, it cannot be taken into consideration by the Administrator when calculating the person’s resources. As a result, if the PIP is not a resource of the Appellant, the Administrator’s policy cannot be applied to it at all.

20. Advocate Gist submits that such a narrow interpretation would be artificial. Instead, the content of Part III of the First Schedule should be treated as those matters where there is something explicit about what is included in the calculation or those receipts and assets that are to be disregarded. In respect of other matters, if the ordinary meaning of “resources” is used, and that term is not defined in the legislation, it follows that something received by a person claiming a supplementary benefit must be regarded as a resource available to the claimant against which the individual’s requirements fall to be determined.
21. Advocate Gist has provided a copy of an annotated and consolidated version of the 1987 Regulations as they apply in, eg, England, taken from what appears to be a looseleaf work entitled *The Law Relating to Social Security*. The terminology is different from Guernsey’s income support legislation because it refers to how to calculate income, rather than resources. Regulation 28 provides that the income of a claimant is to be calculated on a weekly basis by determining in accordance with Part V of the Regulations, other than Chapter VI, the weekly amount of that person’s income. The content of Part V, as shown by the *Owen* case, then sets out comprehensively what is and what is not included for this purpose. Thus, in regulation 29, reference is made to earnings derived from employment as an employed earner and income which does not consist of earnings and regulation 30 refers to earnings of self-employed earners. It suffices for the purposes of this reference to note that the content of the legislation in England is very detailed by comparison to the content of the 1971 Ordinance, although there are some aspects where the elements covered have a direct or close correlation (perhaps indicating that there was some common origin of the provisions now found in the First Schedule to the 1971 Ordinance).
22. In my opinion, and having regard to the whole of the 1971 Ordinance, it would be wrong to give the First Schedule the narrow interpretation. Whilst I take the view that it would probably assist to have a fuller set of provisions, perhaps tailored to suit Guernsey’s needs, setting out what is to be regarded as income for the purposes of considering whether what is now income support is needed, I think it is implicit from the scheme of Part III of the First Schedule that benefits received from any source fall to be regarded as income and so as a person’s resources to be taken into account. Looking at para. 17, a weekly benefit payable under the Social Insurance (Guernsey) Law, 1978, as amended, is one of the exceptions to the rule that £10 a week of income is to be disregarded “*except so far as it consists of any earnings*”, etc. As such, I think this shows that the weekly benefit payment is a form of income that is taken into account when calculating a person’s resources. The primary difference between earnings, which are dealt with expressly, and such a benefit is that there is nothing explicitly stating that the benefit is an element of a person’s resources. However, I do not think that the proper way to interpret the provisions would be to ignore benefits received. It follows, therefore, that in my view it would be wrong to conclude that the absence of anything specifying that the benefit is a resource means that it does not get taken into account at all. This principle applies to “*any weekly benefit payable under the social insurance legislation of any country, other than Guernsey*” (para. 17(b)), from which I am satisfied that the Administrator can bring into account a benefit such as the PIP received as part of the Appellant’s resources. If that were not the case, the inclusion of sub-para. (b) would be otiose

and so contrary to the principle that legislation does not include any element that serves no purpose.

23. The next question is whether the PIP, as a resource of the Appellant, can properly be treated as forward-looking in accordance with the Administrator's policy. There is nothing in the legislative scheme that provides that it cannot. Accordingly, applying the *Matheson* guidance, there is nothing for the policy to contradict, or to modify or extend. It will be a matter for the Tribunal as to whether it is rational for the Administrator to have this policy and whether the Appellant has asked the Administrator to depart from the policy and, if so, whether the refusal to do so is also rational. This will involve considering the logic that underpins the policy, which strikes me as being based on common sense: a person cannot make use of a resource until it is received and, in terms of planning how to make ends meet, it appears to be the case that everyone should budget on the basis of when the next tranche of income will become available, working out how to utilise the resources in hand until that time. This seems to be comparable to the approach of how to view earnings as dealt with by para. 15 of the First Schedule.
24. The policy would not, though, matter in the Appellant's case if the terms of para. 11 were interpreted in such a way that it led to the total disregard of the PIP in question. This leads to consideration of the second topic on which I invited Advocate Gist to comment. Section 3 of the Human Rights (Bailiwick of Guernsey) Law, 2000, as amended, requires legislation to be read and given effect, so far as it is possible to do so, in a way which is compatible with Convention rights. Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms protects the peaceful enjoyment of a person's possessions. Advocate Gist has provided some helpful materials on the extent to which social security benefits fall within Article 1 of Protocol 1, which assists me on the question of whether there is any scope to read into the terms of para. 11 of the First Schedule to the 1971 Ordinance equivalent benefits derived from another jurisdiction.
25. The scope of the protection afforded is summarised at para. 15.003 of *Human Rights Practice* as being:

“Article 1 of Prot. No. 1 extends to protect individuals from arbitrary interference by the state with their existing possessions. It nevertheless recognises the right of the state to control the use of, and even to expropriate, the property of individuals in the public interest. The Convention institutions have sought to ensure that any interference with property rights is conducted in a manner which is not arbitrary and which is in accordance with the law. As regards the necessity for the interference, however, the Court and Commission have generally accorded states a wide margin of appreciation.”

I accept Advocate Gist's submission that this wide margin of appreciation is important and that Article 1 of Protocol 1 is not about receipt of the PIP and any effect on it, but rather looking at the decision of the Administrator to reduce the amount of the supplementary benefit payable to the Appellant as a result of treating the amount of the PIP paid as a resource available for each of the following four weeks until it was exhausted. In effect, this involves looking at the supplementary benefit that would otherwise have been payable and treating that reduction as an interference with the Appellant's entitlement to receive that larger amount.

26. A detailed analysis of the position was undertaken by the European Court of Human Rights in *Stec v United Kingdom* (2005) 41 EHRR SE18. There had been divergent lines of authority in respect of contributory and non-contributory benefits before then, but the Court concluded that those differences could no longer be justified. Its reasoning was as follows:

“50. The Court’s approach to Article 1 of Protocol No. 1 should reflect the reality of the way in which welfare provision is currently organised within the Member States of the Council of Europe. It is clear that within those States, and within most individual States, there exists a wide range of social security benefits designed to confer entitlements which arise as of right. Benefits are funded in a large variety of ways: some are paid for by contributions to a specific fund; some depend on a claimant’s contribution record; many are paid out of general taxation on the basis of a statutorily defined status ... Given the variety of funding methods, and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Article 1 of Protocol No. 1. Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter type of system also contribute to its financing, through the payment of taxes.

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

In the light of these comments, I am satisfied that a claim for benefit in Guernsey in principle engages this Convention right to respect for the peaceful enjoyment of property. As a result, the possibility of construing the legislation so that it is compatible with this right also potentially becomes available.

27. General substantive principles concerning the Article are applicable (see para. 54 of the *Stec* case):

“It must, nonetheless, be emphasised that the principles, most recently summarised in *Kopecky v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX, which apply generally in cases under Article 1 of Protocol No. 1, are equally relevant when it comes to welfare benefits. In particular, the Article does not create a right to acquire property. It places no restriction on the Contracting State’s freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme (see, *mutatis mutandis*, *Kopecky* [GC], § 35(d)). If, however, a Contracting State has in force legislation providing for the payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements (*ibid.*).”

There is again reference to the margin of appreciation enjoyed by the State in deciding the finer details of the scheme, provided, of course, that it is operated in a non-discriminatory fashion. As it was put by the UK Supreme Court in para. 32 of *R (HC) v Secretary of State*

for Work and Pensions [2018] 2 All ER 1, “the Strasbourg court has long accepted that the allocation of limited public funds in the social security and welfare context is pre-eminently a matter for national authorities, subject only to the requirement that their decisions should not be ‘manifestly without reasonable foundation’”.

28. Moreover, although not directly relevant to how to construe Guernsey’s legislative framework, Advocate Gist has pointed out that Schedule 9 to the 1987 Regulations as they operate in England, which covers sums to be disregarded in the calculation of income other than earnings, refers in para. 5B(1) to any child tax credit, which is defined in regulation 2 as “a child tax credit under section 8 of *The Tax Credits Act 2002*”. Through this example, I understand him to be advancing the case that the English provisions for income support have certain disregards by reference only to benefits payable under domestic legislation, and there is nothing on the face of the 1987 Regulations relating to any comparable social security benefit received from another jurisdiction. Although it was not put quite as bluntly as this, it amounted to a submission that there is no reciprocity in that jurisdiction to broadening the situations in which income payments received fall to be disregarded in a way that would arise if para. 11 of the First Schedule were to be construed in the manner suggested by the Appellant’s ground of appeal.
29. In my view, the 1971 Ordinance, and particularly the content of para. 11, does not have to be read as if it also extended to disregarding payments received by way of benefits from other jurisdictions. The approach that has been taken is, I think, within the bounds of the margin of appreciation afforded to the States of Guernsey to list those types of payment that can properly be wholly disregarded. In saying that, I note that para. 11(a) (“any sums payable to any person as holder of the Victoria Cross or of the George Cross”) appears as para. 10 of Schedule 9 to the 1987 Regulations (although that paragraph also adds “or any analogous payment”) and there is good reason for making an exception for those who have been decorated at the highest level for gallantry. It would be permissible for the States to decide to extend the ambit of those aspects of a person’s resources that fall to be disregarded when considering whether or not to pay what is now income support (and, if so, in what amount) if they chose to do so. It would amount to there being a willingness to make more public money available to pay what is now income support. However, whether to follow that course is a matter for political judgment, not for judicial development. In the absence of such a choice being made, I do not find that the legislation has to be interpreted in such a way as to introduce that level of equivalence with benefits paid by some other jurisdiction so as to make the operation of the benefit system Convention-compliant. In other words, I do not think that the Administrator was required by section 3 of the Human Rights Law to broaden the interpretation given to para. 11(d) of the First Schedule to the 1971 Ordinance by reading in some additional wording requiring him to wholly disregard the PIP received by the Appellant because it is within Guernsey’s margin of appreciation not to include those receipts by claimants for supplementary benefit (or now income support) of payments from elsewhere, other than those expressly included.
30. Having concluded that there is nothing within the statutory scheme that prevents the Administrator using a policy that monies received are resources for the coming period, even if paid by reference to a previous period, I take the view that the Administrator’s policy is a permissible one in law for him to use. As I have said, how he has used it in the Appellant’s case is a matter for the Tribunal to determine in the light of that answer to the first question it has posed.

The second question

31. During the course of the appeal proceedings, the Administrator decided to refer the decision he had taken in respect of the Appellant to the Committee. The outcome of doing so was that the Committee did not direct the Administrator to alter the amount of supplementary benefit payable to the Appellant. The Tribunal now asks if this process means that the decision about which the Appellant complains is a decision of the Committee rather than the Administrator and so one in respect of which the Tribunal has no jurisdiction. Indeed, had a direction been given, the decision would, in my view, still be that of the Administrator, albeit giving effect to it, and so appealable to the Tribunal in any event.
32. Whilst it is correct that section 13 of the 1971 Law provides that there is no appeal from any direction, determination or decision of the Committee made under any provision of the Law or of any Ordinance made thereunder, what has happened in this case has resulted in there being no direction to the Administrator. The decision in respect of the Appellant remains, therefore, a decision of the Administrator, from which an appeal to the Tribunal lies pursuant to section 14 of the 1971 Law. It is not a determination of the Committee and the only decision made by the Committee was not to give a direction, from which there is no appeal under the terms of the Law.
33. In summary, therefore, the steps taken by the Administrator to inform the Committee of the position and ascertain whether the Committee was minded to give him any direction under the terms of the legislation to which I have already referred has not taken the Appellant's complaint outside the jurisdiction of the Tribunal.

The third question

34. In respect of the Tribunal's alternative to the second question, Advocate Gist points out that section 14 of the 1971 Law provides an exhaustive list of the types of decision of the Administrator that are susceptible to an appeal to the Tribunal. It does not include an Administrator's decision to put a matter before the Committee but without making any recommendation as to what the Committee ought to do.
35. In my view, the Tribunal needs to remind itself of what it is that is being appealed by the Appellant. There is no appeal on the basis that the Administrator fell into error in taking the issue to the Committee without making a recommendation that the Committee should increase the amount of the Appellant's supplementary benefit for the period in question. Were the Appellant to attempt to make such a case, the Tribunal should, in my opinion, decline to entertain it as falling outside the terms of section 14. Further, if the Tribunal were to conclude that the appeal should be allowed on this basis, it seems to me that the Administrator would potentially be able to appeal against that decision for these reasons. What the Tribunal now needs to determine is the appeal made by the Appellant against the decision that was actually taken by the Administrator and to do so, where applicable, in the light of the principles set out in this judgment.

Conclusions

36. For the reasons I have given, I answer the three questions referred to the Court by the Tribunal as follows:
 - (a) The practice of the Administrator treating income received as resources for the period ahead is a policy rather than something set out in statute and so does not strictly bind the Administrator in every case. As a policy, it is not contrary to the statutory framework and so is not objectionable on that basis. It is now for the Tribunal to determine whether or not the approach the Administrator has taken to this policy in the Appellant's case has been appropriate.

- (b) The Tribunal still has jurisdiction to determine the Appellant's appeal, even though the Administrator referred the Appellant's case to the Committee.
- (c) The Tribunal is not able to allow the Appellant's appeal solely by reference to finding that the Administrator should have recommended to the Committee that the amount of supplementary benefit payable to the Appellant should be increased.