30 August 2018

PRESS SUMMARY

In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland) [2018] UKSC 48
On appeal from: [2016] NICA 53

JUSTICES: Lady Hale (President), Lord Mance, Lord Kerr, Lord Hodge, Lady Black

BACKGROUND TO THE APPEAL

Widowed parent's allowance ('WPA') is a contributory, non-means-tested, social security benefit payable to men and women with dependent children, who were widowed before March 2017. Under s 39A Social Security Contributions and Benefits (Northern Ireland) Act 1992 ('s 39A') the widowed parent can only claim the allowance if he or she was married to or the civil partner of the deceased. The issue in this appeal is whether this requirement unjustifiably discriminates against the survivor and/or the children on the basis of their marital or birth status, contrary to article 14 of the European Convention on Human Rights (ECHR) when read with either the right to respect for family life under article 8, or the protection of property rights in Article 1 of the First Protocol (A1P1).

Ms McLaughlin's partner, John Adams, died on 28 January 2014. They were not married but had lived together for 23 years. They had four children, aged 19, 17, 13 and 11 years when their father died. He had made sufficient contributions for Ms McLaughlin to be able to claim WPA, had she been married to him. Her claims were refused by the Northern Ireland Department of Communities. She applied for judicial review of that decision on the ground that s 39A was incompatible with the ECHR.

The judge in the High Court agreed and made a declaration that s 39A was incompatible with article 14 read with article 8. The Court of Appeal, however, unanimously held that the legislation was not incompatible with article 14, read with either article 8 or A1P1. Ms McLaughlin therefore appealed to the Supreme Court.

JUDGMENT

The Supreme Court by a majority of 4 to 1 (Lord Hodge dissenting) allows the appeal and makes a declaration that s 39A is incompatible with article 14 of the ECHR read with article 8, insofar as it precludes any entitlement to WPA by a surviving unmarried partner of the deceased. Lady Hale, with whom Lord Mance, Lord Kerr and Lady Black agree, gives the substantive judgment of the majority. Lord Mance, with whom Lady Hale, Lord Kerr and Lady Black agree, gives a short concurring judgment. Lord Hodge gives a dissenting judgment.

REASONS FOR THE JUDGMENT

Article 14 secures the rights and freedoms of the ECHR without discrimination. It raises four, somewhat overlapping, questions:

Do the circumstances fall within the ambit of one or more of the Convention rights?

A breach of a right is not necessary, but the facts must fall within the ambit of one or more of them. It is clear that denial of social security benefits falls within the ambit of A1P1 **[16]**. WPA also falls within article 8 as it is a positive measure by the state demonstrating its respect for family life **[19]**.

Has there been a difference in treatment between two persons in analogous situations?
In a decision in 2000, *Shackell v United Kingdom* (App 45851/99), the European Court of Human Rights (ECtHR) ruled inadmissible a complaint that a denial of widow's benefits to unmarried surviving partners was discriminatory, holding that marriage conferred a special status and was different from cohabitation. In the present case, however the relevant facet of the relationship is not the public commitment but the co-raising of children **[26]**. The purpose of WPA is to benefit the children. It makes no difference to the children whether or not the couple were married to one another, but their treatment is very different **[27]**. Lord Mance considers that the reasoning of the ECtHR in *Shackell* failed to address the clear purpose of the widow's benefits in that case, namely to cater for the interests of any relevant child, and *Shackell* should not therefore be followed by the Supreme Court **[49].**

Is that difference of treatment on the ground of a relevant status?
It is well established that being unmarried is a status for the purpose of Article 14, just as being married can be **[31]**.

Is there objective justification for that difference in treatment?
This question depends on whether it pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved **[32]**. The promotion of marriage and civil partnership is a legitimate aim **[36]**, and WPA is part of a (small) package of social security measures which privileges marriage and civil partnership **[37]**. However, it was not a proportionate means of achieving this legitimate aim to deny Ms McLaughlin and her children the benefit of Mr Adams' contributions because they were not married to each other. WPA exists because of the responsibilities of the deceased and the survivor towards the children, and its purpose is to diminish the financial loss caused to families with children by the death of a parent **[39]**. This conclusion is reinforced by the international obligations to safeguard children's rights, to which the UK is party, which inform the interpretation of the ECHR rights; and it is noteworthy that in most other member states survivor's pensions are paid directly to the children irrespective of birth status **[41]**.

Remedy
The exclusion of all unmarried couples from receipt of WPA will not always amount to unjustified discrimination, but it will inevitably do so in a legally significant number of cases, which is sufficient to require the court to make a declaration of incompatibility under s 4(2) of the Human Rights Act 1998. It will be for the relevant legislature to decide whether or how the law should be changed **[43]**.

Lord Hodge, dissenting, would have held that the purpose of the provision of WPA is to assist the survivor rather than a benefit for bereaved children **[58, 73-78]**. The circumstances did not justify departing from the consistent line of authority from the ECtHR confirming the difference of status between marriage/civil partnership and cohabitation **[64]**, so the situations were not analogous **[79]**. Even had they been, the difference in treatment in the provision of a contributory rather than means-tested benefit, not directed to need, was not manifestly disproportionate, but objectively justified **[85-87]**.

References in square brackets are to paragraphs in the judgment