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Case analysis: *In the matter of an application by Siobhan McLaughlin for judicial review* [2016] NIQB 11

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The High Court in Northern Ireland has held that the denial of a widowed parent's allowance on the death of the applicant's partner on the grounds that the couple were not married unlawfully discriminated against her. The refusal of a bereavement payment to the same applicant because of her marital status was upheld.

The context

Siobhan McLaughlin had lived with her deceased partner for 23 years on his death in January 2014. They had four children. Ms McLaughlin applied for a bereavement payment and widowed parent's allowance, both of which were refused on the grounds that the couple had not been married. She then sought a judicial review of this decision.

Bereavement payment and widowed parent's allowance are contributory benefits, payable to a surviving spouse or civil partner on the basis of the deceased's national insurance contributions. Bereavement payment is a one-off payment, while widowed

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parent's allowance may continue for as long as the surviving partner is below pensionable age, in receipt of child benefit in respect of any of the couple's children and has not entered into a new marriage, civil partnership or cohabiting relationship.[1] Equivalent benefits exist in Great Britain.[2]

Refusal of the benefits was alleged to constitute unlawful interference with the applicant's rights to private and family life and to autonomy under article 8 of the European Convention on Human Rights by penalising her decision not to marry. It was alternatively claimed to represent unlawful discrimination on the basis of marital status contrary to article 14 ECHR in conjunction with article 8 and article 1, protocol 1 (P1-1).

The ruling

Article 8

The argument on the basis of article 8 alone was rejected, first because article 8 seldom imposes positive obligations on states to financially support citizens[3] and secondly because imposition of the rights and responsibilities of marriage on unmarried couples could as readily be argued to represent an infringement of individual autonomy as their denial.[4]

[1] Social Security Contributions and Benefits (Northern Ireland) Act 1992 c7 s36; 39A
[2] Social Security Contributions and Benefits Act 1992 c4 s36; 39A
[3] *Petrovic v Austria* (app no 20458/92) [1998] 27 March 1998
[4] *McLaughlin* [2016] para 64 (Treacy J)

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Article 14

The respondent – the Department for Social Development (DSD), which is responsible for social security in Northern Ireland – accepted that marital status is one of the categories protected from discrimination under article 14 and that the decision complained of falls within the ambit of P1-1 and potentially article 8. In assessing the compatibility of the decision with article 14, the court considered two key questions. First, whether the position of the applicant was "analogous" to that of a bereaved spouse or civil partner. Second, if so, whether the difference in her treatment compared to a surviving spouse or civil partner represented a proportionate means of pursuing a legitimate objective.[5] These questions are answered differently in respect of each benefit.

For the purposes of the claim for bereavement payment, the position of the applicant was found *not* to be analogous to that of a surviving wife. UK and Strasbourg authorities recognise a "fundamental difference between marriage/civil partnership and cohabitation."[6] It was therefore legitimate for the state to make receipt of a benefit on the basis of a deceased partner's contributions contingent on marriage or civil partnership for the purpose of promoting these institutions.

Whereas bereavement payment is a benefit whose "sole beneficiary… is the partner of the deceased," widowed parent's allowance was held to be "granted due to parentage and co-raising of… children."[7] The status of the couple's relationship was

[5] *Brewster v NILGOSC and DOE* [2013] NICA 54 [2014] Pens LR 103 para 64 (Coghlin LJ)
[6] *McLaughlin* [2016] para 13 (Treacy J); Brewster [2013] fn5; *Shackell v UK* (app no 45851/99) [2000] 27 April 2000
[7] *McLaughlin* [2016] para 68-69 (Treacy J)

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therefore a secondary consideration to their joint responsibility for their children – for whose care the applicant remained every bit as responsible as would have been the case had she been a bereaved wife. Since the denial of the benefit discriminated against the couple's children on the basis of their birth status, the decision was found to violate article 8 in conjunction with article 14. Although promotion of marriage and civil partnership is a legitimate objective, the discrimination experienced by the applicant and her children could not represent a proportionate means of pursuing it.

Discussion

Benefits for widows or benefits for children?

Parties to the ECHR are afforded a wide margin of appreciated in matters of economic and social policy. Although this does not free them of all obligations under article 14, the judgment distinguishes between 'suspect' grounds for discrimination – immutable characteristics such as gender or sexual orientation – and other grounds.[8] As couples' marital status is a matter of choice, it falls within the 'non-suspect' grounds; states will therefore find it easier to justify differential treatment on its basis than, for example, on the basis of gender, which must be justified by "very weighty reasons."[9]

Treacy J held that refusal of bereavement payment correctly reflected the explicit connection of the benefit to marriage or civil partnership. *Brewster* and a series of Strasbourg judgments spanning decades were cited as authorities for the principle

[8] *Swift v Secretary of State for Justice* [2014] QB 373 [2013] HRLR 21 para 24 (Lord Dyson MR)
[9] *Stec v United Kingdom* (app no 65731/01) [2006] 43 EHRR 1017 para 52

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that entry into a marriage or civil partnership signals acceptance of a distinct package of rights and responsibilities – as against one another, third parties *and* the state – that do not apply to cohabitees.[10] A decision not to formalise the relationship is a decision not to "opt in" to the associated rights and responsibilities.[11] It would only be unlawful to exclude cohabiting partners from bereavement payment if it were manifestly unreasonable to do so. Case law recognises the legitimacy of promoting marriage and civil partnership by restricting access to certain social benefits in this manner.[12]

Where marriage is *not* the most relevant consideration, case law was found to point to a different outcome. The exclusion of cohabiting couples from the pool of potential adoptive parents was unlawful because the primary purpose of adoption legislation is not the promotion of marriage, but the best interests of the child.[13] Further, where cohabitees are treated like married couples or civil partners in life, as in armed forces occupational benefits, their positions should continue to be treated as analogous after the death of one partner.[14] In particular, married and unmarried parents are analogous because they have the same financial obligations in respect of their children.[15] Since the surviving parent's responsibilities towards her children are unaffected by marital status, the exclusion of unmarried partners from the scope of

[10] *Lindsay v UK* (app no 11089/84) [1987] 9 EHRR CD555; *Shackell* fn6; *van der Heijden v Netherlands* app no 42857/05 [2013] 57 EHRR 13
[11] *McLaughlin* [2016] para 66 (Treacy J)
[12] For example, *ES v Secretary of State for Work and Pensions* [2010] UKUT 200; *Yigit v Turkey* (app no 3976/05) [2011] 53 EHRR 25
[13] *Re G* [2008] UKHL 38 [2009] 1 AC 173
[14] *Ratcliffe v Secretary of State for Defence* [2009] EWCA Civ 39 [2009] ICR 762
[15] *PM v UK* (app no 6638/03) [2005] 42 EHRR 45

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widowed parents' allowance "cannot be justified… even allowing for the state's margin of appreciation," being "inimical to the interests of children."[16]

Social security decision making in Great Britain and Northern Ireland

Social security in Northern Ireland is administered separately from Great Britain and governed by Northern Ireland-specific legislation. However, law and policy, including the relevant provisions of the 1992 Act, are in most respects closely modelled on Great Britain.[17] Whether the Department for Work and Pensions will amend its approach to adjudicating claims for widowed parent's allowance in line with the *McLaughlin* judgment, or face its own judicial review, remains to be seen. DWP's response to the recent Social Security Advisory Committee report makes clear that it envisages bereavement benefits remaining tied to marriage or civil partnership, reflecting the legislation underpinning the new bereavement support payment, which will replace widowed parent's allowance from 2017.[18] This position was subsequently criticised by the Work and Pensions Committee, which, citing oral evidence from the SSAC chair, called for the dismantling of "'one of the last bastions' of the traditional marriage-based contributory system."[19] Echoing the *McLaughlin* judgment, the committee goes on to point out that "the needs of bereaved children

[16] *McLaughlin* [2016] para 72 (Treacy J)
[17] For discussion, see M Simpson, 'Developing constitutional principles through firefighting: social security parity in Northern Ireland' (2015) (1) Journal of Social Security Law 31
[18] Pensions Act 2014 c19 s30; Social Security Advisory Committee, 'Bereavement benefit reform' (OP16, London: SSAC, 2015); Department for Work and Pensions, 'Social Security Advisory Committee report on bereavement benefit reform: government response' (London: DWP, 2015)
[19] Work and Pensions Committee, *Support for the bereaved* (HC551, House of Commons, 2016) 28; P Gray in Work and pensions committee, 'Oral evidence: bereavement benefits, HC551-ii' (House of Commons, 2016) 13

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do not differ because of their parents' marital status and children have no control over whether their parents decide to marry."[20]

As the Committee suggests, the decision of the Northern Ireland court on an identical benefit might be expected to influence the outcome of a similar case. On the other hand, it is possible that the judgment forms part of a sequence of events that are driving a small but real gap between social security policy and practice in the UK's component regions. The feature of widowed parent's allowance that led the court to hold unlawful its denial to bereaved partners who had been cohabiting but had not formalised the relationship by marriage or civil partnership was the fundamental purpose of the benefit – to assist with the continued fulfilment of what had been the couple's shared parental responsibilities. This echoes the contention in *JS/SG* that the household benefit cap[21] unlawfully discriminated against lone parents (and therefore against women) because of the inclusion of child-related benefits within the scope of the cap.[22] However, the two cases resulted in opposite outcomes.

Although the Convention on the Rights of the Child is not cited by name in the *McLaughlin* judgment, it easy to connect the ruling that the restriction of widowed parent's allowance to surviving spouses or civil partners is "inimical to the interests of children" with the duty of the state in article 3(1) UNCRC to ensure the best interests of the child form a primary consideration in any actions by welfare

[20] Work and Pensions Committee, fn19: 30
[21] Benefit Cap (Housing Benefit) Regulations 2012 no 2994
[22] *R (on the application of JS and others) v Secretary of State for Work and Pensions (Child Poverty Action Group and another intervening)* [2013] EWHC 3350 (QB) [2014] PTSR 23; *R (on the application of SG) v Secretary of State for Work and Pensions* [2014] EWCA Civ156 [2014] HRLR 10; *R (on the application of SG and others) (previously JS and others) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449

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institutions concerning children. Article 3(1) is also recognised to form part of the proportionality test for interference with the right to respect for family life under article 8 ECHR.[23] Further, the conclusion that the indirect discrimination against children on the basis of their birth status inherent in the law renders unlawful the discrimination against the parent on the basis of his or her marital status enshrined in the 1992 Act is in the spirit of the close association between the right of the child and that of the "persons having responsibility for the maintenance of the child" to benefit from social security in article 27 UNCRC.

Similar arguments were deployed in *SG*, producing a deeply divided set of judgments but a different outcome. On the applicability of article 3(1) UNCRC, the various judges divide into several camps. A first holds that the article has no effect in English law except in immigration cases.[24] A second holds that it has direct effect, so that the best interests of the child must be at the "forefront" of the social security policymaker's mind, albeit that they may be outweighed by competing policy objectives.[25] A third holds that the article is engaged as an aid to interpretation of article 8 ECHR only when a minimum threshold of interference with that right is crossed.[26] In the decisive Supreme Court judgment, Lord Carnwrath concurs with Lady Hale's view that the cap "cannot possibly be in the best interests of the children affected,"[27] but concludes that article 3(1) cannot be relevant to the case at hand because it concerns alleged discrimination against *adults* in their enjoyment of a

[23] *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 [2013] 1 WLR 3690 para 10 (Lord Hodge)
[24] *JS* [2013] fn22 para 45 (Elias LJ)
[25] *SG* [2014] fn22 H2
[26] *SG* [2015] fn22 para 139 (Lord Hughes)
[27] *SG* [2015] fn22 para 226 (Lady Hale)

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social security right protected by P1-1 ECHR – the children themselves have no "relevant possessions" as the benefits are paid to their parents.[28]

Lord Carnwrath's conclusion contrasts not only with the dissenting judgments of Lady Hale and Lord Hughes, but with the *McLaughlin* judgment. Each of these is grounded in the principle that "a lone [parent's] interests, when it comes to receiving state benefits, are indissociable from those of her children."[29] From this perspective, the parent's right to social security *is* the child's right to social security. Therefore, even though there was no prospect of a breach of article 8 ECHR in its own right in *McLaughlin* – the denial of widowed parent's allowance did not put the applicant's children at risk of destitution,[30] but reduced her income by only £10 per week – and although the benefit protected by P1-1 was paid to the parent and not the child, the fact that it was a *child-related* benefit was crucial to the finding that article 14 had been breached.

A wider pattern emerges when recent developments in Northern Irish social security law and practice are considered. As in England, where article 3(1) UNCRC is incorporated into domestic law only within the parameters set by the Children Act 1989, Children Act 2004 and Borders, Citizenship and Immigration Act 2009,[31] in

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[28] *SG* [2015] fn22 para 100 (Lord Carnwrath)
[29] *SG* [2015] fn22 para 266 (Lord Kerr)
[30] Prevention of child destitution is one of the rare grounds on which article 8 can impose a positive obligation on states to provide financial support – see *Anufrijeva and another v London Borough of Southwark; R on the application of N v Secretary of State for the Home Department; R on the application of M v Secretary of State for the Home Department* [2003] EWCA Civ 1406 [2004] 2 WLR 603 para 43 (Lord Woolf)
[31] Children Act 1989 c41 contains various references to the best interests of children in care; Children Act 2004 c31 s11 imposes the article 3(1) duty on certain authorities with responsibility for child welfare; Borders, Citizenship and Immigration Act 2009 c11 s55 imposes the duty on immigration authorities

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Northern Ireland the best interests of the child must form a primary consideration in specified circumstances only.[32] Nonetheless, during legislative scrutiny of Northern Ireland's Welfare Reform Bill,[33] which as introduced would have replicated Great Britain's Welfare Reform Act 2012, concerns about the conformity of proposed changes to social security law with article 3(1) were noted.[34] Although the Bill's legislative failure was followed by the enactment at Westminster of a Welfare Reform Order in which most of its provisions, including the enabling provision for the household benefit cap, survive,[35] a working group appointed to propose 'mitigations' to the reforms advocates the disapplication of the cap to claimants with dependent children for "up to" four years.[36] The applicants in *SG*, therefore, would *not* be subject to the capping of their benefit income for the time being if they lived in Northern Ireland because of their status as parents. Given the relatively low level of housing costs in the region, disapplication of the cap to households including children is likely to mean *no* claimant is in fact affected before implementation of the lower cap in the Welfare Reform and Work Bill.[37]

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[32] Children (Northern Ireland) Order 1995 no 755 (NI 2); The UNCRC enjoys a higher status in Wales, where Ministers are required to have due regard to part 1 and specified articles of the optional protocols "when exercising *any* of their functions" (emphasis added) – see Rights of Children and Young Persons (Wales) Measure 2011 nawm 2 s1

[33] Welfare Reform Bill (NIA Bill 13/11-15) – although the Bill failed to complete its passage through the Assembly, most of its provisions () survive in the Welfare Reform (Northern Ireland) Order 2015 no 2006 (NI 1)

[34] Ad-hoc Committee, *Report on whether the provisions of the Welfare Reform Bill are in conformity with the requirements for equality and observance of human rights* (NIA 92/11-15, NI Assembly, 2013)

[35] Welfare Reform (Northern Ireland) Order 2015 no 2006 (NI 1)

[36] A supplementary payment would be made to households with children affected by the cap to make good the loss of income – Welfare Reform Mitigations Working Group, *Welfare Reform Mitigations Working Group report* (Belfast: OFMDFM, 2016) 10

[37] Welfare Reform and Work HL Bill (2015-16) [92] clause 8 – competence for social security in Northern Ireland has been temporarily transferred to Westminster to allow extension of the

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The UK's nascent process of welfare regionalisation has thus far been primarily conducted in the political arena. The divergent judgments in *McLaughlin* and *SG* may provide an early example of its reflection in judicial decision-making. The next test of parity in the courts may not be far away. Northern Ireland is also due to replace widowed parent's allowance with bereavement support payment and, as in Great Britain, legislation limits eligibility for the new benefit to surviving spouses and civil partners. [38] During legislative scrutiny, the Committee for Social Development recommended that DSD investigate the feasibility of a test to determine whether a cohabiting couple shared a relationship of sufficient closeness for the survivor to qualify for the benefit,[39] but the relevant provisions of the Act as passed mirror those for Great Britain.[40] The *McLaughlin* judgment creates a serious problem for DSD: whereas the 1992 Act was passed at Westminster under direct rule, the 2015 Act was passed by the Northern Ireland Assembly. Since the devolved legislatures lack competence to legislate contrary to the ECHR rights,[41] the *McLaughlin* judgment implies that s29 *must* be interpreted so as to extend eligibility to a bereavement support payment to a surviving cohabitee if there are dependent children, or be ruled invalid if this is impossible, as with the provisions of devolved legislation

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provisions of the Welfare Reform Act 2012 c5 and the Welfare Reform and Work Bill – see Northern Ireland (Welfare Reform) Act 2015 c34; Northern Ireland Office, *A fresh start: the Stormont agreement and implementation plan* (Belfast: NIO, 2015)

[38] Pensions Act (Northern Ireland) 2015 c5 part 5

[39] Committee for Social Development, *Report on the Pensions Bill (NIA Bill 42/11-16)* (NIA 229/22-16, Belfast: NI Assembly)

[40] Pensions Act 2014 c19 part 5

[41] Scotland Act 1998 c46 s29(2)(d); Northern Ireland Act 1998 c47 s6(2)(c); Government of Wales Act 2006 c32 s81; for discussion see M Simpson, 'The Agreement and devolved social security: a missed opportunity for socio-economic rights in Northern Ireland?' (2015) 66(2) Northern Ireland Legal Quarterly 105-125

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challenged in *Salvesen*.[42] Any such challenge to the devolved Act would take place under the constitutional legislation for Northern Ireland rather than the Human Rights Act, meaning that the Northern Ireland Human Rights Commission is capable of initiating proceedings with the purpose of proving incompatibility with the ECHR without being dependent on an actual victim of the alleged incompatibility doing so.[43]

Aside

The court considered a submission from the respondent that the application should be rejected on the grounds that judicial review is not the appropriate means of contesting a decision on a social security benefit when the right of appeal to a tribunal has not yet been exhausted. Treacy J held that judicial review *was* the "more obvious remedy."[44] The decision does not explicitly address the respondent's further submission that the restriction of eligibility for bereavement payments to spouses and civil partners is necessary to avoid the administrative difficulty of establishing *which* cohabiting relationships are sufficiently long term and interdependent to be treated as analogous.[45] However, it can be surmised that this was not considered a strong enough countervailing factor to justify the resulting discrimination.

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[42] *Salvesen v Riddell* [2013] UKSC 22 [2013] HRLR 23; Agricultural Holdings (Scotland) Act 2003 asp 11 s72(6) and (10)
[43] Northern Ireland Act s71(2B); *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2012] NIQB 77 [2012] Eq LR 1135 para 65 (Treacy J)
[44] *McLaughlin* [2016] para 57 (Treacy J)
[45] A similar argument was made before the Committee for Social Development by DSD – see G McCann in Committee for Social Development, 'Minutes of evidence – 22 January 2015', *Report on the Pensions Bill (NIA Bill 42/11-16)* (NIA 229/22-16, Belfast: NI Assembly) 144