



Social rights, child rights, discrimination and devolution: untangling the web

Mark Simpson

ESRAN workshop | Newtownabbey, 16 March 2017

m.simpson@ulster.ac.uk | <http://ulster.academia.edu/marksimpson>

ulster.ac.uk

Social rights, child rights, discrimination and devolution

A tale of two judicial reviews...

Re McLaughlin's application [2016]

- Restriction of bereavement benefits to spouses & civil partners
- Discrimination against unmarried cohabitees
- Unjustified due to impact on children?

R (SG) v SS Work & Pensions [2015]

- Household benefit cap
- Discrimination against women (lone parents and DV victims)
- Unjustified due to impact on children?

Social rights, child rights, discrimination and devolution

Judicial deference to the legislature in social policy

- ECtHR: states enjoy wide margin of appreciation (*Stec*)
- UK courts: reluctant to overrule legislature
- Can this be reconciled with 'very weighty reasons' test for gender based discrimination?
- What is the role of UNCRC in social security judicial reviews?

Social rights, child rights, discrimination and devolution

R (SG) v Secretary of State for Work and Pensions [2015]

- Supreme Court judgments: “textbook examples of different approaches to linking established human rights jurisprudence to social security provision” (Larkin)
- Lords Reed & Hughes: discrimination lawful
 - Only unlawful if “manifestly without reasonable foundation”
 - Safeguarding public finances, promoting employment & fairness
- Lady Hale, Lord Kerr: discrimination unlawful
 - Interests of lone parent and child “indissociable”
 - Policy “cannot possibly be in the best interests of children”
- Lord Carnwath: discrimination lawful
 - Breach of art 3(1) UNCRC
 - But UNCRC not applicable to discrimination between adult claimants

Social rights, child rights, discrimination and devolution

Re McLaughlin's application for judicial review [2016]

- High Court: unlawful discrimination in widowed parent's allowance
 - “Inimical to the interests of children”
 - Promotion of marriage a legitimate objective, but means disproportionate
- Court of Appeal: discrimination justified
 - Only unlawful if manifestly without reasonable foundation
 - Legitimate to discriminate between adults to promote marriage
 - “The reason the surviving cohabitee was not eligible for the benefit was that she and her late partner were not married. The reason was not related to the status of the children”

Social rights, child rights, discrimination and devolution

Status of the UNCRC

- Directly effective in UK law (Lord Kerr)
- Part of proportionality test for interference with art 8/P1-1 ECHR (*Zoumbas* – and Lady Hale?)
- Not relevant to discrimination between adults (Lord Carnwath)
- Not enforceable in UK courts (Lord Reed)
- Other social rights treaties not mentioned in judgments
 - Relevance of art 13/16 ESC?

Social rights, child rights, discrimination and devolution

Evolving social norms: social security and adoption

- 1996: not irrational to exclude homosexuals from military – but “tide of history” against the policy (*R (Smith) v MOD*)
- 2008: unlawful to exclude homosexual & unmarried couples from adoption (*Re P*)
- Evolving public morals relevant to cohabittees’ social security rights?
- Best interests of the child
 - *Might* be a primary consideration in social security policy
 - *Must* be *the* most important consideration in adoption decisions

Social rights, child rights, discrimination and devolution

The devolutionary dimension

- Status of ECHR differs at devolved and UK level
- UK:
 - Duty of compliance on public authorities
 - Interpretative obligation
 - Declaration of incompatibility
- Devolved regions:
 - No competence to legislate contrary to Convention rights

Social rights, child rights, discrimination and devolution

The devolutionary dimension

- *McLaughlin* JR a potential driver of divergence
- Would not invalidate 1992 legislation
- *Would* suggest provision for new bereavement allowance ultra vires
- Consistent with protection of children in welfare reform mitigations
- Budgetary implications when divergence required by devolution legislation?
- Becoming an issue for Scotland?

Social rights, child rights, discrimination and devolution

References

R v Ministry of Defence ex parte Smith [1996] QB 517

Stec v United Kingdom (app 65731/01) [2006] 43 EHRR 1017

P (a child), Re [2008] UKHL 38

Zoumbas v Secretary of State for the Home Department [2013] UKSC 74

R on the application of SG v Secretary of State for Work and Pension [2015] UKSC 16

McLaughlin's application for judicial review, Re [2016] NICA 53

L Banks & M Simpson, 'Siobhan McLaughlin: a case for extending eligibility for bereavement benefits' (Briefing note to NI Assembly Committee for Communities, 2016)

PM Larkin, 'Delimiting the gulf between human rights jurisprudence and legislative austerity: the judicial entrenchment of "less eligibility"' (2016) 23(1) *Journal of Social Security Law* 42

M Simpson, 'Case comment: *In the matter of an application by Siobhan McLaughlin for judicial review* [2016] NIQB 11' (2016) 23(2) *Journal of Social Security Law* 106