

Casebase Number: G0129

Title of Payment: Widowed Parent's Allowance (UK)



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Organisation who represented the Claimant: n/a

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Case Summary:

This is a case concerning legislation applicable in Northern Ireland.

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 and her husband, John Adams, lived together (apart from two short periods of separation) for 23 years until he died on 28 January 2014. They never married and had four children who were aged between the ages of eleven and nineteen when their father died. He had made sufficient National Insurance contributions for Ms McLaughlin to be able to claim bereavement payment and WPA, had she been married to him. Ms McLaughlin's claims for both bereavement payment and widowed parent's allowance were refused by the Northern Ireland Department for Communities. She applied for judicial review of that decision on the ground that the relevant legislation was incompatible with the ECHR. That claim succeeded in part before Treacy J in the High Court: *In the matter of an application by Siobhan McLaughlin for Judicial Review*: [2016] NIQB 11.

He made a declaration of incompatibility under section 4(2) of the Human Rights Act 1998, that s39A is incompatible with article 8 of the ECHR in conjunction with article 14 "insofar as it restricts eligibility for WPA by reference to the marital status of the applicant and the deceased". The Court of Appeal unanimously held that the legislation was not incompatible with article 14, read either with article 8 or with A1P1: [2016] NICA 53.

Ms McLaughlin therefore appealed to the Supreme Court.

Key Conclusions:

The Supreme Court by a majority of 4 to 1 (Lord Hodge dissenting) allowed the appeal and made 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.

Relevant Legislation:

39A – Widowed Parent’s Allowance.

(1) This section applies where—

- (a) a person whose spouse dies on or after the appointed day is under pensionable age at the time of the spouse’s death, or
- (b) a man whose wife died before the appointed day—
 - (i) has not remarried before that day, and
 - (ii) is under pensionable age on that day.

(2) The surviving spouse shall be entitled to a widowed parent’s allowance at the rate determined in accordance with section 39C below if the deceased spouse satisfied the contribution conditions for a widowed parent’s allowance specified in Schedule 3, Part I, paragraph 5 and—

- (a) the surviving spouse is entitled to child benefit in respect of a child falling within subsection (3) below; or
- (b) the surviving spouse is a woman who either—
 - (i) is pregnant by her late husband, or
 - (ii) if she and he were residing together immediately before the time of his death, is pregnant in circumstances falling within section 37(1)(c) above.
- (c) the surviving civil partner is a woman who
 - (i) was residing together with the deceased civil partner immediately before the time of the death, and
 - (ii) is pregnant as the result of being artificially inseminated before that time of an embryo, of an egg in the process of fertilisation, or of sperm and eggs.

(3) A child falls within this subsection if one of the conditions specified in section 77(5) below is for the time being satisfied with respect to the child and the child is either—

- (a) a son or daughter of the surviving spouse and the deceased spouse; or
- (b) a child in respect of whom the deceased spouse was immediately before his or her death entitled to child benefit; or
- (c) if the surviving spouse and the deceased spouse were residing together immediately before his or her death, a child in respect of whom the surviving spouse was then entitled to child benefit.

(4) The surviving spouse shall not be entitled to the allowance for any period after she or he remarries, but, subject to that, the surviving spouse shall continue to be entitled to it for any period throughout which she or he—

- (a) satisfies the requirements of subsection (2)(a) or (b) above; and
- (b) is under pensionable age.

(4A) The surviving civil partner shall not be entitled to the allowance for any period after she or he forms a subsequent civil partnership or marries, but, subject to that, the surviving civil partner shall continue to be entitled to if for any period throughout which she or he –

- (a) satisfies the requirements of subsection (2)(a) or (b) above; and
- (b) is under pensionable age.

(5) A widowed parent's allowance shall not be payable—

- (a) for any period falling before the day on which the surviving spouse's entitlement is to be regarded as commencing by virtue of section 5(1)(l) of the Administration Act; or
- (b) for any period during which the surviving spouse and a person of the opposite sex to whom she or he is not married are living together as husband and wife; or
- (c) for any period during which the surviving spouse or civil partner and a person of the same sex who is not his or her civil partner are living together as if they were civil partners."

To summarise the legislation above:

1. the claimant must be under pensionable age at the date of death and the allowance ceases once he or she reaches that age;
2. the deceased spouse or civil partner must have satisfied the prescribed contribution conditions (the details need not concern us);
3. the surviving spouse or civil partner must either be pregnant (in the prescribed circumstances) or be entitled to child benefit in respect of at least one child or qualifying young person who is either
 - (a) the son or daughter of them both, or
 - (b) a child or qualifying young person in respect of whom the deceased was entitled to child benefit immediately before his or her death, or
 - (c) a child or qualifying young person in respect of whom the survivor was entitled to child benefit, provided that the deceased and the survivor were living together immediately before the death; and entitlement is lost if the survivor marries, forms a civil partnership or when he or she cohabits as if married or in a civil partnership.

The ECHR

Article 14 of the ECHR provides that:

"The enjoyment of the rights and freedoms set forth in this 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."

Key Aspects:

Article 14 secures the rights and freedoms of the ECHR without discrimination. Four key questions were raised (although not rigidly compartmentalised):

1. Do the circumstances “fall within the ambit” of one or more of the Convention rights?
2. Has there been a difference of treatment between two persons who are in an analogous situation?
3. Is that difference of treatment on the ground of one of the characteristics listed or “other status”?
4. Is there an objective justification for that difference in treatment?

Decision of the Supreme Court:

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

The first question that the court had to answer was whether the WPA fell “within the ambit” of article 8 at all for the purposes of discrimination under art 14. It was established that a breach of right is not necessary, but the facts in question must fall within the ambit of one or more of them. Lady Hale argued that it was clear that denial of a social security benefit falls within the ambit of A1P1 (article 1 of the First Protocol). WPA also falls within article 8 as it is a positive measure by the state demonstrating its respect for family life.

2. Has there been a difference in treatment between two persons in analogous situations?

Lady Hale held that that an unmarried widowed parent with children was in an analogous position to that of a married widowed parent with children. The relevant facet of the relationship in this context was not their public commitment, but the co-raising of children. Therefore in a situation like Ms. McLaughlin’s (where the payment in question relates specifically to the raising of children), marriage and cohabitation were analogous. The responsibilities of a parent were the same whether or not they are married.

3. Is that difference of treatment on the ground of a relevant status?

Lady Hale noted that it is well established both in Strasbourg and domestically that not being married can be a status just as being married can be. She relied on the Turkish case of *Yiğit v Turkey* where the Grand Chamber held that “the absence of a marriage tie between two parents is one of the aspects of personal status which may be a source of discrimination prohibited by article 14”.

4. 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. Lady Hale notes that the promotion of marriage and civil partnership is a legitimate aim, and the WPA is a part of a package of social security measures which privileges marriage and civil partnerships. 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. She also acknowledges how her conclusions above are reinforced by the international; obligations to safeguard children's rights which inform the interpretation of the ECHR rights.

Lord Hodge, dissenting, held the purpose of the provision of WPA is to assist the survivor rather than a benefit for bereaved children. He argued that the circumstances of this case did not justify departing from the consistent line of authority from the European Court of Human Rights confirming the difference of status between marriage/civil partnership and cohabitation, so the situations were not analogous. 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.

Date of final Decision: 30 August 2018

Observations:

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. Although the Supreme Court in the UK cannot change the law, by saying it is incompatible with the Human Rights Act, it is putting pressure on the UK's legislature to change the law and ensure it is human rights compliant.

It must also be noted that this case is based on UK legislation. The corresponding social welfare payments in Ireland are Widows pension and Widowed or Surviving Civil Partner Grant. Similar to the UK, these payments are not payable to surviving partners unless they are married or in a civil partnership.

Widow's, Widower's or Surviving Civil Partner's (Contributory) Pension

Widow's, Widower's or Surviving Civil Partner's (Contributory) Pension is a weekly payment to the husband, wife or civil partner of a deceased person. This payment was formerly called the Widow's/Widower's (Contributory) Pension. Either you or your deceased spouse or civil partner must have enough social insurance contributions (PRSI).

To qualify you must, of course, be a widow, widower or surviving civil partner and you must not be cohabiting with another person.

Widowed or Surviving Civil Partner Grant

The Widowed or Surviving Civil Partner Grant is a once-off payment to widows, widowers or surviving civil partners with dependent children.

This grant is available to widows, widowers or surviving civil partners who have one or more dependent children living with them at the date of death, or a widow or surviving civil partner whose child is born within 10 months of the date of death of her spouse or civil partner.

For the purpose of the Widowed or Surviving Civil Partner Grant, a qualified child is a child up to age 18, who is normally resident in the State and who is living with you. A child aged between 18 and 22

who is normally resident in the State continues to be a qualified child provided they are in full-time education at a recognised school or college.

You must also qualify for one of the following payments: Widow's, Widower's or Surviving Civil Partner's Contributory Pension, One-Parent Family Payment, Death Benefit under the Occupational Injuries Scheme and/ or a Widow's, Widower's or Surviving Civil Partner's (Contributory) Pension under EU regulations or under a bilateral social security agreement between Ireland and another country State Pension (Non-Contributory).

In Ireland we also have the 'One-Parent Family Payment' ('OFP'). You can receive OFP for two years from the date of death of your partner. You cannot be paid OFP after your youngest child reaches 18 even if it is less than 2 years after the date of death.

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