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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **9/6/05**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

DEPARTMENT FOR SOCIAL DEVELOPMENT

Appellant;

-and-

SHAUN MacGEAGH

First Respondent;

and

PATRICIA MacGEAGH

Second Respondent.

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Before Kerr LCJ, Nicholson LJ and Campbell LJ

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KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of a Tribunal of Child Support Commissioners of 5 April 2004. The appeal concerns the operation of the Child Support (Northern Ireland) Order 1991 and associated regulations. The first respondent claims that regulation 9(3)(b) of the Child Support Departure Direction and Consequential Amendments Regulations (NI) 1996 (No 541) is incompatible with his rights under the European Convention on Human Rights, in particular, articles 6 and 14 of the Convention and article 1 of the First Protocol. Mr Maguire appeared on behalf of the Department and Mr MacGeagh appeared on his own behalf.

Background

[2] The respondents are divorced and live apart. They have two children who live mostly with their mother. Mr MacGeagh pays child maintenance in respect of each of the children. The issue that arises in this appeal is how the maintenance payments should be assessed.

[3] For the purposes of the 1991 Order and the regulations, because the children live mainly with her, the mother is viewed as 'the parent with care' while the father is viewed as 'the absent parent'. This nomenclature is perhaps unfortunate since it carries for those unfamiliar with the legislation the suggestion that there is a lack of care and attention on the part of Mr MacGeagh. There is nothing in the papers to support such a suggestion. For the purposes of this appeal therefore we will refer to the first respondent by name.

[4] Assessment of payment of child maintenance by a non-resident parent is based on a standard formula set out in Schedule 1 to the 1991 Order. In the case of Mr MacGeagh an assessment using the standard formula was made and this resulted in an obligation for him to pay child maintenance of £112.58 per week.

[5] Once an assessment has been made it is open to either parent to seek what are called 'departure directions'. These apply to future maintenance assessments and provide that the standard formula for assessment is to be departed from in the terms set out in the directions. Directions may only be obtained in circumstances (referred to in the regulations as 'cases') prescribed in the regulations. They are authorised only where a case for them has been made out and it is concluded that it would be just and equitable to sanction the departure.

[6] The Scheme contains two main classes of departure. The first is in relation to 'special expenses', that is where it is asserted that the standard assessment formula does not take sufficiently into account special expenses of the parent in question. The second class encompasses 'additional cases' where the argument is that the standard formula requires adjustment because, for example, a parent is not making full use of available income or assets or has unreasonably high outgoings.

[7] Mr MacGeagh sought departure directions in respect of matters falling within both classes. His claim in relation to 'special expenses' was accepted. This resulted in a new assessment being made which departed from the standard formula contained in Schedule 1. In his 'additional cases' claim Mr MacGeagh sought departure directions in relation to four matters. These were: -

> "1. that the mother had assets capable of producing higher income;
> 2. that the mother's lifestyle was inconsistent with the declared income;
> 3. that the mother had unreasonably high housing costs;
> 4. that the mother's housing costs could be paid by her present partner."

[8] The Department for Social Development refused Mr MacGeagh's application and he appealed their decision to an appeal tribunal under article 22 (2) of the 1991 Order. The tribunal dismissed the appeal. It decided that, since all the departure directions which Mr MacGeagh had sought fell within Regulations 23 to 29 of the 1996 Regulations, there was a legal bar to making the directions in the form of regulation 9 (3) (b). Article 25 (1) provides that any person who is aggrieved by a decision of an appeal tribunal may appeal to a Child Support Commissioner on a question of law and Mr MacGeagh appealed the appeal tribunal's decision. The Chief Commissioner directed, in accordance with paragraph 2(1) of Schedule 4 to the 1991 Order, that the application be dealt with by a Tribunal of Commissioners as it appeared to him that the application involved a question of law of special difficulty. The Tribunal of Child Support Commissioners found that the appeal tribunal had misinterpreted regulation (9) (3) (b) and remitted the matter to be re-heard by a differently constituted tribunal. The Department has appealed to this court against that decision.

Statutory background

[9] Article 5 (1) of the 1991 Order provides that it is the responsibility of each parent of a 'qualifying child' to maintain him. A 'qualifying child' is defined by article 4 as a child at least one of whose parents is an 'absent parent' (*i.e.* a parent who is not living in the same household) and who has his home with a person who is, in relation to him, a 'person with care'. For the purposes of this case it is sufficient to note that a 'person with care' is one with whom the child has his home. Article 5 (3) provides that where a maintenance assessment requires the making of periodical payments, it shall be the duty of the absent parent to make those payments.

[10] The person with care or the absent parent may apply to the Department for a maintenance assessment – article 7 (1). Under article 7 (10) no application may be made at any time in relation to a qualifying child if benefit is being paid to a parent with care of that child. By virtue of article 9 (1), however, where benefit of a prescribed kind is claimed by or paid to the parent of a qualifying child that parent shall, if (a) that parent is a person with care of the child; and (b) that parent is required to do so by the Department, authorise the Department to take action under this Order to recover child

support maintenance from the absent parent. This is what happened in the present case.

[11] By Article 28F (1) the Department may give a departure direction if

> "(a) the Department is satisfied that the case is one which falls within one or more of the cases set out in Part 1 of Schedule 4B or in Regulations made under that Part; and
>
> (b) it is the Department's opinion that, in all the circumstances of the case, it would be just and equitable to give a departure direction."

[12] Paragraph 1 of Schedule 4B (as inserted by the Child Support (Northern Ireland) Order 1995) provides that the cases in which a departure direction may be given are those set out in that Part of the Order or in regulations. Special expenses directions are dealt with in paragraph 2 of Schedule 4B and paragraph 5 (1) provides that the Department may by regulations prescribe other cases in which a departure may be given. The necessary Regulations for the purposes of Schedule 4B are the Child Support Departure Direction and Consequential Amendments Regulations (Northern Ireland) 1996.

[13] Regulation 9 (3) (b) of the regulations provides: -

> "A case shall not constitute a case under regulations 23 to 29 where the application is made by an absent parent where, at the date on which any departure direction given in response to that application would take effect, income support, income-based jobseeker's allowance, working families' tax credit or disabled person's tax credit is or was in payment to or in respect of the person with care of the child or children in relation to whom the maintenance assessment in question is made."

[14] Regulations 23 to 29 cover the four matters on which Mr MacGeagh relied in his 'additional matters' claim. Mrs MacGeagh has been in receipt of working families' tax credit (WFTC) and it was for this reason that the Department and the appeal tribunal concluded that Regulation 9 (3) (b) applied to the case and that Mr MacGeagh was debarred from seeking a departure on the basis advanced by him in respect of the additional cases. The tribunal held that the phrase "in payment" in regulation 9 (3) (b) had to be read as "actually in payment" so that the mere fact of payment of WFTC to Mrs MacGeagh brought that provision into play.

The Tribunal of Commissioners' decision

[15] The Commissioners' findings may be summarised as follows:-

1. Regulation 9 (3) (b) did not violate Mr MacGeagh's rights under articles 6 and 14 of ECHR;

2. The tribunal erred in interpreting the words "in payment" as meaning "actually in payment" as such interpretation could lead to an interference with Mr MacGeagh's property rights in a way which did not achieve a fair balance between the demands of the public interest and the protection of his rights under article 1 of the First Protocol to ECHR;

3. Applying section 3 of the Human Rights Act, the regulation should be read and given effect to in a way which is compatible with Mr MacGeagh's Convention rights. The words "in payment" should be interpreted as meaning "not unlawfully in payment", thereby enabling the relevant authorities to investigate whether the conditions of entitlement to the relevant benefit are satisfied;

The appeal

[16] The questions posed by the Tribunal of Commissioners in the case stated are: -

> "1. Were we correct to invoke section 3 of the Human Rights Act 1998 to interpret Regulation 9(3)(b) of the Child Support Departure Direction and Consequential Amendment Regulations (NI) 1996 without holding, as a matter of law, that there was incompatibility between the said Regulations and article 1 of the First Protocol or any other Convention right?;
>
> 2. Were we correct to hold that the words "in payment" in Regulation 9(3)(b) of the Child Support Departure Direction and Consequential Amendment Regulations (NI) 1996, pursuant to section 3 of the

> Human Rights Act 1998, should be interpreted as meaning "not unlawfully in payment"?;
>
> 3. Were we correct to ascribe to the Child Support authorities the role of determining whether working families' tax credit was not unlawfully in payment?"

Section 3 of HRA

[17] Section 3 (1) of the Human Rights Act provides: -

> "**3.** - (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

[18] The principal issue in this appeal is whether the injunction contained in this provision is to be applied only where the court is satisfied that to adopt a normal interpretation would inevitably lead to a violation of a Convention right, or should recourse be had to the sub-section where it is apprehended that such a consequence *might* arise. The Commissioners thought that the latter was the course to be followed. In paragraph 18 of their decision they posed the question, 'Is there any possible incompatibility with Convention Rights in giving the interpretation of 'actually in payment'?' and at paragraph 25 said, 'The reading of 'actually in payment' does not, in our view, give an interpretation and effect to regulation 9 (3) (b) which is of necessity compatible with Convention rights'.

[19] It is clear from the statements quoted that the Commissioners did not conceive it necessary to decide whether a violation of convention rights would arise if the interpretation adopted by the Department were applied to the regulation. It was enough that there might be such an infringement. In adopting this approach, I am afraid that the Commissioners fell into error. In *R v A* [2001] 3 All ER 1, Lord Hope of Craighead, dealing with the correct approach to be taken to the application of section 3 said (at paragraph 58): -

> "… the question which I have described as the essential question must be addressed first. As Lord Woolf CJ said in *Poplar Housing and Regeneration Community Association Ltd v Donaghue* [2001] EWCA Civ 595 at [75], unless the legislation would otherwise be in breach of the convention section 3 of the 1998 Act can be ignored. So the courts should always ascertain first whether, absent section 3, there would be any breach of the convention."

[20] The need to come to a firm conclusion as to whether a traditional interpretation of section 3 would lead to an infringement of a convention right, before having recourse to section 3, is readily explained by an understanding of the reason for including this provision in the legislation. Its presence in the 1998 Act is as a complement to the power given to superior courts by section 4 to make a declaration of incompatibility. To avoid a proliferation of such declarations it was decided that a new canon of construction containing what has been described as a "strong adjuration" (see *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, per Lord Cooke of Thorndon, at p 373F and *R v A (No 2)* [2002] 1 AC 45) to interpret legislation 'so far as possible' to render it compatible with the convention should be provided. But that strong adjuration only becomes relevant where a conflict with the convention will occur if normal canons of construction are applied. The Commissioners should have directly addressed the question whether, if the words of regulation 9 (3) (b) are given their ordinary meaning, an infringement of convention rights arises. They should have had recourse to section 3 only if they concluded that such an infringement would be the consequence of a normal construction of the provision.

The ordinary meaning of regulation 9 (3)

[21] In *Secretary of State for Social Security v Harmon & others* [1999] 1 WLR 163 the Court of Appeal in England dealt with three cases where the parent with care was the mother and the respondent father was the absent parent. The mother was in receipt of income support. She was required by the Secretary of State under section 6(1) of the Child Support Act 1991 (the equivalent of article 9 (1) of the 1991 Order) to authorise him to take steps to recover child support maintenance from the respondent, and she did so. Paragraph 5 (4) of Schedule 1 to the 1991 Act provided that where income support was paid to a person with care that parent should be taken to have no assessable income.

[22] Each of the respondents contended that the mother was not entitled to income support, and challenged the validity of the section 6 procedure on the basis that the proper meaning of the word 'paid' in paragraph 5 (4) was 'lawfully paid'. This argument (which is precisely the same as advanced by Mr MacGeagh in the present case) found favour with the Child Support Commissioners but not with the Court of Appeal. At pages 172/3 of the report in *Harmon* Millett LJ set out a series of reasons for rejecting the interpretation on which the argument was founded. I do not need to quote all of these but record my agreement with his entire analysis. After pointing out that there was no statutory machinery to enable the child support authorities to determine the eligibility of a parent with care to benefit, Millett LJ said this (at page 173): -

> "Whether the application may be made by the parent with care under section 4 or by the Secretary of State

> with the authority of the parent with care under section 6(1) depends on whether or not benefit is claimed by or in respect of the parent with care or is being paid to or in respect of her. It does not depend on whether the benefit in question is benefit to which she is entitled. This is a simple and straightforward test which can be applied with ease by the child support officer, and which need not delay the assessment or the collection of child support maintenance to which the absent parent is already liable."

[23] This decision was followed in this jurisdiction by the Chief Commissioner in Decision No: CSC1/01-02. But in the present case, the Tribunal of Commissioners concluded that the *Harmon* decision could be distinguished. At paragraph 28 the Commissioners said: -

> "It is in our view obvious that in a departure case the same considerations do not apply. Firstly, the Department has been authorised by the parent with care to recover child support maintenance. Secondly, there has been and remains a liability on the absent parent to pay child support maintenance."

[24] I am unable to agree with this analysis. In *Harmon* the mothers who were caring for the children were required (as was Mrs MacGeagh in this case) by operation of law to authorise the Secretary of State – in Mrs MacGeagh's case, the Department - to recover child support maintenance. The position of the mothers in the *Harmon* case and Mrs MacGeagh in this case appear to be to all intents and purposes identical and there does not therefore appear to be any valid distinction to be drawn between those cases and the present on that account. The fact that there was a continuing liability on the absent parent to maintain his child likewise does not appear to us to be a valid point of distinction. I am satisfied, largely for the reasons given by Millett LJ, that, on its ordinary construction, regulation 9 (3) (b) does not require that the WFTC payable to Mrs MacGeagh should be shown to be lawfully in payment.

Is article 1 of the First Protocol engaged?

[25] Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms provides: -

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

> interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[26] The Commissioners introduced their discussion of Mr MacGeagh's claim that the bar created by regulation 9 (3) (b) violated his rights under article 1 of the First Protocol in the following way: -

> "It seems somewhat strange to talk of someone being deprived of possessions where these are going to meet the cost of maintaining that person's children. The parental duty to maintain children is outlined in United Kingdom law and is perceived by most civilised societies as fundamental. However that duty is imposed by the Child Support (Northern Ireland) Order 1991 on both parents. What the father here is saying is that he is being charged with a disproportionately high share of the child support maintenance and cannot challenge same on the basis of the mother's income because she has an award of WFTC into which he has no right of input. The father's income and capital are his possessions. He is to be deprived of same only if it is in the public interest and subject to conditions provided by law. The father has no objection to paying child support maintenance as such nor did he contend that the child support scheme was not in the public interest. His view is that the particular provision in regulation 9(3)(b) leads to his paying a disproportionately high amount."

[27] Although it is not perhaps strikingly clear from their decision, the Commissioners appear to have concluded that article 1 of the First Protocol was engaged by regulation 9 (3) (b). This much is apparent, I think, from the statement quoted in the preceding paragraph that "the father's income and capital are his possessions". The view that article 1 of the First Protocol would be engaged by the arrangements made under the Child Support legislation was not shared by the majority in the Court of Appeal in *Secretary of State for Work and Pensions v M* [2004] EWCA Civ 1343. In that case although the factual context was distinctly different and although the court did not feel it necessary to express a final view on whether the child support

scheme engaged article 1 of the First Protocol, useful observations on this issue were made, particularly by Sedley LJ. At paragraphs 52/3 he said: -

> "52. I also find it unnecessary to decide whether article 1 Protocol 1 is engaged. But unless it can be said that this article covers anything done by the state which costs the individual money, I have some difficulty in seeing how the child support scheme comes within its ambit. As the Commission recalled in *Burrows v United Kingdom* (27 November 1996),
>
> > 'the deprivation of property … is primarily concerned with the formal expropriation of assets for a public purpose, and not with the regulation of rights between persons under private law unless the state lays hands – or authorises a third party to lay hands – on a particular piece of property which is to serve the public interest…'
>
> 53. Child support is neither a tax nor a form of expropriation: it is an allocation of private financial responsibility, and an expansive approach to article 1 Protocol 1 is in my view to be resisted…"

[28] I find the reasoning in this passage compelling. Properly understood, the child support scheme is not the taking away from an individual what is rightfully his; it is the enforcement of a legal and moral duty on the part of a parent to maintain his offspring. The underpinning purpose of article 1 of the First Protocol, as exemplified in the *Burrows* case, is the restraint of expropriation by the state or its agents of personal possessions for public purposes. It is not designed to protect individuals who are required by the law to discharge personal responsibilities. I have concluded, therefore, that Mr MacGeagh's rights under article 1 of the First Protocol have not been engaged by the statutory requirement to make child maintenance payments.

If article 1 Protocol 1 is engaged, has there been a violation?

[29] If, contrary to the view that I have reached, article 1 of the First Protocol is engaged, there would unquestionably be an interference with Mr MacGeagh's right to peaceful enjoyment of his possessions by the requirement that he make the disputed payment. The issue that would then arise is whether that interference could be justified. Expropriation of an individual's possessions by the state may only take place in conditions provided for by law and where the deprivation is in the public interest.

[30] The first of these conditions is clearly fulfilled in the present case. The requirement to pay child support maintenance is prescribed in the legislation that has been examined earlier in this judgment. The question whether interference with the right can be justified therefore resolves to the issue of public interest. On this subject the approach of some judges has been that review by the courts of what Parliament has judged to be in the public interest should be conducted circumspectly. In *Wilson and others v Secretary of State for Trade and Industry* [2003] UKHL 4 the House of Lords dealt with, among other things, whether section 127(3) of the Consumer Credit Act (which provides that the consequence of failure to state all the prescribed terms of a regulated agreement is that the court is precluded from enforcing the agreement) is compatible with the rights guaranteed by article 1 of the First Protocol. At paragraph 68 of his opinion Lord Nicholls said that the need to hold a fair balance between the public interest and the protection of the fundamental rights was inherent in article 1. There must therefore be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The means chosen to cure the social mischief must be appropriate and not disproportionate in its adverse impact. As to how the court should approach this assessment Lord Nicholls said (at paragraph 70): -

> "In approaching this issue, as noted in *R v Johnstone* [2003] UKHL 28 para 51, courts should have in mind that theirs is a reviewing role. Parliament is charged with the primary responsibility for deciding whether the means chosen to deal with a social problem are both necessary and appropriate. Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified: see the Rent Act case of *Mellacher v Austria* (1989) 12 EHRR 391, 411, para 53. The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's Convention right. The readiness of a court to depart from the views of the legislature depends upon the circumstances, one of which is the subject matter of the legislation. The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene."

[31] On the basis that it is for the state to establish that the interference has been proportionate, how should the court deal with this question in the context of the child support scheme? Should the court approach it in the

usual way, asking the normative questions: - (i) is the legislative objective sufficiently important to justify limiting a fundamental right; (ii) are the measures designed to meet the legislative objective rationally connected to that objective; and (iii) are the means used to impair the right or freedom no more than is necessary to accomplish the legitimate objective; or is this an instance where the court should disavow intervention because an issue of social policy is at stake?

[32] On the subject of the reticence of the courts to intervene (or, as it is sometimes called, 'the deference of the courts') in matters of social policy or, for instance, national security, the judges have not spoken with one voice. While some such as Lord Hoffmann consider that the courts should recognise that there are areas that are off limits to judicial superintendence, others such as Lord Steyn are anxious that the notion of deference should not be extended too far. In *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 Lord Hoffmann said that it was a principle of constitutional law that decisions as to whether something is in the interests of national security are not a matter for judicial decision. Such decisions were entrusted to the executive. This was not so much a matter of deference as the application of legal principle whereby the courts recognised the limits of their legitimate review of the executive's actions. He explained that approach in the following passage (from paragraph 62): -

> "It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove."

[33] In *R (Pro Life Alliance) v BBC* [2004] 1 AC 185 Lord Hoffmann applied a similar approach to the field of policy and the allocation of resources. He said at paragraphs 75/6: -

> "… In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.

> This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in Art.6 of the Convention. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law."

[34] The correctness of this approach has been questioned, particularly by Lord Steyn who has described the notion of deference as "not a matter of law … [but] … a matter of discretion to be exercised in the objective circumstances of the particular case."[1] In support of this claim Lord Steyn quotes *Lester & Pannick, Human Rights Law and Practice* (2nd ed., Butterworths, London, 2004) at paragraph 3.19, fn 3: -

> "This doctrine concerns not the legal limits to jurisdiction but the wise exercise of judicial discretion having regard to the limits of the courts' institutional capacity and the constitutional principle of separation of powers. It is essential that the courts do not abdicate their responsibilities by developing self-denying limits on their powers."

[1] Deference – a tangled story. P.L. 2005, SUM, 346-359

[35] The concept of deference as a discretionary restraint on the extent of the court's reviewing powers rather than a legal curb received support in an article in Public Law by Professor Jeffrey Jowell QC (also cited by Lord Steyn). In it Professor Jowell rejects the theory of deference being based on notions of legal principle and warned of the need for courts to acknowledge the full potential of their role in reviewing decisions said to have been taken in the public interest. He said: -

> "In so far as the courts ... concede competence to another branch of government, it seems to me that such a concession is not a matter of law, nor based upon any legal principle as Lord Hoffmann contends. Lord Hoffmann is right that it is for the courts to decide the scope of rights, but there is no magic legal or other formula to identify the 'discretionary area of judgment' available to the reviewed body. In deciding whether matters such as national security, or public interest, or morals should be permitted to prevail over a right, the courts must consider not only the rational exercise of discretion by the reviewed body but also the imperatives of a rights-based democracy. In the course of some of the steps in the process of this assessment the courts may properly acknowledge their own institutional limitations. In doing so, however, they should guard against a presumption that matters of public interest are outside their competence and be ever aware that they are now the ultimate arbiters (although not ultimate guarantors) of the necessary qualities of a democracy in which the popular will is no longer always expected to prevail."[2]

[36] It is not for this court to choose a side on this debate and it is in any event unnecessary to do so for I do not regard Lord Hoffmann in the passages cited to suggest that matters of public interest are invariably beyond the review of the courts. It appears to me that the level of deference will depend not only on the subject matter under review but also on the nature of the review itself. Thus, for instance, the question whether the measures designed to meet the legislative objective are rationally connected to that objective is a matter that does not call for any great measure of deference. Likewise the requirement that the means used to impair the right or freedom should be no more than is necessary to accomplish the legitimate objective is one which the courts are well equipped to examine. On the first test of proportionality, however, *viz*

[2] "Judicial Deference, Servility, Civility or Institutional Capacity?" [2003] PL 592.

whether the legislative objective is sufficiently important to justify limiting a fundamental right, one can acknowledge that Parliament's conclusion on this would not be lightly set aside. As Lord Nicholls put it in *Wilson* this is "primarily a matter for Parliament".

[37] In this case the public interest at stake is the enforcement of an obligation on parents to provide financial support for their offspring. The scheme replaces in large measure the powers of the courts to provide for maintenance for children by way of periodical payments. As Hale LJ said *Huxley v Child Support Officer* [2000] 1 FLR 898, at 905 and 908: -

> "It is important to bear in mind that the child support scheme is not simply a method for the state to recoup part of its benefit expenditure from the absent parents. It is a replacement both for the former method of doing this and for the court's powers to make orders between individuals for periodical payments for the maintenance of children.
> …
> The child support system has elements of private and public law but fundamentally it is a nationalised system for assessing and enforcing an obligation which each parent owes primarily to the child. It replaces the powers of the courts, which can no longer make orders for periodical payments for children save in very limited circumstances."

[38] The focus of the arrangement is the requirement that the parent with care should seek a maintenance assessment in respect of the absent parent. Where a parent with care is on benefits the scheme requires that parent to authorise the Secretary of State to apply for a maintenance assessment in respect of the absent parent. The underlying purpose of this is that the burden on the taxpayer should be defrayed by the requirement that the absent parent fulfil his or her obligation to financially support their children. This in turn reflects the broader philosophy that, where possible, parents should provide for their children. Another function of the scheme is consistency. This aspect is catered for in the arrangements for making the maintenance assessment according to a statutory formula.

[39] Thus understood, it is not difficult to conclude that the child support scheme is rationally connected to the objective that it is designed to achieve and that regulation 9 (3) (b) in particular has a clear nexus with the aim of making absent parents who can afford to do so support their children financially rather than have the burden of that support thrown on the state.

[40] The question whether the means adopted are no more than is necessary to achieve the objective requires somewhat more elaborate consideration. One must acknowledge the argument that the imposition of a statutory bar to consideration of departure directions where the parent with care of the children is in receipt of benefits, without investigation of her entitlement to those benefits, is more than is necessary to fulfil the goal of the legislation. Expressed in this unvarnished way, however, the argument over-simplifies the position. It implies that there is no mechanism for the investigation of the entitlement of the parent with care to the benefit. This is plainly not the case. All social security and other state benefits are subject to investigation for fraud. Indeed, in the present case Mr MacGeagh's suggestion that his wife might be guilty of fraud in relation to her claim for WFTC was referred to the Inland Revenue for investigation. The issue therefore is whether the state should be obliged to install a further mechanism for investigation of the parent with care's entitlement to benefit specifically for the purpose of the child support benefit scheme. I cannot accept that this is necessary where there already exists a means to check whether the benefit is lawfully paid. Such an investigation can be activated by the absent parent by a report to the relevant authorities.

[41] If the Child Support Agency had to investigate every claim made by an absent parent that the parent with care was not lawfully in receipt of benefits, one can readily envisage that this would throw an enormous logistical burden on the agency that it is not equipped to discharge. Such an obligation would have the potential to frustrate the effective operation of the scheme. The means that have been adopted in the present case are that the absent parent should not be permitted to apply for departure directions where the parent in care is in receipt of benefits. I consider that, given the absent parent's ability to activate an investigation into any possible fraud on the part of the parent with care, this is no more than is required to fulfil the objective of the legislation.

[42] On the question whether the legislative objective is sufficiently important to justify limiting a fundamental right, I would have deferred to the judgment of Parliament. It is right that I should say, however, that even if I had deemed it appropriate to consider this question I would unhesitatingly have answered that the need to ensure that absent parents continued to support their dependent children and that they should not be able to avoid or mitigate that obligation by insisting that the Child Support Agency show that the benefit payable to the parent with care was lawfully in payment was sufficiently important to justify interference with the absent parent's rights under article 1 of the First Protocol.

[43] If, therefore, I had considered that article 1 of the First Protocol was engaged, I would have concluded that there had been no violation of the provision for the reasons that we have given in the preceding paragraphs.

Article 6

[44] Although the article 6 issue is not strictly speaking before us in that there has been no cross appeal against the Commissioners' decision that there had been no violation of that provision, it is right that I should look briefly at this issue, firstly, because Mr MacGeagh was not legally represented on the appeal and secondly because of the injunction contained in section 6 of the Human Rights Act, that it is unlawful for a public authority (such as this court) to act in a way that is incompatible with a Convention right.

[45] So far as is material article 6 provides:-

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[46] To be applicable article 6 requires that the 'civil rights and obligations' of the party asserting a breach should be identified since, according to its text, the article applies 'in the determination' of an individual's 'civil rights and obligations'. The phrase, 'civil rights and obligations' has, of course, an autonomous meaning in the Convention context – see, for instance, *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions and other cases* [2001] UKHL 23; *Runa Begum v Tower Hamlets London Borough Council (First Secretary of State Intervening)* [2003] 2 WLR 388 and in this jurisdiction, *Re Foster* [2004] NIQB 1. But one may leave to one side discussion of the historical source of that expression and concentrate on the question, what is the civil right that Mr MacGeagh can assert in order to claim the protection of article 6. Mr Maguire suggested that the only right that could be claimed is a right to dispute Mrs MacGeagh's benefit entitlement in a child support forum. This appears to me to be the correct formulation of the only feasible claim under article 6.

[47] In *R (Kehoe) v Secretary of State for Work and Pensions* [2004] EWCA Civ 225 the Court of Appeal in England dealt with the question whether the provisions of the Child Support Act 1991 which preclude the respondent from playing any part in the enforcement of maintenance assessments made by the Secretary of State were compatible with the provisions of the Convention, and in particular article 6(1). The mother, who was the parent with care, sought a declaration that those provisions were incompatible with article 6 because they had the effect of denying a parent access to court in connection with disputes as to whether the non-resident parent had paid or ought to pay the sums due under a maintenance assessment, or as to the manner in which the maintenance assessment should be enforced. The Court of Appeal held that it

was a deliberate feature of the child support legislation that it was for the Secretary of State to assess and enforce the maintenance obligation owed by the non-resident parent to the child. The mother had no legal right as against the non-resident parent to a child maintenance payment. Her civil rights under article 6 were, therefore, not engaged.

[48] At paragraph 104 of his judgment Latham LJ said: -

> "The [Child Support] scheme is built firmly on the central premise that the assessment collection and enforcement of maintenance orders should all be in the hands of the Secretary of State, or the CSA. The necessary consequence is that there had to be a redefinition of the rights and obligations of the parents, and of those with care of children. That redefinition … was not a drafting device, but was the necessary consequence of the philosophy of the 1991 Act."

[49] The right of a parent to claim maintenance for a child has always been statutory – for a history of the development of statutory rights in this area see *Re C (A Minor) (Contribution Notice)* [1994] 1 FLR 111, at 116 and the judgment of Ward LJ in *Kehoe*. There was no right at common law to enforce maintenance payments by a parent to a child and this has depended exclusively on statutory provisions. The 1991 Order changed fundamentally the statutory scheme for the enforcement of periodical payments for the maintenance of children. It is, as counsel for the appellant in *Kehoe* put it, self-contained, in that it provides the legal structure within which all relevant rights and obligations are to be found.

[50] Ward LJ in *Kehoe*, while accepting that the 1991 Act obliterated Mrs Kehoe's pre-existing substantive rights to apply for and enforce periodical payments of child maintenance, nevertheless concluded that it was unconstitutional to deny her access to a court and although he accepted the "linguistic" correctness of the argument that she no longer had a substantive right, found that article 6 was engaged. This conclusion was not shared by the majority. All three members of the Court of Appeal were agreed that whether a right exists at all is a matter for the domestic law of the State – see *Matthews v Ministry of Defence* [2003] 2 WLR 435 in particular Lord Hope of Craighead at paragraph 51. But Latham LJ and Keene LJ concluded that the extinguishment of the right to claim periodical payments by the 1991 Act meant that there was no longer any right on which Mrs Kehoe could found her claim that her article 6 rights had been violated. Keene LJ said this at paragraph 112: -

> "In the present case, I agree with Latham LJ that one is dealing with a legal framework which is entirely statutory and it is, therefore, to those statutory provisions that one has to look in order to determine this issue. Under those provisions it is for the Secretary of State (or the CSA) to assess and enforce the obligation owed by the absent parent to the child. Thus one finds that Parliament in the legislation has chosen to confer on the Secretary of State a discretion as to whether or not to take enforcement proceedings (s 4 of the 1991 Act), in a situation where the actual assessment of the absent parent's liability is a mechanical one, achieved by the application of a formula. … under the legislation the parent with care does not have a right as such, as against the absent parent, to any particular sum of money, even after an assessment has been made. This is a deliberate feature of the statutory framework provided by the 1991 Act, and it means that it cannot be said that the parent with care enjoys any statutory right as against the absent parent to a particular sum as a maintenance payment."

[51] I agree with this analysis. In domestic law a parent with care no longer has a right to require an absent parent to make periodical payments for the maintenance of their child. That right has been ceded to the Secretary of State in England and the Department in this jurisdiction. Absent such a right article 6 is simply not engaged. It follows that it would not be open to Mrs MacGeagh to assert an article 6 violation in relation to her husband's failure or refusal to make child support payments ordered under the legislation. *A fortiori* he has no substantive right to dispute Mrs MacGeagh's benefit entitlement and article 6 is not engaged in relation to his claim to be entitled to do so.

Article 14

[52] Again this issue was not the subject of a cross appeal but, for the reasons that we have given earlier in relation to article 6, we have decided that we should consider it.

[53] Article 14 provides:-

> "The employment 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, birth or other status."

[54] It is well settled that article 14 is a parasitic provision and does not constitute a freestanding right. It is not necessary to show that there has been a breach of another Convention right but it must be shown that the facts on which the asserted violation of article 14 is made come within the ambit of another such right. Lord Steyn in *R v Chief Constable of South Yorkshire* [2004] UKHL 39 set out the stages that must be followed in deciding whether a breach of article 14 has been established. He said this at paragraph 42: -

> "Based on the approach of Brooke LJ in *Wandsworth London BC v Michalak*, [2003] 1 WLR 617, as amplified in *R* (*on the application of Carson*) *v Secretary of State for Work and Pensions, R* (*on the application of Reynolds*) *v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin) at [52], and [2003] EWCA Civ 797, five questions can be posed as a framework for considering the question of discrimination: (1) Do the facts fall within the ambit of one or more of the convention rights? (2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (3) If so, was the difference in treatment on one or more of the proscribed grounds under art 14? (4) Were those others in an analogous situation? (5) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?"

[55] Mr Maguire submitted that not only did Mr MacGeagh's claim not fall within the ambit of article 6 or article 1 of the First Protocol, it was impossible to find a relevant comparator for the purposes of article 14 and there was in any event no difference of treatment between Mr MacGeagh and those who might be said to be in an analogous position.

[56] I am content to base my finding that article 14 does not arise on the consideration that neither article 6 nor article 1 of the First Protocol is engaged. Mr Maguire may well be right that there is no effective comparator and it appears virtually certain that any difference in treatment has not occurred on any of the grounds proscribed in article 14 but I would prefer to reserve my conclusions on these issues lest they arise on a future occasion where fuller argument on them might take place.

Conclusions

[57] I have concluded that the Commissioners erred in deciding that they should have recourse to section 3 of the Human Rights Act 1998 without first addressing the question whether the 1996 Regulations were incompatible with a Convention right. I have also decided that they erred in holding that the words 'in payment' in Regulation 9 (3) (b) should be interpreted as meaning 'not unlawfully in payment' and therefore in ascribing to the Child Support authorities the role of determining whether working families' tax credit was not unlawfully in payment. Nicholson LJ, although he differs to some extent with the majority on how it is reached, agrees with the outcome that we propose. We will answer each of the questions posed in the case stated 'No', therefore, and allow the appeal. It follows that the decision of the Appeal Tribunal will be restored and that Mr MacGeagh will be required to make the assessed child support maintenance payments.