Neutral Citation No. [2005] NICA 28(2)

Ref:	**NICC5307**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered:	**09/06/05**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

DEPARTMENT FOR SOCIAL DEVELOPMENT

Appellant;

-and-

SHAUN MacGEAGH

First Respondent;

-and-

PATRICIA MacGEAGH

Second Respondent.

Lord Chief Justice, Nicholson LJ, Campbell LJ

NICHOLSON LJ

[1] I gratefully adopt the Introduction and Background to the Appeal contained in the judgment of the Lord Chief Justice. I respectfully agree that on its ordinary construction regulation 9(3)(b) does not require that the working family tax credit payable to Mrs MacGeagh should be shown to be lawfully in payment. The application for child support maintenance does not depend on whether the benefit is benefit to which she is entitled. I agree with the reasoning of Millett LJ in Secretary of State for Social Security v Harman and Others [1999] 1 WLR 163 as does the Lord Chief Justice.

[2] He then poses the question: "Is Article 1 of the First Protocol engaged?" If one answers that question "Yes", it does not follow that there has been an infringement or violation of the rights of the absent parent. But the absent parent will be entitled to an examination of the legislation by a court and, if there is an appropriate comparator, call in aid Article 14. It appears to me to be plain that Mr MacGeagh has been deprived of "the peaceful enjoyment of possessions." The garnishee order obtained by the Department ensured that. This has been done in the public interest and subject to the conditions provided for by law, which include a provision that payments made by Mr MacGeagh may be collected by the Department and paid to the Department instead of Mrs MacGeagh, the person caring for the children.

[3] I have no difficulty in agreeing with Hale LJ (as she then was) in Huxley v Child Support Officer [2000] 1 FLR 898 that:

> "The child support system has elements of private law 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…."

I have no difficulty in agreeing with Munby J that:

> "The statutory scheme and the CSA's administration of it are Convention compliant. The Commission and ECtHR thus far have declared all challenges manifestly unfounded": see R (Denson) v Child Support Agency [2002] 1 FLR 938 at para. [22].

At para. [27] he referred to Burrows v United Kingdom Application No: 27558/95. He stated:

> "In view of the active role played by the State in assessing and collecting child maintenance payments under the Act the Commission was prepared to assume that there was an interference in the applicant's peaceful enjoyment of his possessions within the meaning of Art.1 of Protocol 1. However the Commission rejected the claim under Art. 1 as also manifestly ill-founded. In explaining why the Commission said this:
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> > 'In that regard, the Commission recalls that the legislation about which the applicant complains is a practical expression of a policy relating to the

> economic responsibilities of parents who do not have custody of their children…. The relevant legislation compels an absent parent to pay money to the parent with custody of the child. The Commission observes that in all Contracting States to the Convention, the legislation governing private law relations between individuals includes rules which determine the effects of these legal relations with respect to property…. This type of rule, which is essential in any liberal society, cannot in principle be considered contrary to Article 1 of Protocol No. 1. However, the Commission must nevertheless make sure that in determining the effect on property of legal relations between individuals the law does not create such inequality that one person could be arbitrarily deprived of property in favour of another'."

At para. 28 he set out a further passage from the decision of the Commission:

> "As regards whether the relevant measures are in the public interest, the Commission notes that while one specific aim of the measures is to make absent parents, who are able to do so, pay for the maintenance requirements of their children, the measures are not intended solely for the benefit of the children but for the benefit of the tax-payer in general who bears the burden of paying for single parents who claim social welfare benefits. In many cases therefore, while the children are no better off since social welfare benefits are removed and replaced with payments by the absent parent, the burden on the tax-payer in general is reduced. The Commission considers that the aims of reducing taxation and increasing parental responsibility must be considered as in the public interest for the purposes of Article 1 of Protocol No 1.
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> The Commission further recalls that, while a Contracting State enjoys a certain margin of

> appreciation as regards interference with the peaceful enjoyment of possession in the public interest, it must respect a reasonable relationship of proportionality between the means employed and the legitimate aim. In view of the fact that the applicant is not required to pay a disproportionate percentage of his gross income in maintenance payments, approximately 20%, and taking into account the disposable income that he is left with, the Commission considers that the United Kingdom has not acted disproportionately in pursuing the legitimate aims referred to above.
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> In the circumstances the Commission does not consider the relevant measures to be disproportionate to the legitimate aim they pursue and considers that a fair balance has been struck between the interests of the community as a whole and those of the individual."

Munby J went on to say:

> "If I may respectfully say so, the approach adopted in these cases by the Commission and the court is, in my judgment, manifestly correct. As the Commission put it in Burrows v United Kingdom (unreported) 27 November 1996, it is in the public interest to have a scheme which aims to reduce taxation and increase parental responsibility. As the court said in Stacey v United Kingdom (unreported) 19 January 1999, it is in the interests of the general community that the State should be able, by recovering maintenance from absent parents, to reduce the burden on the taxpayer of single-parent families. The statutory scheme manifestly pursues a legitimate aim, whether one has regard to Art 8 of the Convention or to Art 1 of Protocol 1.
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> I also entirely agree with the way in which, as I have summarised it in para [23] above, the UK put the matter in argument in Logan v United Kingdom (1996) 22 EHRR CD 178. There is, in my judgment, a pressing social need to ensure that parents fulfil their responsibilities to their children. The statutory scheme, and the CSA's administration of it, strike a fair and reasonable balance between, on the one hand, the absent parent's responsibilities for his or her

> children and, on the other hand, the need for a system that: (i) produces fair and consistent results, (ii) preserves the parents' incentive to work, (iii) reduces the dependency of parents with care on income support, and (iv) provides consequent savings to tax-payers. In other words the statutory scheme achieves a reasonable relationship of proportionality between the legitimate aims of the legislation and the means employed."

[4] The Lord Chief Justice states at para. [27] of his judgment that the underpinning purpose of Article 1 of the First Protocol 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 do not disagree that this is its primary purpose but it is not its only purpose. He cites a passage from the judgment of Sedley LJ at paras. 52 and 53 of Secretary of State for Work and Pensions v M [2004] EWCA Civ. 1343 in which Sedley LJ referred to Burrows v United Kingdom in the following terms:

> "As the Commission recalled in Burrows v United Kingdom 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….'"

The Regulations made under Article 29 of the 1991 Order empower the Department to lay hands – or authorise a third party to lay hands – on part of the income of an absent parent so that it may be paid to the Department. That is not an expropriation in the current form which the legislation takes because the taxpayer has paid the parent with care a sum for maintenance of the child and the income of the absent parent goes to the Exchequer, presumably, and, I assume, the amount taken does not exceed the amount paid to the parent with care of the child. However I can well understand why the Commission (or a court in this jurisdiction) would wish to look at the legislation in order to satisfy itself that there is a reasonable relationship of proportionality between the means employed to assess and recover child support and the legitimate aim to ensure that absent parents maintain their children and help to reduce the burden on the taxpayer. The harsh reality is that the burden does largely fall on the taxpayer. In 2001/2002 the Child Support Agency reported that £2,500 m of maintenance was outstanding, of which nearly £2000 m was probably incapable of collection. But this does not affect the principles.

[5] Notwithstanding what I have said at paragraph [4] it is not necessary for my decision to determine that the child support scheme engages Article 1. For my part I do not regard the reasoning of Sedley LJ, as set out in his judgment or in the judgment of the Lord Chief Justice so "compelling" as to require me to say that Article 1 is not engaged. I am inclined to prefer the reasoning of the Commission.

[6] I agree entirely with the Lord Chief Justice's reasoning that there has been no violation of Article 1: see paras. [28] to [42] of his judgment. It would be otiose to say more.

Article 6

[7] This depends on whether Mr MacGeagh's "civil rights and obligations" are involved, so that he can claim the protection of Article 6. The argument which Mr Maguire advanced was that the only claim which Mr MacGeagh could make was a right to dispute Mrs MacGeagh's benefit entitlement in a child support forum. Under the 1991 Order he is debarred from doing so. But he is also debarred from challenging the formula under which his maintenance payment is assessed and the means by which it is collected and dealt with.

[8] In R (Kehoe) v Secretary of State for Work and Pensions [2004] EWCA Cir. 225 Mrs Kehoe sought a declaration that the provisions of the Child Support Act 1991 precluding her from playing any part in the enforcement of maintenance assessments made by the Secretary of State and, in particular, denying her access to a court were incompatible with the provisions of the Convention, especially Article 6(1). By a majority the court held that she had no legal right as the mother with care for the child against the "absent parent" to a child maintenance payment and that her civil rights were, therefore, not engaged. We were told that this case may well go to the House of Lords.

[9] The Lord Chief Justice states at para. 49 of his judgment that all three members of the court agreed that whether a right exists at all is a matter for the domestic law of the State. Ward LJ in his dissenting judgment set out Mrs Kehoe's rights in domestic law at paras. 63 and 64. He then asked the question whether these rights were "civil rights" within the meaning of the Convention at paras. [65] to [80] and concluded that Mrs Kehoe's civil rights are engaged. He also concluded that Mrs Kehoe's "old" civil rights have been removed and her new attenuated right is determined by a Minister of the Crown. That imperils, he said, the constitutional safeguard of a right of access to a court guaranteed by the separation of powers and the rule of law to guard against arbitrary power and executive rule. However on the issue of proportionality he concluded for the reasons set out at paras. [85] to [92] that the test of proportionality was satisfied because on the evidence there was a

reasonable relationship between the legitimate objectives and the means used to achieve them. Therefore the 1991 Act was not incompatible with Article 6.

[10] Latham LJ stated that he would allow the appeal on the grounds that the respondent was unable to assert that she had an arguable civil right which entitled her under Article 6 to a determination by a court. He stated that there was no justification in departing from "the general principle that Article 6 is concerned only with disputes which can be said, at least on arguable ground, to be recognised under domestic law", citing James v United Kingdom [1986] 8 EHRR 123. Ward LJ took the view that the principles in Golder [1979-80] 1 EHRR 524 prevailed over James: see, especially, para. [49] of his judgment in which right of access to the court is stated to be an element inherent in the right stated by Article 6(1). Latham LJ indicated that if he had not reached the conclusion that Article 6(1) was not engaged, he would have agreed with Ward LJ's conclusions as to proportionality.

[11] Keene LJ stated that he recognised that the issue was far from easy to determine. He relied inter alia, on what Lord Hope said in Matthews [2003] UKHL 4 at para. [51]:

> "Article 6(1) does not have anything to say about the contents of the individual's civil rights, nor does it impose an obligation on the State to confer any particular rights in substantive law upon the individual."

On the other hand Lord Bingham said at para. [3] in Matthews:

> "This means that the concept of a "civil right" cannot be interpreted solely by reference to the domestic law of the member state. It is the view taken of an alleged right for Convention purposes which matters."

Keene LJ agreed with Latham LJ that if Mrs Kehoe did not have an arguable legal right in domestic law to a child maintenance payment of any particular amount or even at all from her husband, then her civil rights in the sense used in Article 6(1) are not engaged.

As I do not have to determine this issue I respectfully decline to endorse the view of the majority of the court. I agree with Ward LJ that on the issue of proportionality, the 1991 Act, as it presently stands, survives any allegation of violation based on deprivation of access to the court and note that Latham LJ would have endorsed this view if he had considered that Article 6 was engaged. I am inclined to the view that Article 6(1) is engaged for the reasons given by Ward LJ but, as I do not have to make a choice

between his reasoning and the reasoning of the majority, I have decided to refrain from doing so. The majority of this court supports the view that Article 6(1) is not engaged for the reasons given by the Lord Chief Justice.

[12] In view of what I have said at paragraph [6] I respectfully agree with the Lord Chief Justice that the appeal should be allowed.