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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Magennis's (Feargal) Application [2010] NICA 43

IN A MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY FEARGAL MAGENNIS

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MORGAN LCJ, GIRVAN LJ and SIR JOHN SHEIL

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from an order of Weatherup J who dismissed the appellant's application for judicial review of the decisions of the Child Support Agency which resulted in the appellant being assessed for child maintenance payments at a rate of 30% of net weekly income rather than at the rate of 15% under the amended scheme contained in the Child Support Pensions and Social Security Act (Northern Ireland) 2000. Mr O'Hara QC and Mr McGleenan appeared for the appellant and Mr Maguire QC and Mr McMillan appeared for the respondent. We are grateful for their helpful written and oral submissions.

Background

[2] The Child Support Agency for Northern Ireland (CSA) was established when the Child Support (Northern Ireland) Order 1991 (the 1991 Order) came into effect on 5 April 1993. The 1991 Order was intended to improve the

position of children whose parents lived apart by establishing a system to assess the appropriate financial contribution of the parent without care and a mechanism for enforcement of that obligation. As well as compelling absent parents who were able to do so to provide for their children it was an objective of the provisions to benefit the taxpayer in general by removing some of the burden of maintenance which would otherwise fall on the state.

[3] The appellant is the father of a child born in August 1994. His relationship with the mother of the child broke down in 1998 and the CSA has been collecting maintenance payments from his employers since 2001. At the time of the initial assessment he was earning approximately £255 net per week. His liability was assessed at 30% under the relevant legislation and he began to make payments of £78 per week. Thereafter he has been assessed on the basis of 30% of his net income when working but has been unemployed for the last 18 months and has been assessed in the sum of £6.50 during that period. The child is now 16 and the appellant's obligation under the 1991 Order will continue until the child leaves school or reaches 19 whichever is the earlier.

[4] The 1991 Order was amended by the Child Support Pensions and Social Security Act (Northern Ireland) 2000 (the 2000 Act). The Child Support, Pension and Social Security (2000) Act (Commencement No 9) Order (Northern Ireland) 2003 commenced provisions which apply in respect of any new assessment in respect of child maintenance by the CSA after 3 March 2003. By virtue of these provisions the assessment in respect of a person in the position of the appellant would be at 15% of his net income. The commencement provisions did not operate to affect the basis of calculation for cases which had initially been assessed prior to 3 March 2003 subject to certain qualifications which are not relevant to this appeal.

[5] Section 28 of the 2000 Act made provision for transitional and transitory arrangements including phasing in.

> "**28. —**
>
> (1) The Department may by regulations make such transitional and transitory provisions, and such incidental, supplementary, savings and consequential provisions, as it considers necessary or expedient in connection with the coming into operation of this Part or any provision of it.
>
> (2) The regulations may, in particular—
>
> (a) provide for the amount of child support maintenance payable by or to any person to be at a transitional rate (or more than one such rate

successively) resulting from the phasing-in by way of prescribed steps of any increase or decrease in the amount payable following the coming into operation of this Part or any provision of it;

(b) provide for a departure direction or any finding in relation to a previous determination of child support maintenance to be taken into account in a decision as to the amount of child support maintenance payable by or to any person.

(3) Article 74(3), (4) and (6) of the 1998 Order (regulations and orders) shall apply to any power to make regulations under this section as it applies to any power to make regulations under that Order.

(4) Regulations under this section shall be subject to negative resolution."

By virtue inter alia of the powers conferred by this section the Department for Social Development made the Child Support (Transitional Provisions) Regulations (Northern Ireland) 2001 which provided for the supersession of assessments whether made before or after the commencement of the 2000 Act and enabled any such assessment to be phased. These Regulations would, therefore, have provided a mechanism for migrating the appellant from assessment under the old scheme to assessment under the new scheme. They have, however, never been commenced.

The submissions of the parties

[6] There are about 35,000 cases remaining in Northern Ireland which are subject to the old scheme. Since there are no new cases under the old scheme and cases fall out of the system as children reach the age limit this number is decreasing. The appellant accepts that the initial assessments under the old scheme were in accordance with law, were necessary in a democratic society to provide appropriate financial support for children and relieve taxpayers and that the means employed were related to those objectives and proportionate. The latter concession reflects the approach to proportionality in respect of child support payments taken by the European Commission of Human Rights in Burrows v UK (Application 27538/97).

[7] The appellant contends, however, that the parliamentary intention of the 2000 Act was to migrate all of the old cases to the new scheme and that the failure to do so rendered the continuing assessment of the appellant under the old scheme disproportionate. Although in this case the effect of such a migration would be a reduction in the amount payable by the appellant there were other cases where by virtue of the differences arising from the legislative

assessments the amount payable to the parent with care would be increased under the new scheme.

[8] In support of the contention that the parliamentary intention was to move all old cases into the new scheme Mr O'Hara QC relied first on the 1999 White Paper "Children's Rights and Parents Responsibilities" which preceded the 2000 Act. The White Paper noted that the child support system had failed to improve the position for children. It had become so complicated that its design prevented the delivery of reliable maintenance and the assessments were virtually incomprehensible. The new scheme was intended to introduce a simple system of rates striking a proper balance between the responsibilities of both parents. The aspiration was that the introduction of the new scheme would free up more time for enforcement. The White Paper estimated that because of the need for new legislation, new computer systems and changes in working practices it would be towards the end of 2001 before the reforms could be introduced. The reformed scheme would deal with new applications first but existing cases were to be transferred at a later date once the Department was sure that the system was operating properly. In fact as we know it was the early part of 2003 before the system was established in relation to new cases.

[9] In 2004 consideration was given to whether the Northern Ireland cases could be transferred to the new scheme either in conjunction with or ahead of migration in Great Britain. That raised an issue concerning the aspiration for parity in the social security, child support and pensions systems which is reflected in section 87 of the Northern Ireland Act 1998.

> "87 Consultation and co-ordination.
>
> (1) The Secretary of State and the Northern Ireland Minister having responsibility for social security ("the Northern Ireland Minister") shall from time to time consult one another with a view to securing that, to the extent agreed between them, the legislation to which this section applies provides single systems of social security, child support and pensions for the United Kingdom."

That aspiration found expression in a Concordat between the Department for Work and Pensions and the Department for Social Development in Northern Ireland dated April 2002. The Concordant is not a binding agreement or contract but its aim is to ensure close working relationships between the Departments. It records that the Belfast Agreement recognised that although there is separate legislation for social security in Northern Ireland and responsibility lies with the Assembly this is an area where parity with Great Britain is normally maintained. The Concordant notes that the aspiration for parity is reinforced by section 87 of the 1998 Act.

[10] The working arrangements for the assessment of child support are based on a computer system which is UK wide. As a result of these common arrangements the CSA in Northern Ireland has entered into a service level agreement with the CSA in Great Britain to administer on a contractual basis casework for the East of England. Mr O'Hara QC accepts that seeking parity is a legitimate objective but submits that it can only be an aspiration and not a binding principle.

[11] In May 2004 the newly appointed chief executive of the CSA raised the feasibility of dispensing with bulk migration to the new system and building the Northern Ireland cases into the new system as new intake. A paper on this was prepared in July 2004 which noted that such an approach would represent departure from parity. The closure of the cases would require discussions with the GB agency and Ministers, negotiation with EDS, the firm responsible for the computer system, and consideration at ministerial level as to how to inform clients of the changes. Legislative change may be required to deal with the closure of old cases and more than 300 staff would need to be recruited and trained. It was anticipated that if ministerial approval was given in September 2004 it would be possible to achieve this outcome by the end of October 2005. At that time the Great Britain assumptions were that migration of old scheme cases could take place between November 2004 and May 2005. The Social Security Policy and Legislation Division of the Department of Social Development in Northern Ireland commented on the May 2004 proposals describing them as a "non runner". The relevant official recorded that it was clear that GB Ministers had decided that they would make a decision on the transfer of old scheme cases once they were sure that the new scheme was working well. Due to parity Northern Ireland was to have the same conversion date as the rest of the UK. A break with parity for early implementation of the new cases would have serious political implications and if there was not going to be approval on the policy/political front any operational considerations became academic.

[12] In September 2004 there was a meeting between a representative of the Department of Work and Pensions and representatives of the CSA in Northern Ireland to discuss the feasibility of the proposal to transfer the old cases as new cases. It was again accepted by CSA that the proposal represented a breach with the parity principle. The representative from the Department of Work and Pensions explained that as a matter of policy they would not support this idea for Great Britain. He pointed out that primary legislation did not allow for the old assessments to be cancelled. Ministers would not want fresh primary legislation on child support as this might be seen as undermining the government's existing scheme for reform. The proposal would also undermine the basic principle of child support reform that moves from the old scheme to the new scheme should be phased so as to

avoid an overnight transformation in people's finances which was unfair and probably unpopular.

[13] Despite these concerns work proceeded on the early conversion of the Northern Ireland caseload and in December 2004 the chief executive of the CSA submitted a discussion document to the relevant Minister noting the continuing delays in the timescales for migration of the current caseload to the new computer system. The note recognised that the then legislative scheme was based on the old scheme liabilities being converted once Ministers were satisfied that the new arrangements were working well enough to allow this to happen. New scheme liabilities were to be phased in over a number of years to ensure that there was no dramatic adverse financial impact.

[14] The Minister was anxious to convert the old scheme caseload to the new scheme as quickly as possible. He concluded that the best approach would be to try to have the Northern Ireland cases included as part of, or in addition to, the 110,000 cases which were due to make up the migration and conversion pilot planned to start later in 2005. In February 2005 he made a formal request to that effect. That request was effectively overtaken by the publication of the Shreeveport Report, commissioned to advise on bulk migration, which was published in April 2005. It concluded that the bulk migration approach which had been government policy was unproven and the risks were too high in terms of business impact to be viable. In February 2006 the government invited Sir David Henshaw to lead a redesign of the child support system and a White Paper later that year eventually led to the passing of the Child Maintenance and Other Payments (Northern Ireland) Order 2008. The Appellant accepts that this legislation has been passed with an aspiration that both old scheme and new scheme cases will be transferred to a further scheme between 2010 and 2013.

[15] The appellant submits that the failure to transfer him from the old scheme to the new scheme before the end of 2005 constituted a breach of his rights under article 1 protocol 1 of the European Convention on Human Rights.

> "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."

As previously indicated the appellant does not say that the legislation as it initially affected him constituted such a breach. He submits that there was a failure by the executive to implement the intention of Parliament that old scheme cases should be transferred into the new scheme. He points out that although in this case that would mean a reduction in the amount paid by him there were other cases where there would be an increase in the amount paid to the parent with care. He complains that although Parliament deemed it necessary for him to make a contribution it did not intend him to continue to make a contribution at the level to which he is now assessed. This goes both to whether the assessment is in accordance with law and whether it is proportionate. The aspiration for parity cannot be an answer. He accepts that the State had a margin of appreciation in terms of the date of implementation.

[16] For the respondent Mr Maguire QC submitted that the legislation did not require conversion of all cases in any timescale. The matter was one of discretion for Ministers to decide when the time was right to bring forward conversion. The White Paper which preceded the 2000 Act specifically asserted that existing cases would be transferred later once the government was sure that the system was operating properly. Mr Maguire QC pointed to numerous statements between the beginning of 2000 and the end of 2006 when this condition was repeated by Ministers in the House of Commons. Thereafter the government was moving in a new legislative direction.

[17] Associated with that condition were two further issues of practicality. The first was that the computer system should be able to carry out bulk transfer of cases to the new scheme in an accurate manner. There is ample material within the papers to demonstrate that this never was the case. The second associated issue was that old scheme cases should be in a fit state to be transferred. The papers indicate that very substantial administrative work was required to achieve that objective and that it had not been achieved within the timescale with which this application is concerned. Mr O'Hara QC did not seek to suggest that any of these conditions had been satisfied but submitted that these administrative reasons were not a sufficient basis upon which to justify the failure to transfer.

[18] Mr Maguire QC relied in any event on the House of Lords decision in M v Secretary Of State for Work and Pensions [2006] UKHL 11 as support for the proposition that child support payments did not interfere with the applicant's right to protection of property under article 1 of the first protocol. Mr O'Hara QC accepts that this decision is binding on us and we consider that he is right to do so. We note that in M the case was made on the basis of a breach of article 14 in connection with article 1 of the first protocol. Although that applicant failed before the House of Lords she subsequently succeeded before the ECHR. We are satisfied, however, that in light of Kay v

Lambeth LBC [2006] UKHL 10 we are bound by the reasoning of the House of Lords.

[19] Finally Mr Maguire QC pointed out that the discretionary judgment upon which the Minister was engaged was ultimately political. It involved a policy judgment on parity but also included assessment of manpower and resources issues, requirements for primary legislation and technical aspects related to the new computerised system. If article 1 of the first protocol was engaged the assessment of such issues by a Minister requires the most substantial margin of appreciation when determining proportionality.

Consideration

[20] There are three issues that arise for determination in this appeal. The first is whether child support payments interfere with the appellant's right to protection of property under article 1 of the first protocol. The parties are agreed that there is binding precedent against the appellant on this point. The issue was considered by the four members of the majority in M v Secretary Of State for Work and Pensions [2006] UKHL 11 and each of them concluded that there was no such interference because the purpose and effect of the scheme was to enforce the personal obligation of the absent parent rather than the expropriation of assets for a public purpose. Although the ECHR concluded that the scheme involved the securing of contributions by the State we are bound by the House of Lords decision. That is sufficient, therefore, to ensure that this appeal must fail.

[21] The second issue is whether there was a Parliamentary intention giving rise to any legal right for the appellant to have his contributions assessed under the new scheme. The appellant does not criticise the decision to commence the new scheme in respect of new applications only. The criticism relates to the failure to transfer old scheme cases to the new scheme at some later date before the end of 2005. The mechanism within the legislation for transfer is section 28 of the 2000 Act as set out at paragraph 5 above. This discretionary power is available to be exercised by the Department as it considers necessary or expedient. The provision, therefore, gives a very wide area of discretion to the decision maker and provides no support for the proposition that the Minister was under any form of duty to move the old scheme cases into the new scheme within any timescale.

[22] The appellant's submission is also in our view contradicted by authority. We are happy to adopt the passage set out by Weatherup J at paragraphs 26 and 27 of his judgment.

> "[26] The effect of legislation granting an executive power to commence a statutory scheme was considered by the House of Lords in R (Fire Brigade Union) v Secretary of State for the Home

Department (1995) 2 All ER 244. In 1964 a non-statutory criminal injuries compensation scheme was set up under the prerogative. The Criminal Justice Act 1988 contained a statutory scheme and included a provision that it was to come into force on a day to be appointed by the Secretary of State. By 1993 the statutory scheme had not been brought into effect but a White Paper proposed to introduce a new tariff scheme. The House of Lords held that there was no legally enforceable duty to bring the statutory scheme into force since the Home Secretary had a discretion to decide to bring the provisions into effect when it was appropriate to do so. His obligation was to keep under review the question of the bringing into force of the statutory scheme. In the event the House of Lords held that it was an abuse of power for the Home Secretary to act inconsistently with the duty to keep under review the introduction of the statutory scheme by introducing an alternative tariff scheme.

[27] On the nature of the Home Secretary's power Lord Mustill stated at page 262h:

> "Parliamentary Government is a matter of practical politics. Parliament cannot be taken to have legislated on the assumption that the general state of affairs in which it was thought desirable and feasible to create the power to bring a new regime into effect will necessarily persist in the future. Further study may disclose that the scheme had unexpected administrative flaws which would make it positively undesirable to implement it as enacted, or (for example) it might happen that a ruling of the European Courts of Human Rights would disclose that persistence with the scheme would contravene the international obligations of the United Kingdom. Financial circumstances may also change, just as the Secretary of State maintains that they have changed in the present case; the scheme may prove unexpectedly expensive, or a newly existing or perceived need for financial stringency may leave insufficient resources to fund public expenditures which might otherwise be desirable.""

Applying those principles to this case it is clear that there was no legislative duty on the Minister to transfer the applicant's liability from the old scheme to the new scheme.

[23] The last issue is that of proportionality and only arises if we are wrong on the first issue. At first sight this challenge has many of the characteristics of

a discrimination case. Essentially the appellant complains that he is treated differently from a person in similar circumstances whose claim was first assessed after 3 March 2003. His difficulty arises from the need to demonstrate that the reason for the difference of treatment was by reason of one of the discrete grounds set out in article 14 of the ECHR or on the basis of a difference in status if he is to bring his case within the discrimination provisions of the convention. No such case was explored before us. If the appellant had been able to identify some characteristic which engaged article 14 the question of justification would then have arisen. That would have required an analysis of the reasons for the assessment methodology under the old scheme and the change under the new scheme. None of that material was before us. If this had been an article 14 case it would, however, have required some compelling reasons to justify such a marked difference in contribution over such a prolonged period and it is highly unlikely that administrative difficulties would have been sufficient.

[24] The assessment of proportionality in property cases, which is what we are concerned with, involves the striking of a fair balance between the public interest and the protection of the individual's fundamental rights (see Sporrong and Lonnroth v Sweden (1982) 5 EHRR 35). James v United Kingdom (1986) EHRR 123 shows the latitude given to the State in determining what is in the public interest.

> "…the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation."

[25] The appellant accepts that the scheme as it initially applied to him was proportionate. He has not advanced any analysis of the old scheme by way of criticism other than to point to the different outcome under the new scheme. It is clear that the new scheme was introduced because the old scheme was not serving its purpose. It is common case that the government intended to transfer the old cases to the new scheme between March 2003 and the change of legislative plan in 2006. The papers indicate that the reason for not doing so was the difficulty in getting the new scheme to function efficiently despite the expenditure of many millions of pounds on the computer system. Any attempt to alter the position of the old scheme cases by way of transfer during this period would have created further administrative failures. The government at all times had indicated the basis upon which it would proceed to transfer and acted in accordance with those pronouncements. The appellant accepts that the government was entitled to delay the transfer of the

old cases when it set up the new scheme and accordingly accepts that the maintenance of two schemes with different outcomes was proportionate.

[26] In those circumstances we do not consider that it can be said that the failure of the government to transfer the appellant's case and the continuation of his assessment under the old scheme lies outside the latitude available to the State in balancing the rights of the appellant and the public interest. For the reasons set out above we dismiss this appeal.