Judicial Communications Office

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COURT FINDS THAT PROVISIONS FOR THE DISABLED IN THE PENSIONS ACT (NORTHERN IRELAND) 2015 ARE INADEQUATE

Summary of Judgment

The Court of Appeal[1] today ruled that the provisions of sections 29 and 30(1)-(3) of the Pensions Act (Northern Ireland) 2015 are incompatible with Article 14 ECHR read with Article 8 of and/or Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court concluded that section 29(1)(d) of the 2015 Act should be read and given effect so that the national insurance contribution condition for Bereavement Support Payment is to be treated as met if the deceased was unable to comply with section 30(1) throughout her working life due to disability. Reading and giving effect to the 2015 Act in this manner means that it is compatible with Article 14 ECHR read in conjunction with Article 8 and A1P1.

Introduction

A Social Security Appeal Tribunal ("the tribunal") referred a question to the Court of Appeal as to whether the provisions of sections 29 and 30(1)-(3) of the Pensions Act (Northern Ireland) 2015 ("the 2015 Act") are incompatible with Article 14 read with Article 8 of and/or Article 1 of the First Protocol ("A1P1") to the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

The issue relating to incompatibility also raised a devolution issue because a provision is outside the competence of the Northern Ireland Assembly if it is incompatible with any Convention rights. The 2015 Act is an Act of the Northern Ireland Assembly.

These incompatibility and devolution issues arose because sections 29 and 30(1)-(3) of the 2015 Act impose a requirement of *actual payment* of Class 1 or Class 2 national insurance contributions by a deceased spouse or civil partner as one of the conditions of the surviving spouse or civil partner being entitled to Bereavement Support Payment ("BSP").

Background

Mrs Pauline O'Donnell had been unable to work throughout her working life due to severe congenital disabilities and therefore could not and did not "pay" any Class 1 or Class 2 national insurance contributions, although she was "credited" with contributions. She could have but did not make Class 3 (voluntary) contributions but even if she had these would not have met the contribution condition for BSP. She died on 31 July 2017.

[1] The panel was Morgan LCJ, Stephens LJ (delivering the judgment of the Court) and O'Hara J.

The Department for Communities ("the respondent") declined the application for BSP made by her surviving spouse, Mr Michael O'Donnell, ("the appellant") on the basis that "your wife did not pay enough National Insurance contributions." The appellant appealed to the tribunal, arguing that the contribution condition that Class 1 or Class 2 national insurance contributions must have been "paid" by the deceased spouse or civil partner were unjustifiable discriminatory treatment of the appellant and of their children on account of the disability of Pauline O'Donnell in circumstances where she could not work throughout her working life due to her disabilities and therefore could not pay Class 1 or Class 2 national insurance contributions. The appellant described this as "unlawful indirect associative disability discrimination" contrary to Article 14 read with Article 8 of and/or A1P1 to the ECHR.

The Referral from the Tribunal and the question for the Court of Appeal

In accordance with Schedule 10 Paragraph 8 of the Northern Ireland Act 1998 ("the NIA") and Order 120 Rule 6 of the Rules of the Court of Judicature (Northern Ireland) 1980, the tribunal adjourned the appeal and referred to the Court of Appeal the following question:

> "Are the provisions of Sections 29 and 30(1)-(3) of the Pensions Act (NI) 2015 incompatible with Articles 8, 14 and Protocol 1 Article 1 of the European Convention on Human Rights, as provided by the First Schedule to the Human Rights Act 1998?"

The question is confined to the facts of this reference which involves a deceased individual who, as a result of disabilities, could not work throughout her working life and therefore could not pay Class 1 or Class 2 national insurance contributions.

The Appeal

The Article 14 questions

To resolve the question referred to the Court of Appeal by the tribunal, the Court had to answer a series of questions as to whether or not there had been unjustifiable discrimination contrary to Article 14. These questions were formulated by Lady Hale at paragraph 136 in the case *R (DA & DS) v Secretary of State for Work and Pensions* 2019 UKSC 21 as follows:

(i) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights?

(ii) Does the ground upon which the complainants have been treated differently from others constitute a "status"?

(iii) Have they been treated differently from other people not sharing that status who are similarly situated or, alternatively, *have they been treated in the same way as other people not sharing that status whose situation is relevantly different from theirs* [emphasis added]?

(iv) Does that difference or similarity in treatment have an objective and reasonable justification, in other words, does it pursue a legitimate aim and do the means employed bear "a reasonable relationship of proportionality" to the aims sought to be realised (see *Stec v United Kingdom* (2006) 43 EHRR 1017, para 51)?

The Court of Appeal referred to these questions as the "*DA and DS questions*". Prior to answering the questions, the Court concluded that the natural formulation of the complaint in this reference was that the appellant and his children had been treated similarly to those whose situation was relevantly different (i.e. they had been treated similarly to families of non-disabled people who had not met the contribution condition). On this basis, it was the emphasised words in question (iii) that were relevant.

The Court's answers to the Article 14 questions

The answer to the first *DA and DS question* is that the circumstances fall within the ambit of both Article 8 and A1P1. There was no dispute before the Court that the subject matter of the complaint fell within the ambit of both Article 8 and A1P1 ECHR. The Convention does not require member states to establish BSP but where domestic law provides for surviving spouses to be entitled to BSP that entitlement is within the ambit of both Article 8 and A1P1. The reasons for this were set out by Lady Hale at paragraph [137] of her judgment in *DA & DS*.

The answer to the second *DA and DS question* is that the difference in treatment was on the ground of "other status" within Article 14. The Court ruled that there was differential treatment on the grounds of the appellant's and the children's status because the contribution condition could never be satisfied by the deceased due to her severely disabled status.

The answer to the third *DA and DS question* is that the appellant and his children had been treated in the same way as other people not sharing their status whose situation is relevantly different from theirs. The Court found that the deceased, who as a result of disability could not work and could never meet the contribution condition, was treated in exactly the same way as an individual who could work and who could meet the contribution condition but did not do so. This meant that the appellant and his children had been treated in the same way as others whose situation was significantly different by reason of the disability of the deceased. The 2015 Act did not differentiate between persons in significantly different situations and there had been a failure to treat differently persons whose situations were significantly different. The discrimination was by comparison to non-disabled persons.

The answer to the fourth *DA and DS question* is that the respondent failed to justify the similarity in treatment of those with and those without severe disabilities so that the contributory principle, in so far as it affects those individuals who through disability cannot work throughout their working life, is manifestly without reasonable foundation. The Court of Appeal answered the fourth *DA & DS question*, which relates to the respondent's justification for the adverse treatment, by breaking it down into the four stage analysis which was formulated in the case of *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 at 790 – 791 paragraph [74].

Once the respondent put forward its reasons for the adverse treatment, the Court used the *Bank Mellat* technique to answer the sole question as to whether or not the appellant had demonstrated that the reasons were "manifestly without reasonable foundation". The Court was bound by the majority decision in *DA & DS* so that the "manifestly without reasonable foundation" formula applied to all four stages of *Bank Mellat*.

The Court found that the factors relied on by the respondent constituted *explanations* as to why the contribution condition was included in the legislation. They did not constitute *justification* for the discriminatory effect of the contribution condition when applied to spouses of people with severe disabilities who were never able to work throughout their working life.

The Court also found that the respondent failed to comply with the positive obligation to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different. This failure was confirmed by the respondent's breach of its obligation to comply with the United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities, which informs interpretation of the ECHR.

Having applied the *Bank Mellat* technique, the Court concluded that the contributory policy in its application to those who through disability were unable to work throughout their working life was manifestly without reasonable foundation. The inclusion of an exception in the legislation would simply amount to recognition that those who cannot contribute should not be excluded. It was possible to make an exception without undermining the contributory principle, as shown by section 30(3) of the 2015 Act.

Conclusion

The Court considered that the exception was limited to the facts of the reference. It read in an exception that makes this clear, in the following terms:

> "For the purposes of section 29(1)(d) the contribution condition is to be treated as met if the deceased was unable to comply with section 30(1) throughout her working life due to disability."

The Court concluded that section 29(1)(d) of the 2015 Act should be read and given effect so that the contribution condition is to be treated as met if the deceased was unable to comply with section 30(1) throughout her working life due to disability. Reading and giving effect to the 2015 Act in this manner means that it is compatible with Article 14 ECHR read in conjunction with Article 8 and A1P1.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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