Neutral Citation Number: [2023] EWCA Civ 1156

Case No: CA-2022-001882

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**Mr Justice Kerr**
**[2022] EWHC 2298 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2023

**Before :**

**LORD JUSTICE UNDERHILL**
**(Vice-President of the Court of Appeal (Civil Division))**
**LADY JUSTICE ELISABETH LAING**
and
**LADY JUSTICE FALK**

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**Between :**

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| **DANIEL RICHARD JWANCZUK** | **Claimant/ Respondent** |
| **- and –** | |
| **SECRETARY OF STATE FOR WORK AND PENSIONS** | **Defendant/ Appellant** |

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**Clive Sheldon KC** and **Zoe Gannon** (instructed by **the Treasury Solicitor**) for the **Appellant**
**Catherine Callaghan KC** and **Tom Royston** (instructed by **Public Law Project**)
for the **Respondent**

Hearing dates: 13-14 June 2023
Further written submissions: 19 and 28 June 2023

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# Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday, 11 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lord Justice Underhill :**

## INTRODUCTION

1. This appeal concerns a claim for bereavement support payment ("BSP") made by the Claimant, Daniel Jwanczuk, following the death of his wife Suzanne ("Suzzi"). Suzzi was born in 1974. She suffered throughout her life from a progressive degenerative condition called Ullrich congenital muscular dystrophy, which rendered her severely disabled. She and the Claimant had known each other since they were children. They fell in love and started living together when they were young adults: they married in 2005. Although Suzzi had hopes of going into paid employment, at least in the earlier stages of her illness, she never did so. The Claimant cared for her until her death on 20 November 2020. His witness statement gives a moving account of their relationship and of her long and courageous struggle to make the most of her life despite her disabilities.

2. BSP is a non-means-tested contributory benefit, the purpose of which is to assist with the additional expenditure that is typically associated with bereavement. It is paid partly as an immediate lump sum, and partly by monthly payments for a period of eighteen months: it is paid at one or other of two flat rates, depending on whether the survivor has dependent children. It was introduced by the Pensions Act 2014, replacing three existing forms of bereavement benefit – bereavement payment, bereavement allowance and widowed parent's allowance. The form of the new benefit was the subject of a consultation document issued jointly in December 2011 by the Department for Work and Pensions ("the DWP") and the Northern Ireland Department for Social Development titled *Bereavement Benefit for the 21st Century*.

3. The relevant provisions of the 2014 Act read as follows:

> "30. *Bereavement support payment*
>
> (1) A person is entitled to a benefit called bereavement support payment if –
>
> (a) the person's spouse, civil partner or cohabiting partner dies,
>
> (aa) …
>
> (b) the person is under pensionable age when the spouse, civil partner or cohabiting partner dies,
>
> (c) the person is ordinarily resident in Great Britain … when the spouse, civil partner or cohabiting partner dies, and
>
> (d) the contribution condition is met (section 31).
>
> (1A)-(1D) …
>
> (2) The Secretary of State must by regulations specify –
>
> (a) the rate of the benefit, and

(b) the period for which it is payable.

(3)-(7) …

31. *Bereavement support payment: contribution condition and amendments*

(1) For the purposes of section 30(1)(d) the contribution condition is that, for at least one tax year during the deceased's working life –

(a) he or she actually paid Class 1 or Class 2 national insurance contributions, and

(b) those contributions give rise to an earnings factor (or total earnings factors) equal to or greater than 25 times the lower earnings limit for the tax year.

(2) For earnings factors, see sections 22 and 23 of the Social Security Contributions and Benefits Act 1992.

(3) For the purposes of section 30(1)(d) the contribution condition is to be treated as met if the deceased was an employed earner and died as a result of —

(a) a personal injury of the kind mentioned in section 94(1) of the Social Security Contributions and Benefits Act 1992, or

(b) a disease or personal injury of the kind mentioned in section 108(1) of that Act.

(4) In this section the following expressions have the meaning given by section 122(1) of the Social Security Contributions and Benefits Act 1992 —

'employed earner',

'lower earnings limit',

'tax year', and

'working life'.

(5) … ."

4. I need not elucidate all the cross-references in section 31 to the Social Security Contributions and Benefits Act 1992. It is enough to say that "working life", as referred to in subsection (1), begins in the tax year in which the person in question attains the age of 16; that an "earnings factor", as referred to in subsection (2), is a concept adopted by the 1992 Act in order to provide a common basis for measuring earnings; and that the "lower earnings limit" is a weekly figure the amount of which is set each year – in 2022/23 it was £123 per week.

5. Four points about BSP should be noted at this stage:

(1) The contribution necessary to qualify is modest. The deceased spouse[1] need only have paid national insurance contributions ("NICs") in a single year of their working life and only on the basis of earnings of about £3,000. The contribution condition in what became section 31 (1) was described by the responsible Minister in the committee stage of the bill in the House of Commons as "probably one of the most, if not the most, relaxed contribution requirements in the system", adding that that was in order to "ensure that we support as many people as possible".

(2) The contribution condition is deemed to have been met if the deceased was employed and dies as a result of industrial injury or disease (together, for short, "the death at work exception"): see section 31 (3). Because of point (1), this provision will only have practical effect where the death occurs very early in the deceased's working life: once they have paid the minimum contributions the claimant qualifies anyway.

(3) The national insurance system provides for people who are not paying actual NICs in some circumstances to receive "national insurance credits". Those circumstances include where the person in question is in receipt of disability benefits but they extend to a much wider group, including for example the unemployed, carers and those in training. Credits count primarily towards state pension entitlement. They do not count toward BSP because section 31 (1) requires NICs to have been "actually paid".

(4) The bereavement benefits which were replaced by BSP were also contributory but the detailed contribution requirements varied between them. In the case of bereavement allowance and widowed parent's allowance the requirement could be satisfied by the receipt of national insurance credits: actual payment of NICs was not a condition.

6. Apart from the devastating personal impact on the Claimant, Suzzi's death caused him real financial difficulties. He lost his income as a carer. The income from the benefits that she had been receiving also ceased to come in. He applied for BSP. This was refused because he could not satisfy the contribution condition since Suzzi had never paid NICs. That refusal was maintained by the DWP in a reconsideration decision dated 6 October 2021. If the Claimant had been found to be eligible the total amount of benefit payable would have been £4,300.

7. In January 2022, with the assistance of Public Law Project, the Claimant began judicial review proceedings against the Secretary of State for Work and Pensions claiming that the absence of an entitlement to BSP in cases where the deceased spouse had been unable to work as a result of disability constituted a breach of article 14 of the European Convention on Human Rights, read with article 8 and article 1 of Protocol 1 ("A1P1"). He relied principally on the decision of the Northern Ireland Court of Appeal in *O'Donnell v Department for Communities* [2020] NICA 36, which upheld a claim challenging the same rule under the Northern Ireland benefit legislation.

[1] For convenience, I will in this judgment refer simply to "spouses", though the Act refers also to civil partners and cohabiting partners.

8. The Claimant also appealed against the Secretary of State's decision to the First-tier Tribunal ("the FTT"), but that appeal has been stayed by consent.

9. By a decision handed down on 7 September 2022 ([2022] EWHC 2298 (Admin), [2023] 1 WLR 711) Kerr J upheld the Claimant's claim. Applying section 3 of the Human Rights Act 1998, he held that it was possible to construe the 2014 Act in such a way as to treat the contribution condition as having been met "if the deceased was unable to comply with section 31 (1) throughout her working life due to disability"; and he made a declaration in those terms. He made no finding as to whether Suzzi had in fact been unable to earn due to her disability, on the basis that that was a question properly to be decided in the FTT proceedings. I will refer to his reasoning in more detail later. At this stage it is enough to say that he believed that the decision in *O'Donnell* was indistinguishable and that he ought to follow it.

10. This is an appeal against that decision, with permission granted by Kerr J himself. The Claimant has been represented by Catherine Callaghan KC and Tom Royston and the Secretary of State by Clive Sheldon KC and Zoe Gannon. All counsel also appeared before Kerr J. Without wishing to discount the contributions of junior counsel, I will for convenience refer to the skeleton arguments as if they were the work of leading counsel only.

## ARTICLE 14 AND THE HUMAN RIGHTS ACT

11. I need not say much at this stage about the scope and application of article 14 of the Convention and the relevant provisions of the 1998 Act, but I should record the basics.

12. Article 14 is headed "Prohibition of discrimination" and reads:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

In the present case we are concerned with discrimination on the ground of "other status". Although the article does not say so in terms, a discriminatory measure will not contravene article 14 if it is shown to be justified.

13. The correct approach to the application of article 14 in cases concerning entitlement to social security benefits has been most recently and authoritatively reviewed in the judgment of Lord Reed in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223. It is sufficient at this stage to note three points which are uncontroversial:

(1) There may be a breach of article 14 without a breach of any of the other articles of the Convention, but the discrimination relied on must fall within the "ambit" of one of those articles. In the present case, as we have seen, the Claimant relies on article 8 ("Right to respect for private and family life") and/or A1P1 ("Protection of property"), but no issue arises about those articles and I need not set them out here.

(2) Article 14 does not expressly distinguish between different forms of discrimination, but it is now well established that it embraces what in the EU and UK jurisprudence is recognised as indirect discrimination: see *SC* at paras. 50-53.

(3) Discrimination may occur not only where people in the same situations are treated differently but also where people in different situations are treated alike. As Lord Reed put it at para. 48 of his judgment in *SC*:

> "… [A]rticle 14 may impose a positive duty to treat individuals differently in certain situations. … *Thlimmenos v Greece* 31 EHRR 15 … illustrates the nature of the discrimination in such cases. The applicant had received a criminal conviction as a result of his refusal, for religious reasons, to wear a military uniform. He was refused admission to the profession of chartered accountant because he had been convicted of a serious crime. Since his conviction did not imply any dishonesty or moral turpitude which might render a person unsuitable to enter the profession, the court held that 'there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony' (para 47). The discrimination lay in not introducing an exception to a general rule."

This kind of discrimination is commonly referred as to as *Thlimmenos* discrimination.

14. Section 3 of the 1998 Act provides that "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". The phrase "so far as it is possible to do so" has been construed as requiring a court to interpret a statutory provision in a way which is contrary to its otherwise clear meaning where necessary to achieve compatibility with the Convention, provided that the resultant construction is not inconsistent with any fundamental feature, or does not "go against the grain", of the legislation: see *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557. This is often referred to as "the strong interpretative obligation".

15. Section 4 of the Act empowers the Court, where it is satisfied that a provision of primary legislation is incompatible with a Convention right, to make a declaration of that incompatibility.

## ***O'DONNELL***

16. The decision in *O'Donnell* is central to this appeal, and I should start by summarising the issue and the Court's reasoning.

17. Sections 29 and 30 of the Pensions Act (Northern Ireland) 2015 ("PANI") are in materially identical terms to sections 30 and 31 of the 2014 Act: more particularly section 30 of the former, defining the contribution condition, is in the same terms as section 31 of the latter. It was common ground, the point having been expressly

conceded by the respondent Department ("the DfC")[2], that Mrs O'Donnell, the deceased spouse, had been unable to work throughout her working life due to disability and had therefore never paid any NICs. Mr O'Donnell's application for BSP was refused on that basis. He appealed to a Social Security Appeal Tribunal, which referred to the Northern Ireland Court of Appeal the question whether (in short) the relevant provisions were in breach of article 14 of the Convention.

18. The Court (Morgan LCJ, Stephens LJ and O'Hara J) decided the question in Mr O'Donnell's favour. Its judgment was delivered by Stephens LJ. After setting out the evidence and the relevant legislative provisions, the judgment proceeds at paras. 42-49 to analyse how the complaint was formulated. It concludes that it was best understood as alleging *Thlimmenos* discrimination, that is "that the appellant and the children have been treated similarly to those whose situation is relevantly different, with the result that they should have been treated differently" (para. 49)[3].

19. At para. 51, by reference to the judgment of Lady Hale in *R (DA and DS) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289, the Court identified the relevant questions as being:

> "(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?
>
> (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 47, para 51)?"

I will return later to the Court's full reasoning on those questions, so far as they are in issue before us, but I should give a short account of its conclusions at this stage.

20. *(i) Ambit.* The Court held that the circumstances of the claim fall within the ambit of both article 8 and A1P1.

21. *(ii) Status.* The Court accepted Mr O'Donnell's case that the fact that he was "the spouse of a deceased who was severely disabled so that she was unable to work and therefore unable to pay [NICs]" was an "other status" for the purpose of article 14,

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2 The DfC is the successor to the Department for Social Development referred to in para. 2 above.

3 As appears from that quotation, Mr O'Donnell asserted that the article 14 rights of his children as well as himself had been breached. That is an irrelevant feature for the purpose of this appeal, and in what follows I will refer below simply to Mr O'Donnell.

characterising it as an "indirect associative status"[4], and that that was the ground of the difference in treatment of which he complained: see paras. 87 and 89. It should be noted, however, that in its eventual decision the Court formulated the status a little more fully because it included a reference to the deceased spouse having been unable to work "throughout her working life": see para. 24 below.

22. *(iii) Differential treatment.* Para. 90 of the judgment reads:

> "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 means that the appellant and his children have been treated in the same way as others whose situation was significantly different by reason of the disability of the deceased. The 2015 Act has not differentiated between persons in significantly different situations and there has been a failure to treat differently persons whose situations are significantly different. The discrimination is by comparison to non-disabled persons."

That analysis is of course consistent with the formulation of the claim by reference to *Thlimmenos*: see para. 18 above.

23. *(iv) Justification.* At paras. 92-100 the Court examines the justifications for the discriminatory treatment advanced by the DfC. Those were primarily set out in the witness statements of Una McConnell, a civil servant in its Social Security Policy and Legislation Division. The DfC also relied on a witness statement of Helen Walker, a Deputy Director (Life Events and Disadvantage) in the Labour Market, Families and Disadvantage Directorate within the DWP, which had been filed for the purpose of litigation in England about a separate BSP issue (*R (Jackson) v Secretary of State for Work and Pensions* [2020] EWHC 183 Admin, [2020] 1 WLR 1441). Both witness statements are summarised in some detail at paras. 7-15. The Court's primary conclusion was that this evidence was incapable of satisfying the requirement to prove justification because it did not directly address the discriminatory effect complained of: see para. 93. However, it went on to analyse the issue by reference to the four questions identified by Lord Reed at para. 74 of his judgment in *Bank Mellat v Her Majesty's Treasury (no 2)* [2013] UKSC 39, [2014] AC 700. It concluded that justification had not been established: see paras. 95-100. It made it clear that the test that it was applying was whether the application of the contribution condition in Mr O'Donnell's case was "manifestly without reasonable foundation": that formulation is adopted in the Strasbourg jurisprudence to denote the least intensive level of scrutiny.

24. *Remedy.* At para. 79 of its judgment the Court held that it would not be open to it to make a declaration of incompatibility under section 4 of the 1998 Act because (in short) PANI constituted subordinate rather than primary legislation. However, at para. 102 it

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[4] The discrimination in Mr O'Donnell's case can be described as "associative" because it depends ultimately on his wife's inability to work because of her disability rather than on some characteristic of his own. But I respectfully agree with the Northern Ireland Court of Appeal that the label adds nothing significant in this context: see para. 67 of its judgment.

found that, pursuant to the strong interpretative obligation under section 3 of the Act, it could and should read in to PANI an exception 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 POST-*O'DONNELL* GUIDANCE

25. The DfC did not seek permission to appeal against the Court of Appeal's decision. In March 2021 it issued guidance entitled *Bereavement Support Payment – satisfaction of Contribution Condition where the deceased was unable to work due to disability* ("the post-*O'Donnell* Guidance"). The Guidance can be sufficiently summarised for present purposes as follows. It requires decision-makers, in order to comply with *O'Donnell*, "to consider if the late spouse was unable to work throughout their entire working life due to disability" and goes on to consider what kinds of evidence would need to be considered for that purpose. The first step is to check from the records whether the deceased "had continuous entitlement to Invalidity Benefit, Incapacity Benefit and/or Employment & Support Allowance throughout their working life": if they did, that could be taken as evidence that they were unable to work. However, if that could not be established, it did not follow that they should be treated as having been able to work for some or all of the period: there might be various reasons why they were unable to work but did not claim benefits. The next step was to see from the records whether they had at any time been in receipt of Jobseekers Allowance or Unemployment Benefit, which were dependent on their being able to work – in which case the claim should be refused. Both those steps could be taken without the need to contact claimants "at what is a very distressing time". But if they did not provide a conclusive answer it would be necessary to contact the claimant and ask them directly whether the deceased had always been unable to work. The Guidance recognises that claimants may not be able to provide supporting evidence on that question, such as medical records, in which case the decision-maker would have to assess the claimant's statement "on its merits" and may in the absence of other evidence accept it at face value.

## KERR J's JUDGMENT

26. Paras. 1-19 of Kerr J's judgment contain a summary of the facts and the evidence. The Secretary of State's evidence took the form of a witness statement from Ms Helen Walker, whose witness statement in the earlier case of *Jackson* was, as we have seen, relied on in *O'Donnell*.

27. Paras. 24-41 summarise the judgment in *O'Donnell*, and at paras. 42-47 Kerr J considers how he should approach it. Neither party submitted that it was formally binding on him, but they differed as to the weight that should be attached to it. At para. 46 of his judgment Kerr J said that he would be guided by the observations of Ward LJ in *Secretary of State for Work and Pensions v Deane* [2010] EWCA Civ 699, [2011] PTSR 289. Para. 26 of Ward LJ's judgment reads (so far as material):

> "I am satisfied that we are not obliged to follow decisions of the Northern Ireland Court of Appeal, but we must accord them the greatest respect. Where the decision relates to a statutory requirement which

> applies or which is the same as that which applies in England and Wales, then we ought to follow that Court in order to prevent the wholly undesirable situation arising of identically worded legislation on the other side of the Irish Sea (or the other side of the Tweed) being applied in inconsistent ways. The same approach as we adopt for cases of the Court of Session in Scotland should be followed in the case of Northern Ireland."

Those observations were in fact obiter, because the Northern Ireland Court of Appeal was in the event held not to have decided the point in issue; but in support of them Ward LJ quoted from the judgment of this Court in *Abbott v Philbin* [1960] 1 Ch 27, which I consider below. Having cited *Deane*, Kerr J added, at para. 47:

> "Human rights should if possible have the same content throughout the UK. If *O'Donnell* is not distinguishable, I would not depart from it unless persuaded that is clearly wrong, which I would find only with great diffidence."

28. At paras. 48-74 Kerr J summarises the parties' submissions. The only point that I need note at this stage is that, unlike the DfC in *O'Donnell*, Mr Sheldon did not concede that Suzzi was unable to undertake paid work at any point in her working life: he said that there were indications in the evidence (for example, references to her having worked as community volunteer) which suggested that she could have done so at least in the earlier stages of her illness. He did not suggest that that was a question which could be decided in these proceedings: if the Court's conclusion were that BSP had to be paid in cases where the deceased spouse was unable to work throughout their working life it would be for the FTT to decide the factual question of whether that was so in Suzzi's case. As noted above, Kerr J accepted that submission: see para. 100.

29. Kerr J's consideration of the issues begins at para. 75. He introduces this section by saying:

> "I accept Mr Sheldon's submission that I have to consider the arguments afresh. The NICA's decision, persuasive as it is, does not formally bind this court. If *O'Donnell* is wrongly decided, Mr O'Donnell got a windfall and the NI BSP guidance [i.e. what I have called the post-*O'Donnell* Guidance] is too generous. Even if this case is on all fours with *O'Donnell*, it would not be right to decide this case only on the basis that *O'Donnell* stands as authority against the SoS. That said, to the extent that I agree with the NICA's reasoning, I need not say much more than that I do."

He adopts the same fourfold analysis as the Court in *O'Donnell*. Again, I take those points in turn.

30. *(i) Ambit.* At para. 76 Kerr J records that it was common ground that the Claimant's claimed entitlement to BSP came within the ambit of A1P1. That was sufficient to engage article 14 and he did not decide whether it also came within the ambit of article 8.

31. *(ii) Status.* In her skeleton argument Ms Callaghan had formulated the status on which the Claimant relied as "being the spouse of a deceased person who was severely disabled so that she was unable to work and therefore unable to pay Class 1 or Class 2 national insurance contributions": see para. 80. That formulation was not perhaps ideal because it omitted the important phrase "throughout her working life" which appeared in the declaration made in *O'Donnell*. Mr Sheldon argued that such a status was "too vague to qualify because it is not possible to determine who is within the class, in particular because the formulation does not refer to lifelong inability to work". Kerr J rejected that argument: paras. 81-82.

32. *(iii) Differential treatment.* Kerr J agreed with the Northern Ireland Court of Appeal that there was *Thlimmenos* discrimination in cases of this kind, since the Claimant and Mr O'Donnell were being "treated in the same way as other people not sharing their status whose situation is relevantly different from theirs", i.e. people whose failure to meet the contribution condition was as a result of choice rather than disability: see paras. 83-85.

33. *(iv) Justification.* Justification is addressed at paras. 86-97 of the judgment, to which I will return later. Broadly, Kerr J adopted the reasoning of the Northern Ireland Court of Appeal as regards each of the *Bank Mellat* questions (thus also applying the manifestly without reasonable foundation test).

34. Having reached that conclusion, Kerr J observes at paras. 95-96:

> "95. My decision means comity between courts of the UK jurisdictions is preserved and that the human rights at issue in this case have the same content in England and Wales as in Northern Ireland. I do not accept that the two cases have proceeded on different evidence. I am confident from a reading of *O'Donnell* and comparing it to the evidence of departmental and parliamentary procedure before me in this case (aided by Ms Callaghan's submissions in reply) that *O'Donnell* and this case are being decided on, materially, the same evidence.
>
> 96. The SoS was in a position to demonstrate, if she could, that the evidence was different, but all indications are that it was not. It can be said with confidence that the facts are, essentially, on all fours in the two cases. …"

I should note at this stage that there is no challenge in the grounds of appeal to the conclusion in those paragraphs, and Mr Sheldon has not attempted before us the demonstration referred to in para. 96. In any event, I agree with Kerr J that all the indications are that the evidence before the Northern Ireland Court of Appeal was materially the same as that adduced in this case. It would indeed be surprising if there had not been close liaison between the two Departments in *O'Donnell*, given the importance of the "parity principle" explained below and the fact that the consultation referred to in para. 2 was conducted jointly by both.

35. Finally, at para. 99 Kerr J addresses the question of remedy. He finds that it is possible to interpret section 31 of the 2014 Act so as to include an exception in substantially the same terms as had been adopted in *O'Donnell*.

## THE ISSUES ON THIS APPEAL

36. There are four grounds of appeal but I need not set them out in full. In summary:

- Ground 1 is that Kerr J erred by treating himself as effectively bound by *O'Donnell.*
- Ground 2 is that he was wrong to treat the status advanced by the Claimant as a valid "other status" for the purpose of article 14.
- Ground 3 challenges his conclusion on the issue of justification.
- Ground 4 challenges his conclusion that an exception could be read in to section 31 under section 3 of the 1998 Act: it is the Secretary of State's case that the only available remedy, if a breach of article 14 were found, would be to make a declaration of incompatibility under section 4.

37. The Claimant has filed a Respondent's Notice seeking to uphold Kerr J's decision on additional grounds, namely:

(a) that he should have treated the decision in *O'Donnell* as "effectively binding";

(b) that he should have adopted a more intensive degree of scrutiny of the Secretary of State's justification than the manifestly without reasonable foundation test, at least in part because the relevant status constituted what is referred to in the case-law as a "suspect ground";

(c) that there were reasons additional to those relied on by Kerr J why the application of the contribution condition in a case such as this could not be justified.

38. I consider first the issue raised by ground 1 and by head (a) of the Respondent's Notice about the weight to be given to the decision of the Northern Ireland Court of Appeal in *O'Donnell.*

## GROUND 1: THE EFFECT OF *O'DONNELL*

39. Kerr J's direction to himself, based on the judgment of Ward LJ in *Deane,* was that he was obliged to consider the issues "afresh" but that unless *O'Donnell* was distinguishable he should only depart from it if it was "clearly wrong": see paras. 47 and 75 of his judgment. Mr Sheldon submitted that that was the wrong approach. As he put it in his skeleton argument, the requirement that a decision of the Northern Ireland Court of Appeal was entitled to "respect", as it was put in *Deane*,

> "… means no more than that the judgment of the NICA should be considered carefully; effectively that the Court must 'have regard' to a decision of the NICA, and the potential consequence of departing, but not follow it if the Court reasonably disagrees or reasonably concludes that a different decision can and would have (absent a decision of the NICA) been reached. To put it another way, it is not necessary to conclude that the NICA was wrong, or clearly wrong, for the High Court not to follow it, the High Court can decide not to follow a NICA decision where a different reasonable conclusion can be reached. This

> is particularly so in the context of a Convention case, which must be determined on its own facts and based on the evidence and legal argument placed before the Court. Indeed, especially in the context of Convention arguments, it is possible for different Courts sitting in different jurisdictions to reach a different conclusion from one another."

40. Before I consider that submission I should note one point. The question considered in *Deane* was what approach the Court of Appeal in this jurisdiction should take to a decision on the identical issue by the Northern Ireland Court of Appeal. The argument before us, and I think also before Kerr J, assumed that the answer to that question would equally apply to a court of first instance in England. At this stage I will proceed on the same basis, but I consider the point further at para. 49 below.

41. Kerr J no doubt directed himself primarily by reference to *Deane* because, like the present case, it was concerned with a decision of the Northern Ireland Court of Appeal on a social security issue. However, fuller guidance as to the correct approach in cases of this kind can be found in the decision of this Court in *Abbott v Philbin* to which Ward LJ refers in *Deane*. *Abbott v Philbin* was concerned with the status of a decision of the Inner House of the Court of Session in Scotland, rather than the Northern Ireland Court of Appeal, and the decision concerned the meaning of a revenue statute rather than social security legislation, but neither difference is material. The substantive issue in the appeal was whether the value of an option should be assessed for income tax under Schedule E in the year in which it was granted or in the year in which it was exercised. The Inner House had recently, on indistinguishable facts, held that the latter approach was correct: *Forbes' Trustees v Inland Revenue Commissioners* [1958] SC 177. Roxburgh J in the High Court had reached the same conclusion, but on different grounds. On the appeal to this Court, Lord Evershed MR, who gave the leading judgment, disapproved Roxburgh J's reasoning. As regards *Forbes*, he observed at p. 44 that the reasoning of the Inner House had been "severely and, if I may say so, by no means ineffectively impugned both in the court below and in this court"; and at pp. 44-48 he identified in strong terms what he described as the "difficulties" about that reasoning and his "doubts" about the Inner House's conclusion, observing that he was doing so "because …, if this matter were to go further, it might be of some assistance if I were to state them" (p. 46). Having done so, however, he continued, at p. 49:

> "I ask myself, therefore, having expressed such doubts as I have, with all respect to the judges in Scotland, ought this court now to answer those two questions in a precisely opposite sense? It is, of course, quite true that we in this court are not bound to follow the decisions of the Court of Session, but the Income Tax Act and the relevant Finance Acts apply indifferently both north and south of the border, and if we were to decide those questions in a sense diametrically opposite to the sense which appealed to the Scottish judges, we should lay down a law for England in respect of this not unimportant matter which would be completely opposite to the law which was applied, on exactly the same statutory provisions, north of the border. I cannot think that that is right. In a case of a revenue statute of this kind it is the duty of this court, unless there are compelling reasons to the contrary, to say, expressing such doubts as we feel we ought to do, that we should follow the Scottish decision."

In short, he believed that the correct course was to express the Court's doubts and leave it to the House of Lords, if an appeal were pursued, to decide whether they were well-founded. It is reasonably clear that he disagreed with the decision in *Forbes* but that in circumstances where he had decided that it was necessary to follow it he did not think it appropriate to say so in terms[5]. Harman LJ expressed the same "doubt" about the correctness of *Forbes*, albeit in more summary terms, but he agreed with Lord Evershed that, since the Inner House's decision was indistinguishable, "for reasons of policy it would not be right that this court should express a diametrically opposite view" (p. 52). Sellers LJ likewise agreed that the Court should follow *Forbes*, but he said that he did not share Lord Evershed's doubts about its correctness, or "at any rate not with the same emphasis" (p. 50).

42. The Court gave leave to appeal to the House of Lords, which (by a majority) allowed the appeal and overruled *Forbes*: see [1961] AC 352. Lord Simonds said, at pp. 367-368:

> "… the Court of Appeal were constrained to decide this case in favour of the Crown in deference to the decision of the Court of Session in *Forbes*. I agree that the two cases are not in any material respect distinguishable and think that they took the proper course in following it."

Likewise, at p. 373 Lord Reid observed:

> "In the present case the Court of Appeal, though not bound to do so, very properly followed the decision of the Court of Session … I say very properly because it is undesirable that there should be conflicting decisions on Revenue matters in Scotland and England."

The House of Lords thus explicitly approved the course taken by the Court of Appeal.

43. In my view the approach taken in *Abbott v Philbin* amounts to a rule of practice, and I will for convenience refer to it as "the *Abbott v Philbin* rule". There are other cases (in addition to *Deane*) which apply the same rule – see, for example, *Re Hartland* [1911] 1 Ch 459; *Secretary of State for Employment and Productivity v Clarke Chapman & Co Ltd* [1971] 1 WLR 1094 (*per* Widgery LJ at p. 1102); and *R (DK) v Her Majesty's Revenue and Customs* [2022] EWCA Civ 120, [2022] 3 All ER 1025 (*per* Singh LJ at para. 46). I have focused on *Abbott v Philbin* partly because the course taken by this Court was approved by the House of Lords but partly also because it is a particularly strong case: it is, as I have said, reasonably clear that the majority would, but for the decision of the Inner House, have decided the appeal the other way but that it refrained from doing so in order to avoid conflicting decisions about the effect of a UK statute.

44. It is true that the *Abbott v Philbin* rule is one of practice only, and Lord Evershed acknowledged that it might be right to depart from it if there were "compelling reasons" to do so. There is no discussion in the authorities of what might amount to sufficiently compelling reasons. But in my view it is clear that the bar is meant to be a high one. Although Ward LJ in *Deane* used the language of "respect", the importance of securing

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5 I note Harman LJ's sly reference in his concurring judgment to the doubt expressed by Lord Evershed "with such circumspection" (p. 51).

uniformity in the interpretation of a statute applying throughout the UK means that something more is required than the usual respect which is paid as a matter of comity to a court of co-ordinate jurisdiction. Nor, in the light of the decision in *Abbott v Philbin* itself, can it be enough that the second court believes that it would have decided the case the other way. In my view the minimum requirement for a "compelling reason" must be that the second court believes that the first court's decision was clearly wrong, where the word "clearly" connotes a heightened threshold. Ms Callaghan, supporting the Respondent's Notice, submitted that even that would not be sufficiently compelling. It is in truth not useful to attempt nicely to calibrate degrees of (perceived) wrongness; and in any event a compelling reason for departing from the decision of the first court may depend on more than simply the strength of the second court's disagreement. In the end the question has to be decided by reference to the circumstances of the particular case; but the important message is that it will require more than mere disagreement with the decision of the first court to justify a refusal by the second court to follow it.

45. A particular problem may arise where either the evidence adduced, or the particular points argued, before the second court are substantially different than in the first court. I can conceive that in some circumstances, at least where the differences are fundamental, that might be sufficient to justify a departure from the *Abbott v Philbin* rule; but generally I believe Courts should be very slow to take that course. In *Morelle Ltd v Wakeling* [1955] 2 QB 379 the Court of Appeal rejected the argument that the *per incuriam* doctrine permitted it "to disregard an earlier decision of its own or of a court of co-ordinate jurisdiction … whenever it is made to appear that the court had not upon the earlier occasion had the benefit of the best argument that the researches and industry of counsel could provide": see *per* Sir Raymond Evershed MR at p. 406. The Court was not in that case concerned with a decision of a court in a different UK jurisdiction, but the observation seems equally applicable. The policy reasons for maintaining a uniformity of approach between the different jurisdictions apply even if there were differences in how two cases were presented, and resort to the Supreme Court is always available as the final arbiter. In the present case, although there are some particular arguments raised by Mr Sheldon which may not have been raised, at least in the same way, by the Northern Ireland Court of Appeal, there is no problem about differences in the evidence: see para. 34 above.

46. I should add that I can see no basis for Mr Sheldon's submission that the case for the second court departing from the decision of the first is particularly strong in the context of an issue involving Convention rights. I cannot see why there is a greater likelihood in such cases of courts in the different UK jurisdictions reaching different conclusions on identical issues than in other kinds of case; and even if that were so it is precisely the possibility, and undesirability, of that occurring which underlies the policy of restraint which the second court should follow.

47. In his oral submissions Mr Sheldon suggested that the *Abbott v Philbin* rule does not apply in this case because Kerr J and the Northern Ireland Court of Appeal were not considering precisely the same legislation. He also made the related point that PANI occupies a different place in the legislative hierarchy than the 2014 Act, since it is made under delegated powers. I see nothing in either point. Sections 29 and 30 of PANI are in identical terms to sections 30 and 31 of the 2014 Act. That is not an accident: rather, it is the result of the Northern Ireland Assembly applying the so-called "parity

principle". That principle is explained by Stephens LJ in para. 10 of the judgment in *O'Donnell* as follows:

> "Under the NIA [the Northern Ireland Act 1988] social security and child maintenance are both 'transferred matters' and are the full responsibility of the devolved Government. However section 87 NIA requires the Secretary of State with responsibility for social security and the equivalent Northern Ireland Minister to consult each other with a view to securing single systems of social security, child support and pensions for the United Kingdom. This provision is the basis for Northern Ireland maintaining parity with the UK in respect of social security, child support and pensions. Parity is not inflexible and there is scope for the devolved government in NI taking a divergent course. However there are both practical issues and funding consequences. The practical issue is that Northern Ireland is dependent on the Department for Work and Pensions computer systems. At an operational level, the social security systems in Great Britain and Northern Ireland have developed in parallel, and virtually all the social security benefits paid in Northern Ireland are processed on IT systems provided and operated by the Department for Work and Pensions. Any divergence from this would incur modification costs which could be substantial. Northern Ireland could not afford to create and maintain its own IT system; nor, given parity, would such an approach represent value for money. There would also be financial implications for the devolved administration of breaking 'parity' with the rest of the UK if this resulted in increased expenditure."

What matters in this context is that the appropriate legislative body has enacted identical provisions with a view to securing the operation of uniform system throughout the UK.

48. That conclusion accords with the decision of a specially convened Tribunal of Security Commissioners in *R (SB) 1/90* (which was also approved by Ward LJ in *Deane*). In that case the question was whether the Commissioners should follow a decision of the Northern Ireland Court of Appeal on a question about supplementary benefit which was in conflict with an earlier Tribunal decision (*R (SB) 10/88*). At para. 15 of its decision the Tribunal said:

> "Although the social security legislation governing Northern Ireland is not contained in the same Act as applies to Great Britain – and to that extent the position is different from that arising in *Re Hartland* and *Abbott v. Philbin* – we nevertheless consider that, where the relevant provisions are identical (as they are in this case), the same judicial approach should equally be adopted. At the end of the day, the legislative fount of the enactments found both in Great Britain and the province of Northern Ireland is the same, namely Parliament at Westminster. Moreover, it would be naturally expected that, where the statutory provisions operative both in Northern Ireland and Great Britain are identical, such provisions should be interpreted uniformly. Support for this contention can also be found in section 142 of the Social Security Act 1975, sub-section (1) of which reads as follows –

> 'The Secretary of State may with the consent of the Treasury make arrangements with the Northern Ireland Department ('the joint arrangements') for coordinating the operation of this Act and the Social Security (Northern Ireland) Act 1975 with a view to securing that, to the extent allowed for in the arrangements, those Acts provide a single system of social security for the United Kingdom.'
>
> Regulations have been made providing for a substantial degree of assimilation; we refer to the Social Security (Northern Ireland Reciprocal Arrangements) Regulations 1976 [SI 1976 No. 1003]. Manifestly, it is in contemplation that the *same* social security system should within limits operate both in Northern Ireland and in Great Britain, and in pursuance thereof, it would be natural to suppose that the same interpretation should be given throughout the United Kingdom to identically worded provisions. Accordingly, in our judgment, it is incumbent upon us, particularly as the decision of the Court of Appeal in Ireland was unanimous and notwithstanding that the Court chose not to have R(SB)10/88 argued, to follow that decision rather than that of the Tribunal of Commissioners in England in R(SB)l0/88."

49. I return to the point noted at para. 40 above. In my view a judge of the High Court should be even slower than this Court to reach a different conclusion from an appellate Court in Scotland or Northern Ireland on an identical issue about the meaning or effect of UK legislation. The considerations referred to above must have even greater force as between tribunals of different status in the judicial hierarchy. I note that in *Re Hartland* Swinfen Eady J said (at p. 466):

> "Where the exact point has been raised by a special case, and fully argued, and decided by an unanimous judgment of the Court of Session, and where the question is simply one that turns upon the construction of a statute which extends to Scotland as well as to England, I think my duty as a judge of first instance is to follow that decision, leaving the parties, if so advised, to have it reviewed elsewhere."

50. For those reasons I do not believe that Kerr J made any error of law in deciding that he should follow *O'Donnell* unless it was clearly wrong, and I would reject ground 1.

51. That reasoning has implications for how we should approach the remainder of the grounds. To the extent that it is clear that a particular issue before us was directly considered in *O'Donnell* our primary focus should be on whether a sufficiently compelling reason has been shown why we should not follow it, although if we have serious doubts about its correctness, albeit falling short of that standard, it will be appropriate for us to express them.

## GROUND 2: STATUS

52. I should note by way of preliminary that doubts have been expressed in the case-law about the utility of the concept of status as an independent element in determining whether there has been a breach of article 14: see, e.g., the observations of Henderson LJ in *Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123,

at para. 41. I have some sympathy with those doubts, but it would be wrong in this case to depart from the analysis adopted by the Northern Ireland Court of Appeal in *O'Donnell* and by Kerr J.

53. Kerr J followed *O'Donnell* in identifying the Claimant's status as "if the deceased was unable to comply with section 31 (1) throughout her working life due to disability": see para. 9 above. It is convenient to refer to this status simply as "inability to work", though strictly speaking it relates to inability to undertake paid work to the extent necessary to generate payment of Class 1 or Class 2 contributions.

54. Mr Sheldon referred to the status so formulated as "disability plus", to connote the fact that the actual ground of the differential treatment complained of was Suzzi not having paid contributions, albeit that that was a result of her disability. Ms Callaghan put the same point another way by saying that the status on which the Claimant relied was a subset of the broader status of disability. But she said that situations of this kind were not unusual (referring to such cases as *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250) and that the label "disability plus" added nothing useful to the analysis. I agree.

55. Mr Sheldon's essential point under ground 2 is that the status relied on in *O'Donnell*, and in this case, is too uncertain to constitute a valid status for article 14 purposes. He referred to the statement of the European Court of Human Rights in *Clift v United Kingdom* 7205/07, [2010] ECHR 1106, that article 14 "does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or 'status', by which persons or groups of persons are distinguishable from one another" (see para. 55). He submitted that a status formulated by reference to "inability to work" did not satisfy those requirements, and in particular the requirement of "objectivity". Inability to work was not "an objectively determinable characteristic". Determining it would typically require an assessment of the degree of difficulty in working encountered by a disabled person, for which there were no absolute criteria. This objection had apparently not been raised by the DfC in *O'Donnell* and it is not addressed in the Court's judgment.

56. I do not accept Mr Sheldon's submission. It is true that the concept of "inability" to work will often involve a judgment on matters of degree. The status as advanced is clearly not intended to be confined to cases where claimants were incapable of any purposeful activity (for example, if they are in a coma): the real question is whether the disabilities in question are such that throughout the relevant period they could not reasonably be expected to work (or, to be precise, to do paid work such that they pay the prescribed minimum level of NICs). But many characteristics which are well recognised as potential grounds of discrimination under article 14 are not absolute in character and can typically only be identified by an evaluative exercise. One example is disability (recognised as an "other status" in *Guberina v Croatia*, 23682/13, (2018) 66 EHRR 11): there are degrees of disability, and it may be necessary in a particular case to carry out an evaluative exercise in order to establish whether a claimant was indeed disabled in the sense relevant to that claim. Another example is what Ms Callaghan referred to as the status of cohabitation, recognised by the Supreme Court in *Re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250[6]: in a particular case it may well

[6] In fact in *McLaughlin* Lady Hale, who delivered the leading judgment for the majority, simply referred to the relevant status as "not being married" (see para. 31). But the issue arose in the

be necessary to make a judgment whether the relationship in question was sufficiently close to amount to cohabitation. In my view an evaluative exercise of the necessary kind can properly be described as objective as long as it consists of a rational evaluation of objectively established facts. There is nothing in *Clift* that contradicts that approach, which seems to me plainly consonant with the overall purpose of article 14. The issue about status in *Clift* had nothing to do with objective determinability, and the statement quoted by Mr Sheldon was merely prefatory to a different point.

57. In the case of inability to work as a result of disability, there can be no conceptual difficulty about making an evaluative determination of that kind. As Ms Callaghan pointed out, such an exercise has long had to be performed for the purpose of determining entitlement to statutory benefits which are dependent on inability, or limited ability, to work (which I will call for short "inability to work benefits"). Entitlement to sickness benefit under sections 10-13 of the National Insurance Act 1946, and subsequently to invalidity benefit under section 3 of the National Insurance Act 1971, required a determination of whether the claimant was "incapable of work", which was treated in the case-law as referring to "work which he can reasonably be expected to do". The same was true of entitlement to incapacity benefit under the Social Security (Incapacity for Work) Act 1994. Incapacity benefit was replaced by employment and support allowance under the Welfare Reform Act 2007, section 8 (1) of which defines the relevant test as "whether a person's capability for work is limited by his physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require him to work". Essentially the same test is prescribed for the purpose of universal credit by section 37 of the Welfare Reform Act 2012. It is true that at least from 1994 onwards the statutory test has been supplemented by provisions, either in the legislation itself or in regulations, prescribing what factors are to be taken into account in applying the test; but that does not affect the fundamental point that inability to work is recognised as a characteristic that is capable of objective determination.

58. Mr Sheldon pointed out that the detailed scheme under the Employment and Support Allowance Regulations 2008 contemplates that some people in receipt of benefit might in fact be capable of some kinds of work – see regulations 40 and 45. I accept that, but it does not meet Ms Callaghan's point. Her case was not that the provisions in question can be regarded as a precise proxy for "inability to work" for the purpose of this claim (though it will be recalled that they were in fact used as a partial proxy in the post-*O'Donnell* Guidance). The point is, rather, that they demonstrate that there is no inherent objection to treating incapacity for work as an objectively identifiable characteristic. (There is a separate question whether the administrative difficulties resulting from the absence of such a proxy can be relied on by the Secretary of State by way of justification: I will have to return to this later.)

59. Ms Callaghan also referred us to *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550. In that case it was said to be a breach of article

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context of a claim to widowed parent's allowance by a father who had lived with the mother for over twenty years but without getting married. In practice, therefore, the characteristic that gave rise to discrimination was that the couple cohabited without being married: this is explicitly recognised in para. 53 of the concurring judgment of Lord Mance, with whom the other members of the majority agreed.

14 not to exclude from the effect of the so-called "bedroom tax" provisions cases where adult partners could not share a bedroom because one of them was disabled or where a child required overnight care. She pointed out that the Secretary of State did not argue in those cases that the relevant characteristics were too uncertain to constitute a relevant status, notwithstanding that they depended on an assessment of whether the partners "could" share a room or of what care was "required". She also pointed out that when the claims were eventually upheld the Secretary of State enacted Regulations which provided for such assessments to be made on the basis of a reasonableness criterion. The fact that the Secretary of State's stance on this appeal may not be consistent with his[7] stance in other litigation does not really advance the argument; but *MA* is of some value as an illustration of another case of an "other status" requiring an evaluative exercise.

60. Mr Sheldon sought to draw support for his submission from the decision of this Court in *MOC v Secretary of State for Work and Pensions* [2022] EWCA Civ 1, [2022] PTSR 576. The claimant in that case suffered from complex medical conditions and disabilities including cognitive, mental capacity and mental health issues and was entitled to disability living allowance ("DLA"). He claimed that the relevant rule was discriminatory contrary to article 14. The Secretary of State conceded that the claimant had a relevant status, which he formulated as "a severely disabled adult in need of lengthy in-patient hospital treatment"; but the claimant argued that the relevant status should encompass also his lack of mental capacity. The claim was dismissed by both the First-tier Tribunal and the Upper Tribunal. The appeal to this Court was dismissed on the basis that any difference in treatment between the claimant and others not sharing his status was justified, but the Court did also address the issue of status. Singh LJ, who gave the main judgment, said at paras. 64-65:

> "64. The first issue on this appeal is whether there is a relevant 'status'. Speaking for myself, I was attracted at one time during the hearing to the possibility that the relevant status is a severely disabled person who needs hospital treatment and has a deputy appointed by the Court of Protection. [Counsel for the claimant], however, was not prepared to accept that that was the relevant status.
>
> 65. I have reached the conclusion that the Judge cannot be criticised for reaching the conclusion which he did on the question of status. He was right to observe that the question of capacity as such is not a status. First, the scheme of the 2005 Act was designed to move away from a status-based approach to a functional approach, in other words to focus on particular decisions at a particular time. Secondly, there needs to be reasonable certainty: a person's capacity may change from time to time and may do so quickly. That is not a sound foundation for the 'status' required by Article 14."

Peter Jackson LJ in his short concurring judgment at para. 76 noted that the appeal did not turn on the issue of status, but he said:

[7] For convenience, I refer to the Secretary of State by the gender of the current incumbent.

> "I agree with Singh LJ (see para. 65) that there are good reasons of principle and practicality why decision-making capacity does not provide a sound foundation for an Article 14 status. In my view, status is likely to be found in the disability itself, and not in the separate matter of capacity, and that is the conclusion to be reached in the present case."

Andrews LJ agreed with both judgments.

61. I do not believe that *MOC* assists Mr Sheldon. Singh LJ's reasoning is peculiar to the proposed status of lack of capacity under the 2005 Act. The uncertainty which he regarded as fatal was not the fact that a decision about mental capacity involves assessing questions of degree: rather, it was the conceptual uncertainty arising from the fact that under the Act capacity has to be judged by reference to the capacity to take particular kinds of decision at a particular time. The Claimant's case, by contrast, requires the application of the single criterion of whether Suzzi was unable to work at any point in her working life: if she was able to work for some part of the period but not others, that would cause no difficulty because the criterion is binary and she would fall outside the group.

62. Mr Sheldon made the point that as a result of changes in technology and patterns of work generally over the past decades a person who by reason of disability might have been unable to work in, say, 1980 might be able to do so today. That is true, but I do not think that it is relevant to the issue of conceptual uncertainty: the same, objective, criterion would be applied to the circumstances as they were at the relevant date, even if it might produce different answers. No doubt changes of this kind might make it more difficult for a decision-maker today to decide whether someone was unable to work forty years ago, and that may be relevant to one aspect of the justification issue (see para. 72 below); but it is not relevant to the issue of status.

63. I should record that the Court raised with counsel in the course of argument whether Mr Sheldon's objection based on the uncertainty of the claimed status could be met by reformulating it so that it was specifically tied to the receipt by the deceased of inability to work benefits. Formulating the status in that way would avoid the need for any evaluative determination (albeit only because it adopted the result of a prior evaluation or evaluations). We were told by Ms Callaghan that the Claimant would satisfy a criterion of that kind, since Suzzi had been in receipt of such benefits throughout her working life; and she said that she was prepared to advance his case on that basis if the Court rejected the *O'Donnell*-based formulation. But she made it clear that she regarded it as less satisfactory in principle because such a status was not an exact proxy for inability to work and its adoption might have unintended and undesirable consequences. It would exclude those who were in fact unable to work but who at some point in their working lives did not claim the benefits in question, for example those between the ages of 16 and 18 or who had spent time overseas. Conversely, it might be over-inclusive, because, as noted in para. 58 above, the rules governing entitlement to such benefits allow claimants in some circumstances to do some paid work and thus to become liable to pay NICs. Mr Sheldon made it clear that he would object to a late reformulation of the case of this fundamental nature, drawing attention to the same problems as Ms Callaghan. I see the force of those objections, and I do not think it is necessary to pursue the question further.

64. I would accordingly reject ground 2.

## GROUND 3: JUSTIFICATION

### APPROACH

65. The "*Bank Mellat* questions" – or "steps" – which both the Northern Ireland Court of Appeal and Kerr J took as their framework in deciding the justification issue were formulated by Lord Reed as follows:

> "(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right,
>
> (2) whether the measure is rationally connected to the objective,
>
> (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
>
> (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

Lord Reed noted that "in essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure".

66. The "measure" in question in the present case is the application of the contribution condition in determining entitlement to BSP in a case where the deceased spouse had been unable to work throughout their working life.

### THE DWP's CASE ON JUSTIFICATION

#### The Aims

67. In order to carry out the *Bank Mellat* analysis it is necessary to start by identifying the objective – or as it is often put, the aim – of the measure in question. In his skeleton argument before Kerr J ("the skeleton below") Mr Sheldon identified the legitimate aims of the contribution condition as threefold. I take them in turn.

68. The first aim is described in the opening words of para. 45 of the skeleton below as "to reward work through the benefit system". I am not sure that that is the most illuminating shorthand for the point which the skeleton goes on to make, namely that "the contribution principle" is of fundamental importance, "a central policy principle" as it is put. In her witness statement, on which this part of the skeleton is based, Ms Walker says (at para. 92):

> "It is the deceased's NI Contributions gained through working which give entitlement to the benefit. That is the very purpose and structure of the benefit and is part of the 'insurance' aspect of the benefit system, in that in order to obtain the benefit you must first contribute."

She distinguishes such benefits from non-contributory benefits which depend on an assessment of need. In that connection she notes that there can be a stigma associated with the receipt of benefits, but that that is mitigated where the benefit has been earned by the making of contributions.

69. At the risk of emphasising the obvious, it is worth spelling out what, as I understand it, is meant by "the contributory principle" and why it is said to be of central importance. The UK benefit system makes a fundamental distinction between contributory and non-contributory benefits. Bereavement benefits have always been contributory.[8] Contributory benefits are paid to workers on the conceptual model of insurance: they make payments by way of NICs deducted from their earnings and receive benefits, as of right and without means-testing, if the relevant event (such as sickness, unemployment, or bereavement) occurs – "something for something", as it was referred to in one of the consultation responses (see para. 78 below). The availability of contributory benefits encourages people to work, which is itself an important element in Government policy. Claiming them should not be a matter of shame because they are earned. Non-contributory benefits, by contrast, are paid to everyone, whether they work or not, as a matter of welfare and on proof of need. They are accordingly liable, however unfairly, to be regarded as "hand-outs", with the accompanying stigma. It is because of the centrality of that distinction that requiring a contribution for a contributory benefit is a matter of principle, not simply a matter of administrative choice; and any exception to that rule may be regarded as compromising the integrity of the system.

70. The second aim is introduced as "simplifying the benefit system to ensure that administrative cost and complexity is reduced" (skeleton below, para. 46). The point is that basing entitlement on the payment of contributions is not only right for the reasons of principle discussed above but also provides a straightforward "bright line" rule by reference to easily available records. That is in the interests of the public since it places very little burden on the DWP's resources, but it is said also to benefit claimants because they will receive a quick decision and will not be faced, at what will be a difficult time, with complex enquiries about the deceased's history.

71. The skeleton below goes on to contrast those advantages with the difficulties that would be caused if the DWP were required to ignore that rule and assess on a case-by-case basis "whether, over the whole of a person's working life (which may be over 40 years or more), they have been unable to perform any work". It summarises those difficulties (at para. 49) as follows:

> "There is no single proxy or piece of information that the Government holds which would demonstrate such a position. Indeed, there is no easy or quick information at all which could answer this question in the vast majority of cases. And in many cases answering this question will be complicated, resource intensive and ultimately highly uncertain. Entitlement to and claiming benefits or National Insurance Credits may suggest a possibility or likelihood, but it will not evidence categorically

[8] This is clear from the interesting history of BSP and its predecessors at paras. 4-12 of the judgment of Lady Hale in *McLaughlin.*

> or with any degree of certainty, that a person was not able to work throughout their whole working life …".

72. That passage is supported and amplified by a much fuller analysis at paras. 58-87 of Ms Walker's witness statement, of which I should give a short summary. In substance, although not explicitly, these paragraphs are a critique of the process recommended by the post-*O'Donnell* Guidance, to which Ms Walker had referred earlier. They explain with some particularity the difficulty in establishing the deceased spouse's benefits history in order to see whether they had been in receipt of inability to work benefits or, equally, benefits inconsistent with inability to work, which is the first step in that process. She points out that it might be necessary to go back as far as the 1970s, depending on the deceased's age at death. That is not a straightforward exercise. A claimant's files will usually be destroyed 14 months after they cease to receive a particular benefit, and although some computerised records should still exist these are liable to be incomplete and difficult to interpret. At paras. 15-21 Ms Walker gives a detailed account of her attempt to reconstruct Suzzi's benefit records from 1990 onwards, making enquiries also with HMRC: she described the exercise as very difficult and notes that it was not possible to achieve certainty about her benefit history. Further, even where the relevant records are available, and in interpretable form, for the whole period, they cannot give a wholly reliable answer: as already noted, neither receipt nor non-receipt of inability to work benefits definitively establishes whether a person was or was not able to work. That leaves decision-makers having to make the kind of "subjective" decision required by the post-*O'Donnell* Guidance, based on whatever evidence they could obtain. Ms Walker says that this is liable to lead to arbitrary outcomes and unfairness as between claimants: for example, claimants who had known their spouses from a young age would be inherently in a better position to prove that they had never been able to work than those who had only met them in later life. It would also increase the risk of fraud.

73. Arguably that account of the difficulties of introducing an extension to the contribution condition is more relevant to the third and fourth *Bank Mellat* questions than to the definition of the aim of the disputed measure: it is rather artificial to treat avoiding the consequences of departing from the aim as part of the aim itself. Normally I would not bother to make this point, because there is notoriously a good deal of overlap between the different questions in any justification analysis. However, I think it worth doing because, again, the shorthand label that seems to have been adopted for this aim – "simplifying the benefit system" – may not fully describe the arguments which the Secretary of State deployed under it.

74. In connection with this aim Mr Sheldon referred both Kerr J and us to *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311, *per* Lord Neuberger at paras. 54-57, as authority for the proposition that in principle it may be justifiable for the administrative workability of a bright line rule to outweigh the unfairness to some of those who may be excluded by it. He also referred us to *R (A) v Criminal Injuries Compensation Authority* [2021] UKSC 27, [2021] 1 WLR 3746, *per* Lord Lloyd-Jones at para. 90.

75. The third aim (para. 51) reads:

> "[T]he Government also sought to ensure greater certainty in understanding entitlement to benefits. Greater certainty means that

> individuals understand their entitlement and are able to plan for their financial future. Introducing a measure which requires a complicated administrative judgement on a case-by-case basis, such as requiring the Government to assess whether a person has been disabled for their whole working life, introduces substantial uncertainty into the benefit system making it difficult for individuals to make prudent financial decisions and planning."

The essential aim expressed here seems to be substantially the same as the second, i.e. to promote simplicity in the benefit system by avoiding criteria requiring a complicated administrative judgment in each case. The desirability of people being able to "plan for their financial future" is no doubt a particular advantage of having a simpler system, though possibly one of more limited application in the context of bereavement benefit.

76. It is, to anticipate, common ground that those aims are legitimate and rationally connected to the imposition of the contribution condition so that *Bank Mellat* steps (1) and (2) are satisfied. The issue is about steps (3) and (4) – in short, proportionality, to which I now turn.

Proportionality

77. It is the Secretary of State's case that the harm done to his legitimate aims by allowing the proposed exception to the contribution condition outweighs the discriminatory impact on the class affected by it and that it is accordingly proportionate. Mr Sheldon submitted that because the impugned measure represents a policy choice about a question of economic or social strategy in the context of welfare benefits, made initially by the Government but endorsed by the legislature in primary legislation, the margin of appreciation was wide.

78. In connection with that submission Mr Sheldon emphasised that the Minister made a conscious decision that the importance of the contributory principle outweighed the fact that the contribution condition would exclude spouses of people who were unable to meet it as a result of illness or ill-health. The relevant evidence is in paras. 26-49 of Ms Walker's witness statement. Following the consultation referred to at para. 2 above, civil servants prepared a submission to the Minister for Welfare Reform, Lord Freud, dated 13 March 2012 which summarised the responses and made recommendations. The summary of the relevant responses reads:

> "11. Generally, respondents supported the proposed simplifications to the contribution conditions for bereavement benefits. Some people did, however, express concerns about people who might not qualify under these conditions. Examples provided included:
>
> - Where women have supported the home and raised children rather than working, they may not have paid the appropriate amount of contributions so the husband/civil partner may not be eligible for bereavement payment should she die. In such cases, the surviving husband/civil partner may have to change his/her working patterns to fit around child care responsibilities;

> • *Where individuals have had a history of illness preventing them from working and paying sufficient contribution conditions, such as young cancer patients* [emphasis supplied];
>
> • Where, due to economic circumstances, individuals have been unable to find work and pay sufficient contributions.
>
> 12. Many of these respondents suggested taking National Insurance credits, or the surviving spouse's contribution record, into account when determining entitlement. Conversely, a small number of respondents criticised a perceived weakening of the link between contribution histories and the value of bereavement benefits, undermining the 'something for something' principle of the National Insurance system. Some people suggested that the link between the bereavement benefits they received and their late spouse or civil partner's National Insurance contributions played an important role in their experience of the payments, avoiding the stigma associated with being 'on benefits'."

Para. 13 of the submission is headed "Treatment of National Insurance credits" and reads as follows:

> "Including credited National Insurance contributions when calculating entitlement would open access to bereavement benefits, meaning that only a very small number of people would not qualify for benefit ... Whilst this would improve access to the benefit, this would significantly undermine the contributory principle and would be inconsistent with the Government agenda of making work pay. On this basis, we do not recommend that this option is pursued."

By e-mail dated 19 March 2012 the Minister accepted that recommendation. He did not give further reasons but he can be assumed to have adopted the reasons given in the submission.

79. The published response to the consultation addressed this question under the heading "Simplifying entitlement conditions". The relevant part of the summary of comments reads:

> "There was broad support for the proposal to simplify National Insurance contributions, though some organisations qualified their support …
>
> Where concerns were raised about the proposed changes to contribution conditions, these mainly focused on the exclusion from coverage of those who had not paid enough National Insurance contributions, including:
>
> • Those who had supported the home rather than being in paid employment;

- *Those who had been unable to work due to illness or disability* [emphasis supplied];

- Those who had recently left full-time education.

Some respondents made suggestions for increasing coverage, including:

- Taking National Insurance contributions of both the surviving and deceased spouse into account to determine entitlement;

- Taking National Insurance credits into account to determine entitlement;

- Making the benefit universal, i.e. paid to anyone in the event of the death of a spouse or civil partner.

Conversely, some respondents described the consultation proposal as too generous, not adequately rewarding work, and not being faithful to the contributory principle."

The Government's response reads:

"The Government recognises the important role that the contributory principle plays in people's experience of accessing benefits by creating a sense of entitlement that removes the stigma often associated with claiming means-tested benefits. Yet at the same time, bereavement benefits are paid in the event of the premature death of a working-age spouse or civil partner. Expecting a complete National Insurance record in such circumstances is clearly inappropriate.

The Government is striking a balance between these two issues, whilst seeking to make contribution conditions easy to understand, by basing contribution conditions for the Bereavement Support Payment on the existing Bereavement Payment. This will mean that people will be entitled to receive the full payment as long as their late spouse or civil partner paid National Insurance contributions at 25 times the Lower Earnings Limit for any one year prior to their death.

National Insurance credits and Class 3 National Insurance contributions will not count towards entitlement."

80. The italicised words show that the Government clearly appreciated that the contribution condition would exclude claimants whose deceased spouses had been unable to work as a result of disability. Ms Callaghan points out, however, that there is no explicit consideration of whether a particular exception should be made in their case. The only alternative which is expressly considered, and given a reasoned rejection, is allowing national insurance credits to count, which was a proposal that would have applied in a very much wider class of cases: see para. 5 (3) above. She also pointed out that the issue was not addressed in any of the various impact statements prepared.

THE REASONING ON JUSTIFICATION IN *O'DONNELL*

81. The primary reason why the Northern Ireland Court of Appeal rejected the DfC's justification case appears at paras. 92-93 of its judgment as follows:

> "92. In order to justify what would otherwise be the discriminatory effect of a rule governing entitlement to welfare benefits, the respondent has first to put forward its reasons for having countenanced the adverse treatment. The adverse treatment which is to be justified is the exclusion from any entitlement to BSP of a spouse or civil partner and of their children when the deceased was never able to work due to disabilities. Once the respondent has put forward its reasons then we would propose to use the technique or tool of the *Bank Mellat* questions in order to answer the sole question as to whether the complainant has demonstrated that the reason or reasons were manifestly without reasonable foundation.
>
> 93. The respondent has not acknowledged the discriminatory effect and quite simply has put forward no reason for having countenanced the adverse treatment. In a discrimination case, what must be justified is the difference in treatment or in this reference the lack of difference in treatment and not merely the underlying policy. The factors relied on by [counsel] which can be summarised as (a) incentivising work (b) protecting the contributory principle and (c) simplifying the benefits system justify the underlying policy but they do not justify the failure to treat the severely disabled differently from those without disabilities. It is the failure to treat them differently that needs to be justified. There was no discussion prior to the 2015 Act of making an exception for those who could not work throughout their working life due to disabilities. This means that there was no justification at the time of the failure to make an exception for this category of disabled person. That is not conclusive but what is conclusive is that there has been no after the event attempt at justifying why such an exception could not be made. We consider that none of these reasons addresses the adverse treatment. The factors relied on by the respondent constitute explanations as to why the contribution condition is included in the legislation. They do 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. These factors explain the measure but they do not provide justification for the discriminatory effect of the measure."

At para. 94 it says that that is "sufficient to conclude the reference", although it in fact goes on in the following paragraphs to carry out an analysis by reference to the *Bank Mellat* questions.

82. It should be noted that the three headline aims identified by the Court – "(a) incentivising work, (b) protecting the contributory principle and (c) simplifying the benefits system" – are substantially the same as the aims advanced in these proceedings. At para. 95 it records a slightly fuller "articulation" of those aims, namely "(a) to

incentivise work, (b) to make work pay, (c) to avoid the stigma associated with claiming means-tested benefits, (d) to simplify the contributory condition, (e) to avoid undermining the contributory principle, and (f) to comply with the parity policy"; but that does not seem significantly different.

83. I should say something about the reasoning in para. 93 and the consequent conclusion in para. 94. The Court's statement that "there was no discussion prior to [PANI] of making an exception for those who could not work throughout their working life due to disabilities" reflects the evidence summarised at paras. 79-80 above. There was indeed no discussion of making an exception for the group in question; but the impact on that group was clearly drawn to the Minister's attention and also, through the consultation response, to Parliament. In any event the Court – with respect rightly – does not regard the absence of contemporaneous consideration as fatal. Its dispositive reasoning is based on the point that, even if the factors relied on by DfC by way of after-the-event justification explain why the contribution condition was imposed they do not attempt to justify why no exception was made in order to avoid its discriminatory impact on those who are unable to work as a result of disability. I should say that I regard that distinction as debatable. It seems to me arguable that the case advanced by the Secretary of State, and it would appear by DfC, does attempt to justify the application of a contribution condition in the case of those who are unable to work – that is, by contending that the fundamental nature of the contributory principle precludes exceptions from it.

84. However, even if the Court's conclusion in para. 94 were wrong, that would not be the end of the case because, as already noted, it went on to conduct a *Bank Mellat* analysis. After summarising the aims relied on by DfC, as set out above, it held at paras. 95 and 96 that those aims were legitimate and that the contribution condition was rationally connected to them. At para. 97 it said that the third and fourth questions could be considered together. It continued:

> "98. In answer to those questions, we consider that the policy in its application to those who through disability are unable to work throughout their working life is manifestly without reasonable foundation. It is just not reasonable to suggest that one can incentivise a severely disabled person to work if through their disability they cannot work. Alternatively, to put it another way, that is manifestly without reasonable foundation. Furthermore, one cannot make work pay if through disability the individual cannot work. There is no stigma attached to credits of national insurance if a person is disabled. No one is going to think worse of a disabled person who can never work if they do not do so and receive credits rather than making payments. The contributory principle for BSP is extremely modest and that extremely modest application of the principle is not undermined by an exception being made in relation to those who through disability cannot contribute throughout their working life. An exception would simply amount to recognition that those who cannot contribute should not be excluded. That does [not] undermine the close relationship between the contribution condition and employment merely recognising that the severely disabled are at a substantial disadvantage if they cannot work throughout their working life. It is entirely possible to make an

> exception without undermining the contributory principle as is shown by section 30(3) of the 2015 Act. … In answer to question three, we consider that a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. That less intrusive measure was to create an exception for those never able to work through disability and therefore never able to pay Class 1 or Class 2 National Insurance Contributions. In answer to the fourth question, the severity of the measure's effect on the associated rights of the persons whose deceased spouse or civil partner was never able to work through disability was clearly disproportionate to the likely benefits of the impugned measure.
>
> 99. We also consider that the respondent has failed to comply with the positive obligation to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different. This failure is confirmed by the respondent's breach of its obligation to comply with UNCRC [the United Nations Convention on the Rights of the Child] and UNCRPD [the United Nations Convention on the Rights of Persons with Disabilities], which informs interpretation of the ECHR.
>
> 100. As Lord Reed stated, 'in essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure'. We consider that the adverse impact is disproportionate."

(The breaches of the UNCRC and the UNCRPD referred to in para. 99 are of the general duty imposed on states parties by both treaties to – in broad terms – give proper weight to the interests of children and of people with disabilities when taking public measures: see para. 12 of the judgment.)

85. It will be seen that the core of the Court's reasoning is in para. 98. It holds, in short, that not to make an exception for people who are too disabled to work is manifestly without reasonable foundation, essentially because it believes that doing so for this limited class would not "undermine" the contributory principle or, as it also puts it, "unacceptably compromise" the aims which it seeks to achieve. In support of that conclusion it notes two points in particular:

(a) that in the case of BSP "the contributory principle … is extremely modest", which I take to be a reference to the fact that the contribution condition is satisfied by a payment of NICs in a low minimum amount for a single year – see para. 5 (1) above; and

(b) that the statute itself makes an exception where the deceased spouse dies as a result of industrial injury or disease – see para. 5 (2).

I will postpone my observations on those paragraphs until I have set out Kerr J's reasoning.

KERR J'S REASONING ON JUSTIFICATION

86. Kerr J starts this part of his judgment, at para. 86, by referring to a submission by Mr Sheldon to the effect that the ground of discrimination in this case was not a so-called "suspect ground" of the kind which has traditionally been treated as requiring a more intensive standard of review. He held that this was not a question that he needed to consider since in *O'Donnell* the Court explicitly applied the least intensive standard of review.

87. At para. 87 Kerr J held that the Secretary of State's aims were legitimate and that the contribution condition was rationally connected to them. He summarised them as "(i) to reward work through the benefit system; (ii) to simplify the benefit system and reduce administrative cost and complexity so that BSP is paid quickly when most needed; and (iii) to promote certainty and transparency for individuals in understanding entitlement to benefits": that reflects the way that they had been advanced by Mr Sheldon, subject to my caveat about the rather unsatisfactory nature of those shorthand descriptions. As he observed, they were, in substance, the same as the objectives relied on in *O'Donnell*.

88. At para. 88 of his judgment Kerr J says that the next issue was "the third and fourth *Bank Mellat* questions". Para. 89 reads:

> "The NICA effectively answered yes to both questions. I respectfully agree with those answers, for the reasons given at [98]-[100], quoted above, which do not need elaboration and on which I cannot improve. I need add only a few further comments."

(I note that, whether or not by design, that approach passes over paras. 92-94 of the Court's judgment: Kerr J thus does not comment on the primary route which the Court took to its conclusion on justification.)

89. Kerr J's "further comments" are directed at various particular submissions made to him but not directly covered in *O'Donnell.* They are at paras. 90-98. I can omit paras. 90-91, which deal with a point which is not in issue before us, and paras. 95-96, which I have already quoted at para. 34 above. The remaining paragraphs read:

> "92. Next, I gain only limited assistance from the NI BSP guidance, not considered in *O'Donnell*. Had I upheld the SoS's arguments in favour of a simple bright line rule requiring actual payment of NICs, it would follow that the NI BSP guidance is inappropriate here in England. But if, as I consider, the NICA's decision is correct, the NI BSP guidance still does not itself prove that the SoS's concerns about complexity, delay and expense are wholly unfounded; only that they are not of enough weight to sustain the justification defence.
>
> 93. The next and related point is that I am not deciding whether and to what extent receipt of relevant state benefits is a valid proxy for inability to work. No doubt in many cases it will be, but each case ultimately turns on its own facts. I have not found it necessary or practicable to conduct an exhaustive analysis of all the relevant benefits in place at various times since 2014 and their historic predecessors.

> 94. The benefits legislation and case law does show that a person may be in receipt of what is now called employment and support allowance, founded broadly on an inability to work, yet may perform 'exempt' work to a limited extent without losing entitlement[9]. The materials do not, however, enable me to determine when, in individual cases, the deceased's benefit records will themselves be enough to determine a surviving spouse's BSP claim, and when they will not be. That is a matter for decision makers on the ground.
>
> …
>
> 97. I agree with the submission that the NICA ought not to have placed any weight on the breaches of the two relevant international conventions, the UNCRC and the UNCRPD. But I am far from convinced that the NICA's conclusion was strongly influenced by its finding that the contribution condition in the PANI 2015 breached the Department's obligations under those two conventions (of which one, the UNCRPD, is relevant in the present case). I accept Ms Callaghan's submission that the observations on breach were *obiter*.
>
> 98. The fact that the PANI 2015 is subordinate legislation does not make any difference, in my judgment. The interpretative exercise required under section 3 of the Human Rights Act is available in the case of both primary and secondary legislation. The primary and secondary legislation are in materially the same terms. Any difference in the degree of deference to the legislature that is appropriate, is in my view theoretical rather than real because the PANI 2015 is an Act of the elected legislature, the Northern Ireland Assembly."

I have quoted those paragraphs in full because some of the Secretary of State's grounds of appeal relate to them; but they are essentially secondary to Kerr J's adoption of the reasoning in *O'Donnell*.

## THE APPEAL

### The Grounds of Appeal

90. Ground 3 advances three distinct sub-grounds criticising particular aspects of Kerr J's reasoning on justification, as follows:

(a) that he was wrong to reject the Secretary of State's contention "that she was entitled to draw a 'bright line' in the provision of BSP" and/or that he gave no reasons for that conclusion;

(b) that he "wrongly applied the Manifestly Without Reasonable Foundation … test" in the following respects:

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[9] The reference to "exempt" work is to regulation 45 of the 2008 Regulations referred to at para. 58 above.

> "First, it was not open to the Court to hold both that the Secretary of State could have well founded concerns (judgment §92) and that the policy was MWRF. The learned Judge misapplied the standard of review required by the MWRF test.
>
> Second, the Court did not find that the receipt of benefits payments was a valid proxy for being unable to work, as asserted by the Claimant (judgment §§93-94). In the circumstances, the Court ought to have found that the absence of a valid simple proxy, did constitute a sufficient justification for the contribution condition (to the threshold of MWRF).
>
> Third, in holding that the distinction between primary legislation and secondary legislation was 'theoretical rather than real' (judgment §98) the learned Judge erred in determining the weight to be afforded to an Act of Parliament as compared to secondary legislation.
>
> Fourth, in refusing to determine whether or not the claimed status was a suspect ground, the Court erred in its considerations of the justification (judgment §86)."

(c) that he was wrong to hold that the reliance in *O'Donnell* on UNCRPD and UNCRC was obiter.

*Ground (a)*

91. The Court in *O'Donnell* does not in para. 98 of its judgment (or elsewhere) expressly address the question whether a bright line argument of the kind identified in the case-law was capable of justifying the application of the contribution condition in cases where the deceased was unable to work. However, some such argument is necessarily implicit in the aim of "simplifying the benefits system" to which the Court referred in para. 95 of its judgment, and it is reasonable to infer that it did have regard to that aim in its overall assessment of proportionality. It may well be that counsel for the DfC did not develop a fully-fledged bright line argument in the same way that Mr Sheldon has done in these proceedings: that would not be entirely surprising given that he did not have the post-*O'Donnell* Guidance as a focus for exploring the difficulties of making an exception to the contribution condition. But that would not in my view be a sufficiently compelling reason not to apply the *Abbott v Philbin* rule: see para. 45 above.

92. Kerr J does explicitly address the bright line argument: see para. 92 of his judgment, where he says in terms that the Secretary of State's "concerns about complexity, delay and expense … are not of enough weight to sustain the justification defence". I accept that no detailed reasoning is advanced in support of that conclusion, but as I read it that is because he regarded the question as being already covered by the decision in *O'Donnell*. In any event, even if his reasoning can be criticised as inadequate, it would be wrong to allow the appeal on this basis in view of my conclusion that the point must be taken to have been decided by the Northern Ireland Court of Appeal and that there is no compelling reason not to follow it.

*Ground (b)*

93. I take the particular points made under this ground in turn.

94. As to the first, what Kerr J says at para. 92 does not amount to a conclusion that the Secretary of State's concerns about the administrative difficulties of making a case-by-case assessment of inability to work were well-founded. He is plainly saying no more than that, to the extent that there were such difficulties, the decision of the Northern Ireland Court of Appeal meant that they were insufficient to outweigh the discriminatory impact of the contribution condition.

95. As to the second, it is a matter of judgment whether the difficulties, described in Ms Walker's evidence, caused by the absence of a simple proxy for inability to work amount to a sufficient justification for not permitting an exception to the contribution condition. I do not accept that the fact that there were such difficulties necessarily meant that the imposition of the condition was justifiable, even applying the least intensive standard of review.

96. As to the third, I can only say that I respectfully agree with Kerr J, for the reasons that he gives. An Act of the Northern Ireland Assembly cannot be equated, for these purposes, with ordinary secondary legislation.

97. As to the fourth, it was the Claimant's case before Kerr J, maintained before us by his Respondent's Notice, that since his ineligibility was the result of Suzzi's disability this was a case of discrimination on the ground of disability, which has been treated in the Strasbourg case-law as requiring a more intensive standard of review – see para. 112 of Lord Reed's judgment in *SC*. Mr Sheldon disputes that on the basis that this is a case of "disability plus": cf. para. 54 above. I can see nothing wrong in Kerr J's refusal to decide the point on the basis that the Court in *O'Donnell* had found in the Claimant's favour when applying the least intensive standard of review. If, however, the point did have to be addressed, I would regard the way that the issue was framed by the parties as too mechanistic in the light of paras. 157-162 of Lord Reed's judgment in *SC*. The particular nature of the ground of discrimination and how it operates in the particular circumstances of the case is simply something to be taken into account in the overall proportionality assessment. The Northern Ireland Court of Appeal was aware of all the relevant circumstances and reached the conclusion that it did on the issue of proportionality. Nice points about the appropriate standard of review could not have justified Kerr J in declining to follow *O'Donnell*; and the same applies to us.

*Ground (c)*

98. This ground arises out of para. 99 of the judgment in *O'Donnell*, where the Court refers to the DfC's failure to comply with the requirements of the UNCRC and the UNCRPD. Before Kerr J Mr Sheldon submitted that it should have given no weight to that consideration because both treaties are unincorporated in UK law: see paras. 74-96 of the judgment of Lord Reed in *SC*, which post-dates *O'Donnell*. As we have seen, Kerr J accepted that submission, but he held that the reference to the two treaties was not part of the Court's *ratio*.

99. The Secretary of State challenges that conclusion, but in my opinion it is right. The reference to breaches of the UNCRC and the UNCRPD is by way of "confirmation" of

the finding made in the previous sentence that, to paraphrase, there had been a *Thlimmenos* breach. That language necessarily implies that the finding is established irrespective of those breaches. That is what one would expect, since the finding follows from the Court's previous reasoning, up to and including (in particular) para. 98.

Overview

100. It follows that I am not persuaded that any of the specific points pleaded under ground 3 of the Grounds of Appeal demonstrates that Kerr J was wrong to follow *O'Donnell*.

101. Having said that, in the course of Mr Sheldon's oral submissions it became clear that those particular criticisms were aspects of a broader challenge to the reasoning in *O'Donnell*. His starting-point was that we are in this case concerned with a measure defining entitlement to social security benefits, in respect of which the Strasbourg case-law has always, and rightly, accorded member states a wide margin of appreciation. Further, the measure in question is contained in primary legislation, following a consultation in which the impact on disabled people of the provision which is now challenged was considered by the responsible Minister. In those circumstances the Court should be very slow to find that the decision not to make an exception for people who are unable to work through disability was manifestly without reasonable foundation. Mr Sheldon's primary submission is that it was in fact entirely reasonable not to make such an exception, because doing so would indeed have undermined the basic principle that contributory benefits should only be available to those who had paid contributions; and that in para. 98 of its judgment the Northern Ireland Court of Appeal failed to address that basic point.

102. I see force in that submission. At first reading paras. 98 and 100 of the judgment in *O'Donnell* may look like a straightforward proportionality evaluation of a kind with which another court would be very slow to interfere. But on a closer reading it seems to me arguable that they do not address the essential point being made by the Secretary of State, as summarised at para. 69 above. In the first part of para. 98 the Court points out in strong terms that the legitimate aims of the contributory principle have no application to the case of people who are unable to work through disability. That is true as far as it goes, but the real question is whether that fact justifies making an exception in their case. As to that, it goes on to say that "an exception would simply amount to recognition that those who cannot contribute should not be excluded". But it might be said that the language of "recognition" assumes the very point in issue. I do not think that it is self-evident that a contributory benefit should be payable to the bereaved spouses of those who have not paid contributions, even where that is as a result of disability. It might be thought to be a matter for the judgment of the legislature whether such a case requires a departure from the contributory principle or whether it is sufficient to leave the surviving spouse, if they are in need, to claim non-contributory benefits.

103. As noted at para. 85 above, the Northern Ireland Court of Appeal attached weight in reaching its conclusion to the facts (a) that the minimum level of contributions was modest and (b) that PANI itself provided for an exception in the case of what I have called death at work. But it may be debatable how weighty those points really are. As for (a), it might be thought that, from the point of view of giving effect to the contributory principle, what matters is having a contribution condition rather than the level at which it is set. In fact the low level at which it is set by section 31 (1) might be

thought to emphasise that the Government believed that it could not be dispensed with altogether. As for (b), it is arguable that the death at work exception is consistent at least with the spirit of the contributory principle: it applies only where the deceased is in employment and (at least potentially) liable to pay contributions but has been prevented from doing so by a work-related death, which is a circumstance for which a scheme of work-dependent national insurance might be expected to provide. On any view the departure from the contributory principle is very limited compared with an exception which covers a case where the deceased never worked at all.

104. Mr Sheldon also relies on the real difficulties of assessing inability to work over the lifetime of the deceased, with which neither the Northern Ireland Court of Appeal nor Kerr J dealt in any detail. This may be a factor in considering justification overall. If it stood alone, I should not myself be inclined to give it much weight, not least because the post-*O'Donnell* Guidance shows that the kinds of problem explained by Ms Walker were not thought by the DfC in Northern Ireland to be insuperable. Ms Callaghan pointed out that there is no evidence of the number of cases in which these administrative problems might arise.

105. Having said that much, I do not think it right to develop the points further, still less to express any concluded view, because I do not believe that this comes close to being a case of the exceptional kind where it would be right for this Court to decline to follow *O'Donnell*. Applying the *Abbott v Philbin* rule, such doubts as I have about whether I would have reached the same decision as the Northern Ireland Court of Appeal do not justify a refusal to follow its decision on this issue.

## GROUND 4: REMEDY

106. The application of section 3 of the 1998 Act is dealt with at paras. 101-102 of the judgment in *O'Donnell*. As we have seen, the Northern Ireland Court of Appeal held that it was possible to read down section 30 of PANI (the equivalent of section 31 of the 2014 Act) to the effect set out at para. 24 above. It had in an earlier part of the judgment (paras. 75-77) summarised the applicable principles by reference to the well-known authorities deriving from *Ghaidan*, and it evidently concluded that that did not go against the grain of the legislation; but it did not advance any reasons in support of that conclusion.

107. Kerr J addressed the issue at para. 99 of his judgment. He said:

> "I do not accept that the section 3 interpretative remedy is off limits on the basis that to read in the suggested words would go against the grain of the legislation. There is already an exception in the case of disabling personal injury or disease during employment. Injury and disease are not dissimilar from congenital or other forms of disability. All involve impairment of bodily functions, which may make work impossible. The exception carved out by the NICA under section 3 does not go against the essentials of the legislation."

108. Mr Sheldon submitted that to read section 31 down in that way does indeed go against the grain of the legislation. The most straightforward way of putting the point would be to say that it is a fundamental feature of entitlement to the benefit that the deceased spouse should have paid NICs: BSP is a contributory benefit. But it is not as simple as

that because of Kerr J's point about the death at work exception: how can the payment of contributions be said to be a fundamental feature of the legislation when the selfsame section provides for circumstances where it is not required? Mr Sheldon sought to meet that difficulty by characterising the fundamental feature as being that the deceased should have been working. As he put it at para. 57 of his skeleton argument:

> "… (i) the 'grain' of the legislation was that it rewarded work, this was the case for the contribution condition and the exception under s.30(3)(a), and/or (ii) Kerr J failed to have regard to the fact that the exception for those with an industrial disease or disabling personal injury only applied to those who were working. As such the exception was not for those with 'bodily impairments', but rather for those who were ***working***, but who, ***because of*** that work and the illness or injury they suffered as a result, were unable to make the contribution and died."

109. I see a good deal of force in the submission that the exception to the contribution condition which the Northern Ireland Court of Appeal and Kerr J were prepared to read in is not "possible" within the meaning of section 3 of the 1998 Act. I am not, however, sure that Mr Sheldon's way of dealing with the death at work exception is entirely apt. In my view the better way of putting it would be that the relevant fundamental feature of the legislation is indeed the payment of NICs, and that that is not inconsistent with Parliament choosing to make the limited exception that it did. Partly that would be because the exception applies in circumstances where, but for the work-related death, the deceased might have been expected to become liable to pay contributions: cf. para. 103 above. But there is the further point that where Parliament has expressly considered what exceptions should be made to a fundamental feature of a statute it might be thought to go against the grain to introduce a different, and far wider, exception than the one that it chose to make.

110. It seems to me, therefore, that the conclusion that a remedy is available under section 3 is, with respect, less straightforward than the Northern Ireland Court of Appeal and Kerr J appear to have believed. I do not, however, express any concluded view, for the same reason as in para. 105 above. The Northern Ireland Court of Appeal has decided as a matter of *ratio* that the relevant statutory language can be read down in the way that Kerr J did, and I see no compelling reason which would justify our reaching a different conclusion.

## CONCLUSION

111. I would dismiss this appeal.

**Elisabeth Laing LJ:**

112. I agree.

**Falk LJ:**

113. I also agree.