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15/003309/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARINA LENNON FOR JUDICIAL REVIEW

v

THE DEPARTMENT FOR SOCIAL DEVELOPMENT

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McCLOSKEY J

Introduction

[1] The central issue raised by this judicial review challenge is whether unlawful discrimination of a specified type occurs where a woman in receipt of Widowed Parents Allowance ("WPA") cohabits and/or remarries with the result that her entitlement to the allowance is extinguished by statute.

[2] Marina Lennon (nee McKeown, hereinafter "the Applicant"), now aged 45 years, married Barry James McKeown on 5 September 1998. They had one child together who is now aged 15. Her husband died on 28 October 2012. Thereafter, the Applicant qualified for WPA, receiving £91.97 weekly. In November 2014, having informed the Social Security Agency ("SSA"), the body which administers all statutory benefits on behalf of the Respondent, the Department for Social Development ("DSD"), that she had begun a cohabiting relationship with John Paul Lennon, her payments of WPA were suspended. The couple were married on 28 August 2015. This triggered the formal termination of her WPA payments.

[3] Both the initial suspension decision and the later termination decision were in accordance with the operative statutory provisions. The question which arises is whether those provisions unlawfully discriminate against the Applicant under Article 8 ECHR and Article 1 of The First Protocol, in conjunction with Article 14.

The Applicant contends that they do and seeks (*inter alia*) a declaration under section 4(2) of the Human Rights Act 1998 ("HRA 1998") that the offending statutory provisions are incompatible with her Convention rights aforesaid.

The Expanded Factual Matrix

[4] The parties' representatives helpfully cooperated with the court in providing a schedule containing the following agreed facts.

[5] At the time of her first husband's death, the Applicant was in receipt of Severe Disablement Allowance ("SDA") in the sum of £80.70 per week, Disability Living Allowance (high rate care) at £77.45 per week and Income Support at £126.26 per week. Her total weekly income from benefits at that time was £284.41, excluding Housing Benefit, which was paid directly to the Applicant's landlord, South Ulster Housing Association.

[6] On 13 November 2012 the Applicant's payments of SDA ended as she was found not to have a limited capability for work. Under the Employment and Support Allowance (Transitional Provisions and Housing Benefit) (Existing Awards) Regulations (Northern Ireland) 2010 awards of Income Support ("IS") paid on the grounds of disability were converted to Employment Support Allowance ("ESA") where claimants were found not to have a limited capability for work.

[7] The Applicant was informed by letter dated 7 December 2012 from the SSA that she was entitled to WPA of £91.97 per week payable from 28 October 2012. For the purposes of IS and ESA, the entitlement to WPA was taken into consideration as income subject to a £10 disregard. The additional £10 benefit represented by WPA was therefore reflected in the Applicant's IS and ESA payments and the Applicant did not receive a separate payment.

[8] In May 2013, the Applicant met John Paul Lennon and began a relationship with him. On 1 October 2014, they began to cohabit with Mr Lennon. The Applicant and Mr Lennon then initiated a joint benefits claim. The Applicant contacted the Social Security Agency on 13 October 2014 to advise that Mr Lennon had moved in on 1 October 2014. She provided the Social Security Agency with written confirmation by way of handwritten letter dated 21 November 2014 that Mr Lennon had moved in with her on 1 October 2014.

[9] The Applicant received a letter from the Social Security Agency dated 11 December 2014 which stated that her WPA would no longer be payable to her but should her circumstances change i.e. should she stop living with her partner or remarry, she should contact the Bereavement Benefit Team immediately. She was informed that upon cohabitation, her WPA was suspended. She was advised that the reason why the payment was suspended rather than completely stopped was that because they were not married but simply living together. The Applicant was further advised that at any time they stopped living together, then the suspension of

payment of the WPA would be lifted. Finally, the Applicant was advised that should she remarry, then her WPA would no longer be suspended but instead terminated.

[10] The Applicant initiated these judicial review proceedings on 13 January 2015. Progress has been regrettably sluggish on account of another judicial review case which advanced to the Court of Appeal and, ultimately, the United Kingdom Supreme Court (*infra).*

[11] The Applicant and Mr Lennon delayed getting married until 28 August 2015 because of the financial implications of doing so. The Applicant then received a letter from the SSA stating that the WPA benefit would be terminated. Given that her entitlement to WPA was already suspended, the termination of the benefit did not have any impact on the sum of weekly benefit received by the Applicant following her marriage.

[12] As of 14 April 2018, the Applicant was in receipt of DLA (now known as 'personal independence payment') in the sum of £108.25 per week, and child benefit of £20.70 per week. Throughout her cohabitation and subsequent marriage to Mr Lennon, the Applicant's claim for means-tested benefits has been treated as a joint claim with Mr Lennon. She was therefore then in receipt of ESA in the sum of £176.05, and child tax credit of £62.09. There is a child maintenance deduction on this claim as Mr Lennon has been subjected to a weekly enforcement of £8.40 per week, relating to children of his first marriage. The Applicant's total weekly benefit income as of April 2018 was therefore £346.39, excluding housing benefit.

[13] The rent for the above-named property at April 2018 was £116.82 per week, and the rates £16.26. Due to the introduction of Social Sector Size Criteria, the Applicant's entitlement to Housing Benefit has been reduced from the full amount of rent and rates to the full amount of rates and £100.47 per week in rent, as a result of under occupation. However, the Applicant is in receipt of Welfare Supplementary Payments to mitigate that shortfall in full, in the sum of £16.35 per week. She does not therefore have to meet the costs of rent or rates on the property, as was the position at the time of the death of her first husband.

[14] As at the date of the substantive hearing, 30 May 2019, the Applicant was in receipt of Personal Support Payment of £443 per month, child benefit of £20.50 per week, ESA of £245 per fortnight and Child Tax Credit of £65 per week (totalling some £1,200 monthly).

The Legislation

[15] Section 39A of the Social Security (Contributions and Benefits) (Northern Ireland) Act 1992 (the "1992 Act"), under the banner of "Widowed Parent's Allowance", provides:

"39A. - (1) This section applies where –

(a) a person's spouse or civil partner has died before the day on which section 29 of the Pensions Act (Northern Ireland) 2015 comes into operation (but see subsection (1A)),

(b) the person has not married or formed a civil partnership after the death but before that day, and

(c) the person is under pensionable age on that day.

(1A) This section does not apply in cases where a woman's husband has died before 9 April 2001.

(2) The surviving spouse or civil partner shall be entitled to a widowed parent's allowance at the rate determined in accordance with section 39C below if the deceased spouse or civil partner satisfied the contribution conditions for a widowed parent's allowance specified in Schedule 3, Part I, paragraph 5 and-

(a) the surviving spouse or civil partner is entitled to child benefit in respect of a child or qualifying young person falling within subsection (3) below;

(b) the surviving spouse is a woman who either-

(i) is pregnant by her late husband, or

(ii) if she and he were residing together immediately before the time of his death, is pregnant in circumstances falling within section 37(1)(c) above; or

(c) the surviving civil partner is a woman who-

(i) was residing together with the deceased civil partner immediately before the time of the death, and

(ii) is pregnant as the result of being artificially inseminated before that time with the semen of some person, or as a result of the placing in her before that time of an embryo, of an egg in the process of fertilisation, or of sperm and eggs..

(3) [am. 2002 c.21 from 6 April 2003] [am. 2007 NI c.2] A child or qualifying young person falls within this subsection if the child or qualifying young person is either-

(a) a son or daughter of the surviving spouse or civil partner and the deceased spouse or civil partner; or

(b) a child or qualifying young person in respect of whom the deceased spouse or civil partner was immediately before his or her death entitled to child benefit; or

(c) if the surviving spouse or civil partner and the deceased spouse or civil partner were residing together immediately before his or her death, a child or qualifying young person in respect of whom the surviving spouse or civil partner was then entitled to child benefit.

(4) The surviving spouse shall not be entitled to the allowance for any period after she or he remarries or forms a civil partnership, but, subject to that, the surviving spouse shall continue to be entitled to it for any period throughout which she or he-

(a) satisfies the requirements of subsection (2)(a) or (b) above; and

(b) is under pensionable age.

(4A) The surviving civil partner shall not be entitled to the allowance for any period after she or he forms a subsequent civil partnership or marries, but, subject to that, the surviving civil partner shall continue to be entitled to it for any period throughout which she or he-

(a) satisfies the requirements of subsection (2)(a) or (b) above; and

(b) is under pensionable age.

(5) A widowed parent's allowance shall not be payable-

(a) for any period falling before the day on which the surviving spouse or civil partner's entitlement is to be regarded as commencing by virtue of section 5(1)(l) of the Administration Act;

> *(b) for any period during which the surviving spouse or civil partner and a person of the opposite sex to whom she or he is not married are living together as husband and wife; or*
>
> *(c) for any period during which the surviving spouse or civil partner and a person of the same sex who is not his or her civil partner are living together as if they were civil partners."*

The Applicant seeks a declaration of incompatibility in respect of section 39A(5)(b).

The Legislative Rationale and Policy

[16] It is appropriate to highlight certain aspects of the Department's evidence which make clear the aims and rationale of WPA. In its modern incarnation WPA exists from 1999. It is payable to both widows and widowers. From 2004 it has been available to the surviving member of civil partnerships (see the Civil Partnership Act 2004). It is a contribution-based benefit. As regards eligibility, there are two important requirements in particular. First, the deceased spouse or civil partner must have made the requisite National Insurance Contributions. Second, the survivor must be entitled to Child Benefit in respect of a specified child or qualifying young person or be pregnant. There are certain other entitlement conditions of no moment in the present context.

[17] As the White Paper which was the precursor to the modern statutory provisions challenged by the Applicant makes clear (CM4104, November 1998) it has long been the case under successive statutory regimes that where a widow remarries or lives with another man as his wife the relevant benefit is no longer payable. This philosophy dates from the Beveridge Report itself, published in 1942:

> "There is no reason why a childless widow should get a pension for life; if she is able to work, she should work. On the other hand, provision much better than at present should be made for those who, because they have to care for children, cannot work for gain or cannot work regularly."

The predecessor benefit, Widowed Mother's Allowance, dates from the National Insurance Act 1946. As the White Paper explains, this underwent periodic revision during the succeeding five decades.

[18] On 25 March 1999 during the debate of the Standing Committee on Bills, Welfare Reform and Pensions Bill the Minister stated the following:

> "As we have made clear, the whole point of bereavement benefit is to provide financial support for the surviving spouse in the period immediately following bereavement. The circumstances of a bereaved person living with the spouse when that spouse dies are different from those of someone living with a new partner. A widow or widower who is cohabiting may well be receiving financial support from a current partner. In those circumstances, it would be difficult to justify paying a non-means tested benefit which is intended to cushion the loss of income on the death of a spouse."

To like effect is a statement made by the Secretary of State for Work and Pensions in the House of Commons after WPA had been introduced (on 29 October 2002):

> "Bereavement allowance and Widowed Parents' Allowance … are intended to provide financial support in widowhood and are designed to help the widowed spouse maintain him or herself and any dependent children in the absence of the deceased spouse's income. If a widow or widower remarries they are treated, for benefit purposes, in the same way as members of any other married couple. Other social security benefits or tax credits may be available to help support the new family depending on their circumstances."

[19] From the evidence one readily identifies a policy rationale and aim of distributing finite public funds as equitably as possible and, more specifically, providing financial support to surviving spouses and civil partners during a period when their need would be expected to be greatest, while discontinuing such support when their adult relationship circumstances alter in a manner whereby the earlier need would generally be expected to be dissipated. This is a policy of longstanding. It bears the hallmarks of rationality, fairness and balance. I consider that it comfortably withstands the application of the diagnostic tool which the court is required to employ namely that of without reasonable foundation. The legislative policy which the Applicant challenges would also, in my estimation, withstand analysis by the application of less elevated standards of review. It follows that the requirement of justification is clearly satisfied.

The Decision in McLaughlin

[20] *In Re McLaughlin* [2018] UKSC 48 concerned the extinguishment of the same benefit, WPA, under the same statute, in the case of the female surviving parent who was the mother of four children born of the survivor's unmarried relationship with their now deceased father. The national insurance contributions made by the deceased father suffered from no insufficiency. Notwithstanding, the mother's claim

for WPA was refused on the ground that the surviving parent of an unmarried relationship was excluded by the legislation. More technically and specifically, she did not fall within the statutory definition of "spouse".

[21] The mother's challenge to this exclusion was pursued under Article 14 ECHR in conjunction with Article 8 and Article 1 of the First Protocol. The Supreme Court, by a majority of 4-1, held that unlawful discrimination had been established. The kernel of the reasoning of the majority was that while the State's desire to accord a privileged status to marriage was a legitimate one, the impugned exclusion was not a proportionate means of achieving this aim. The court declared that section 39A of the 1992 Act is incompatible with Article 14 ECHR, in tandem with Article 8, insofar as it precludes any entitlement to WPA by a surviving unmarried partner of the deceased.

[22] The structure of the leading judgment of the majority, that of Baroness Hale of Richmond PSC, is instructive. She first examined the question of whether the appellant's case fell within the ambit of Article 14 ECHR in conjunction with one of the substantive Convention rights. She concluded that the facts fell within the ambit of both Article 8 ECHR and Article 1 of The First Protocol.

[23] The second issued examined was the "comparator" question i.e. whether the appellant was able to demonstrate differential treatment as between her and a person in an analogous situation. Baroness Hale observed at [26]:

> "It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an obvious difference between the two persons that they are not in an analogous situation."

The answer was to be found by focussing on the bereaved children of the relationship. See [27]:

> "Widowed parents' allowance is only paid because the survivor is responsible for the care of children who were at the date of death the responsibility of one or both of them. Its purpose must be to benefit the children. The situation of the children is thus an essential part of the comparison. And that situation is the same whether or not the couple were married to one another. It makes no difference to the children."

Approached in this way, the requirements of analogous situation was satisfied.

[24] The third issue analysed was whether the differential treatment of which the appellant complained was on the ground of some "other status". An affirmative

answer was swiftly supplied: this requirement was satisfied by virtue of the appellant's status of unmarried person.

[25] Finally, Baroness Hale turned to the question of justification. This raised the discrete issue of whether the court was the domestic institution "most competent and appropriate to strike the necessary balance between the individual and the public interest": at [34]. The other two institutions to be considered were the executive and the legislature. Given that the differential treatment was, as a minimum, largely based on the birth status of the children a "suspect ground" was in play and, thus, "particularly careful scrutiny" was required: [35]. Acknowledging that the promotion of marriage was the aim in play and was legitimate, Baroness Hale then turned to consider whether there was a rational connection between this aim and the means employed.

[26] Baroness Hale reasoned, at [38] – [39]:

> "Where means-tested benefits are concerned, it is difficult indeed to see the justification for denying people and their children benefits, or paying them a lower rate of benefit, simply because the adults are not married to one another. Their needs, and more importantly their children's needs, are the same. But we are concerned here with a non-means-tested benefit "earned" by way of the deceased's contributions. And the allowance is a valuable addition to the household income if the survivor is in work. Is it a proportionate means of achieving the legitimate aim of privileging marriage to deny Ms McLaughlin and her children the benefit of Mr Adams' contributions because they were not married to one another?
>
> ...
>
> In my view, the answer to that question is manifestly "no", at least on the facts of this case. The allowance exists because of the responsibilities of the deceased and the survivor towards their children. Those responsibilities are the same whether or not they are married to or in a civil partnership with one another. The purpose of the allowance is to diminish the financial loss caused to families with children by the death of a parent. That loss is the same whether or not the parents are married to or in a civil partnership with one another."

Accordingly, the disparity in treatment was not justified.

[27] Lord Mance JSC, in his concurring judgment, highlighted the clear purpose of WPA namely "to continue to cater, however broadly, for the interests of any relevant child" while, in the same passage, recognising that the surviving mother was also an intended beneficiary: [49]. At [50] Lord Mance described the "continuing well-being of any child of a survivor" as the "main purpose" of WPA. He reiterated this at [52]:

> "… widowed parent's allowance is fundamentally aimed at securing the needs and well-being of children."

He added at [53]:

> "The starting point is surely that, where children are for relevant purposes in a similar situation, the law would be expected to deal with them in the same way. I am not persuaded that any substantial grounds exist for thinking that this was not and is not feasible, as well as just, in the present context."

[28] Lord Hodge JSC, dissented. He agreed with the majority that the facts fell within the ambit of Article 8 and that being unmarried can constitute an "other status" within Article 14. However, having observed – at [72] – that the "comparator" question and the "objective justification" question involve "considerable overlap", he disagreed with the majorities approach to each. His disagreement entailed the minority view that WPA "… is a benefit to assist the bereaved survivor rather than a benefit for bereaved children …" see [74]. He concluded that a cohabiting survivor is not analogous to a married or civil partnership survivor: [79]. Finally, espousing the test of "manifestly without reasonable foundation" in determining the question of whether the differential treatment was justified, Lord Hodge, reiterating his assessment that WPA operates to benefit the surviving widow rather than any children, concluded that there was no disproportionality in treating a cohabitee survivor differently from a surviving spouse or a surviving civil partner: [85].

The Decision in DA and others

[29] The recent decision of the Supreme Court in this R (DA and others) v Secretary of State for Work and Pensions [2019] UKSC 21 was timely in the context of the current proceedings, being promulgated on 15 May 2019. It represents the most comprehensive recent exposition of that court of the correct approach to Article 14 ECHR cases, providing welcome clarity on certain important issues. In the context of the instant proceedings its most arresting feature is the unequivocal espousal by the majority of the "manifestly without reasonable foundation" test in the determination by the court of the issue of justification in Article 14 cases. Having said that, I do not overlook the contribution made to the frequently challenging

issues of "other status" and comparators. There is much learning in the five judgments delivered.

[30] Lord Wilson, delivering the main judgment of the majority, suggested that where the court, in a Convention context, inquiries into the justification of the effect of a measure of economic or social policy and, more specifically, the question of fair balance there are two possible approaches, namely the court answers the question for itself or applies the test of manifestly without reasonable foundation: see [64]. Lord Wilson's espousal of the second of these approaches was expressed in trenchant terms: see [65]. This is followed by an important passage in [66]:

> "When the State puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular, to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable."

[31] Lords Carnwath and Hodge, in separate majority judgments, concurred with Lord Wilson's endorsement of the test of manifestly without reasonable foundation. As Lords Reed and Hughes agreed with Lord Carnwath, it follows that this test was endorsed by five of the seven members of the Court.

[32] The dissenting judgments of Lady Hale and Lord Kerr are described by Lord Wilson as "powerful". Both espouse a broader, or more intrusive, constitutional role for the court in cases where alleged discriminatory treatment arises in the field of government economic policy. They highlighted in particular that the ECtHR's adoption of the margin of appreciation in cases of this kind need not necessarily be replicated at the level of the domestic court. This is expressed with particular clarity at paragraphs [167]-[171] of the judgment of Lord Kerr. In holding that the statutory measures under challenge constituted an unjustifiable interference with the appellant's rights under Article 8 ECHR and Article 1 of the First Protocol, the dissenting judges concluded, in the words of Lady Hale at [157], that:

> "…the weight of the evidence shows that a fair balance has not been struck between the interests of the community and the interests of the children concerned and their parents."

[33] Judicial struggles with the various facets of the complex subject of equality are commonplace. Lady Hale alludes to this in a striking passage, at [132] – [133]:

> "These are cases about equality and equality is the most complicated and difficult of all the fundamental rights, even without the delicate context of entitlement to welfare benefits. A professional lifetime of struggling with equality issues has persuaded me that some degree of complexity is inevitable and we should not apologise for it. …
>
> The delicacy arises because these are cases about equality in an area, not principally of social policy, but of economic policy."

Notably, Lady Hale cited *In Re McLaughlin*, together with *Willis v United Kingdom* [2002] 35 EHRR 547 as "examples (that) are more clear-cut than these".

The Principles Applied

[34] The starting point in the court's determination of the issues is an uncontentious one. It is common ground that the payment of WPA falls within the ambit of Article 8 ECHR and Article 1 of the First Protocol. Taking this starting point, my assessment of the parties' arguments, which were of impressive quality, is that the issues which the court must address are these:

(i) What is the "status" of the Applicant?

(ii) Can she lay claim to an "other status" within the embrace of Article 14 ECHR?

(I recognise the overlap of (i) and (ii))

(iii) If the "other status" hurdle is overcome, is the Applicant the victim of differential treatment when compared with others in an analogous situation?

(iv) If the first two hurdles are overcome, is such differential treatment on the ground of her Article 14 protected status?

(v) If the foregoing three hurdles are all overcome, is the differential treatment justified or, more specifically, is it manifestly without reasonable foundation?

[30] I would formulate the question in this way: What are the factors and characteristics which define the Applicant's status in the context of the legal challenge which she is pursuing?

Does the Applicant have an Article 14 ECHR Status?

[35] This is not a complex or sophisticated question. It invites concentration on the relevant life events affecting, and life circumstances of, the Applicant both before and after her first husband's death. One possible answer to the question posed is the following. The Applicant is a person whose first marriage ended after some 14 years upon the demise of her first husband; there is one still dependent child of the marriage; being widowed, the Applicant received WPA; some two years later she began a cohabiting relationship and, less than one year later, she was remarried; and her entitlement to WPA was ended from the commencement of the cohabiting relationship and continues. I shall return to examine the correctness of this moderately lengthy answer.

[36] The argument of Mr Ronan Lavery QC (with Mr Conan Fegan of counsel) is that the Applicant's status falls within Article 14 initially as a cohabiting person and later as a remarried person. The counter argument of Mr Tony McGleenan QC (with Ms Laura Curran of counsel) is that the Applicant in effect invites the court to create a novel category of "relationship status", namely being in a cohabiting or remarried relationship. This, it is submitted, is clearly outwith the bounds of the types of personal characteristic held by the ECtHR to be protected by Article 14.

[38] The decisions of the ECtHR in *Clift v United Kingdom* [2009] ECHR 718 and the Supreme Court in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59 featured in the submissions of counsel. In both cases the members of a category of sentenced prisoners whose defining characteristic was the nature and length of their sentence were held to thereby have a status protected by Article 14.

[39] In the jurisprudence of the ECtHR dating from *Kjeldsen v Denmark* [1976] 1 EHRR 711 there is an identifiable cohort of decisions defining Article 14 "other status" by reference to a personal characteristic of the person concerned. But there are other decisions adopting a broader approach, such as *Maktouf v Bosnia and Herzegovina* [2013] 58 HRR 11 and *Magee v United Kingdom* [2000] 31 EHRR 35, at [50] especially. The decision in *Clift* is probably that most frequently invoked in support of the proposition that Article 14 "other status" is not confined to innate qualities such as race, colour, birth status, gender or sexual orientation (see per Baroness Hale in *Stott* at [209]). In *Clift* the ECtHR eschewed an *ejusdem generis* interpretation of Article 14. It reasoned *inter alia* that not all of the protected factors are a personal characteristic, instancing in particular property, as *James v United Kingdom* [1986] EHRR 123 and *Chassagnou v France* [1999] 29 EHRR 615 demonstrate.

[40] I have canvassed in [36] above one possible answer to the question posed at the beginning of this section of the judgment. In my view it is the wrong answer as it focusses insufficiently on the narrow statutory context in play and succumbs to unnecessary complexity and sophistication, each of which has from time to time dogged the proper understanding and development of equality law. The simple analysis, in my estimation, is that the Applicant was formerly an unmarried widow, then became a cohabitee and, finally, became a (re)married person. The issue of

"other status" under Article 14 is something which has evolved incrementally, usually by reference to the expressly protected categories, or qualities, and those unexpressed but judicially recognised, without the shackles of the *ejusdem generis* principle. But for her conversion from the status of unmarried widow to cohabiting widow and then married person the Applicant would be entitled to receive WPA. Her status has graduated from that of single widow to cohabiting person and ultimately to married person. In *McLaughlin* Baroness Hale noted at [31]:

> "It is well established both in Strasbourg and domestically that not being married can be a status just as being married can be."

This was stated unequivocally by the Grand Chamber in *Yiğit v Turkey* [2010] 53 EHRR 25 at [79]. The decision in *Re G* [2009] AC 173 provides another illustration.

[36] The conclusion that the Applicant's status of cohabiting person initially and married person subsequently both fall within the embrace of Article 14 must in my view follow from the immediately preceding analysis.

Analogous situation?

[41] During the period of some two years following the death of her first husband the Applicant's status was that of unmarried, single widow. This progressed to cohabiting widow and, later, married person. The Applicant seeks to compare herself in each of the last mentioned capacities with a single widow ("single" denoting not cohabitating as well as not remarrying).

[42] The riposte on behalf of the Department entails, firstly, a submission relating to the rationale of the statutory scheme under scrutiny. Mr McGleenan argued that the purpose of WPA is to protect widows and surviving civil partners from the impact of the loss of income of the deceased. Such income, I observe, could have derived from conventional earnings (in whatever capacity) or State benefits or even a combination of both. The aforementioned purpose, it is argued, is based on an assumption that those who are married support each other financially. This assumption underpins many aspects of revenue law, social security law and family law. Where a bereavement occurs, the surviving parent is deprived of the previous financial support provided by the deceased spouse or civil partner. WPA is designed to compensate this loss. The next step in the argument involves the contention that where the surviving parent cohabits or remarries the same assumption applies, namely that there will be mutual financial support. This analysis gives rise to the submission that neither of the situations occupied by the Applicant post-dating her initial situation of single widow is analogous for the purposes of Article 14.

[43] It appears to me that one can at almost any stage of a discrimination analysis introduce the salutary reminder of Lord Nicholls in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 at paragraph 3:

> "… the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

This can be linked to the analysis of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 at [10], which was that it was impossible to answer the "comparator" question without deciding why the complainant was treated in the offending way fundamentally, this would raise the question of whether such treatment was on an impermissible ground. The passage quoted from *Carson* is readily traceable to [10] of *Shamoon* followed by [11]:

> **"**This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

[44] Mr McGleenan's submission about the rationale and purpose of WPA is confirmed by the following passage from the judgment of Baroness Hale in *McLaughlin*, at [27]:

> "Widowed parents' allowance is only paid because the survivor is responsible for the care of children who were at the date of death the responsibility of one or both of

> them. Its purpose must be to benefit the children. The situation of the children is thus an essential part of the comparison. And that situation is the same whether or not the couple were married to one another. It makes no difference to the children. But had the couple been married, their treatment would be very different: their household would have significantly more to live on while their carer is in work."

While this passage focusses exclusively on the surviving child or children, Baroness Hale evidently accepted in a later passage of her judgment, at [38], that the financial benefit conferred by WPA extends to all members of the household which, of course, encompasses the surviving spouse: this must surely be correct. It is also consistent with the description provided by Lord Mance at [50] namely that the continuing well-being of any affected child is the "main" (not sole) purpose of WPA. While recognising the assessment of Lord Hodge at [74], namely that the majority view was that the purpose of WPA is to benefit the children, I consider that a somewhat more nuanced approach was adopted by those two members of the majority who committed their views to writing. Furthermore, this provides a neater fit with the undisputed evidence.

[45] I consider that the outworkings of the rationale of the legislation, as explained above, are uncomplicated. In cases where the life circumstances of the surviving spouse are those of a single adult with a dependent child or children, the legislation assumes a financial need and payment of WPA is thereby generated. In contrast, where the life circumstances of the surviving spouse entail the formation of a new adult relationship, whether of the cohabiting or married variety, the assumption underpinning the legislation is that the financial need caused by the death no longer exists: the economic gap will be sufficiently filled by the formation of the new adult relationship. This analysis highlights the distinction between the first situation of the Applicant following the death of her husband and the ensuing second and third situations. In the second and third situations the Applicant seeks to compare herself with where she was in the first situation.

[46] The legal validity of this comparison falls to be tested by the application of well-established principles. These were helpfully summarised by Baroness Hale in *McLaughlin* at [24]:

> "Unlike domestic anti-discrimination law, article 14 does not require the identification of an exact comparator, real or hypothetical, with whom the complainant has been treated less favourably. Instead it requires a difference in treatment between two persons in an analogous situation."

And at [26]:

> "It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an obvious difference between the two persons that they are not in an analogous situation."

The correct answer to this question must also take into account that the measure under challenge belongs to the realm of social security legislation, one in which assumptions and generalisations operate.

[47] The comparator invoked by the Applicant is a single bereaved parent presumptively deprived of the financial support previously provided by the deceased spouse. This situation applied to the Applicant initially following her first husband's death. In each of the two situations to which the Applicant has belonged subsequently – and continues to so belong – she has been, first, a cohabiting adult partner and, second, a married adult, each being a situation in which the assumption underpinning the offending legislation does not apply. Quite the contrary: the rationale of the legislation entails the assumption that in each of these situations the advent of a new adult partner will address – maybe not fully but sufficiently - the economic gap caused by the demise of the Applicant's first husband. I consider that the difference between the Applicant in each of her two situations and the comparator invoked by her is not technical or modest or tangential. It is, rather, unmistakable. The two people under scrutiny occupy situations which are manifestly different. Mr McGleenan argued that the contrary contention is "demonstrably untenable". Given effect to the foregoing analysis, I agree.

Justification

[48] I have found it possible to determine the "comparator" issue in this case without identifying any of the mischiefs or suffering any of the complexities contemplated by Lord Nichols in *Shamoon* and *Carson.* Thus, as did the Supreme Court in *McLaughlin*, I have proceeded via the staged mechanism rather than the omnibus question route. This has led to the *terminus* that the Applicant's challenge must fail.

[49] Notwithstanding, acknowledging the possibility of error and taking into account that arguments have been presented on the issue of justification, I shall proceed one stage further. It is appropriate to recall those aspects of the Department's evidence which make clear the aims and rationale of WPA rehearsed at [16] – [18] above.

[50] From the evidence one readily identifies a policy rationale and aim of distributing finite public funds as equitably as possible and, more specifically, providing financial support to surviving spouses and civil partners during a period when their need would be expected to be greatest, while discontinuing such support

when there adult relationship circumstances alter in a manner whereby the earlier need would generally be expected to be dissipated. This is a policy of longstanding. It bears the hallmarks of rationality, fairness and balance. I consider that it comfortably withstands the application of the diagnostic tool which the court is required to employ namely that of without reasonable foundation. The legislative policy which the Applicant challenges would also, in my estimation, withstand analysis by the application of less elevated standards of review. It follows that the requirement of justification is clearly satisfied.

Omnibus Conclusion

[51] Nothing in the court's analysis or conclusions seeks or serves to diminish the fact that in consequence of the impugned statutory exclusions the Applicant has suffered a loss at the rate of £10 per week since December 2014. The court does not underestimate the impact of this loss. However, for the reasons given I consider that her challenge must fail. The application for judicial review is, therefore, dismissed.