

## Unlawful indirect associative disability discrimination

*O'Donnell v Department for Communities* [2020] NICA 36; August 10, 2020

### Introduction

The Court of Appeal in Northern Ireland recently made a decision with far reaching consequences for the spouses and children of deceased disabled individuals. *O'Donnell* concerned bereavement support payment (BSP). The Social Security Tribunal to which that appeal was made had referred the question of whether s29 and s30(1) - s30(3) of the Pensions Act (Northern Ireland) 2015 (2015 Act) were incompatible with ECHR Article 14, read with Article 8 and Protocol 1 Article 1. Those provisions stipulated that, in order for a claimant to receive BSP, their deceased spouse must have paid Class 1 or Class 2 National Insurance Contributions (NICs).

### Facts

Mr O'Donnell's wife had been unable to work throughout her life because she suffered from Friedreich's Ataxia, a rare degenerative disorder. Mrs O'Donnell suffered from ataxia and weakness which worsened over time and affected her heart function. This culminated in her being severely neurologically impaired, using a wheelchair from the age of 18. It was clear that Mrs O'Donnell had been unable to accrue any NICs and so Mr O'Donnell's application for BSP was refused.

### Court of Appeal

The appeal was allowed; the CA found that the provisions had resulted in unlawful indirect associative disability discrimination, and were incompatible with ECHR Article 14, read with Article 8 and Protocol 1 Article 1.

### Article 14 and indirect associative discrimination

Interestingly, the CA made clear that Mr O'Donnell was not required to establish a stand-alone form of status. Mrs O'Donnell could not pay the requisite NICs because of her disability, and the direct effect of that was that she could not provide BSP for her husband – and their four children – upon her death [56]. Mr O'Donnell and the children were indirectly affected by this discrimination by association and that was enough [57]. As a result, both Mr O'Donnell and

his children had established 'other' status under Article 14: the former as the spouse of a severely disabled deceased individual unable to work and pay NICs, and the latter as the children of a severely disabled deceased individual unable to work and pay NICs [87].

### The discrimination: failing to treat different people differently

In line with *Thlimmenos v Greece* (2001) 31 EHRR 15, the court recognised that Article 14 rendered it unlawful for states to *fail to treat differently* persons whose situations are *significantly different* [42]. The provisions of the 2015 Act had led to Mr O'Donnell and his children being treated similarly to those whose situations were different [49]. In that respect, the comparator was a deceased spouse *without* a disability who was able to work and pay NICs but who did not work [60]. The provisions applied to both disabled spouses who could not work and able-bodied spouses who could work. A distinction needed to be made between each in order to ensure disabled spouses were treated differently, and their spouses and children as a result.

### Justification

The Department of Communities sought to justify the discrimination on the basis of (a) incentivising work (b) protecting the contributory principle and (c) simplifying the benefits system. But the court found these relevant to the underlying policy only; those aims did not justify the discriminatory treatment resulting from that policy [93]. As applied to the discrimination these objectives were manifestly without reasonable foundation because:

1. a severely disabled person cannot be incentivised to work if they cannot work due to their disability;
2. a disabled person unable to work cannot make work pay; and
3. the NICs requirements as a manifestation of the contributory principle would not be undermined by their removal in certain circumstances, given the contribution required for BSP was modest (75% of potential claimants would satisfy the NICs requirements) [98].

### The remedy

The court made use of its ability under s3 of the Human Rights Act 1998 to interpret the provisions in accordance with the ECHR. The following was read into the 2015 Act:

*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. [102]*

### Comment

#### BSP claimants

*O'Donnell* has profound ramifications for spouses, and children, of deceased individuals unable to work due to their disability. The CA's broad approach to associative discrimination opens the door for claimants who have been refused BSP in Northern Ireland on the same basis as Mr O'Donnell to have those refusals reviewed. New claimants in the same situation will be able to apply without being barred due to their deceased spouse's inability to work.

Importantly, there are also possible ramifications for similar claimants in England, Wales and Scotland. The CA alluded to the principle of parity as between the social security systems of Northern Ireland and Great Britain [10]. Whilst minor differences have emerged over time between each jurisdiction's social security regimes, any differences between ss 29 and 30(1) – (3) of the 2015 Act and ss 30 – 31(1) – (3) of Great Britain's Pensions Act 2014 (the 2014 Act) were deemed immaterial. These provisions of the 2014 Act include the same NICs requirements in relation to BSP as the 2015 Act. The significance of this parity is stark, and the CA went as far as it could without explicitly impugning the 2014 Act:

*The policy of parity may explain why in Northern Ireland the relevant provisions have been adopted given that they were adopted in England and Wales but that policy does not serve to justify the impugned difference in treatment. Unjustifiable discrimination is not justified by parity. [98]*

### UK's international obligations

The CA also took a robust view of the 2015 Act when set against the UK's international obligations. It found that that Act's provisions breached the UK's obligations under the United Nations Convention on the Rights of the Child (UNCRC) and UN Convention on the Rights of Persons with Disabilities (UNCRPD). In doing so, the court took the view that these obligations incorporated the need – as part of any equality impact assessment – to consider the indirect associative impact of any measures on able-bodied spouses, children or partners of deceased disabled individuals who were unable to work due to their disabilities [12]. Further, obligations under the UNCRC and UNCRPD also informed the court's view of the need for the UK to make necessary distinctions between groups or persons whose circumstances are '*relevantly and significantly different*' under the ECHR [49] and [99].

The CA did not stop there. Perhaps most importantly in terms of the UK's international obligations, it went one step further than Lord Wilson in *R (DA and DS) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289 who stated that a:

*... decision not made in substantial compliance with article 3.1 [of the UNCRC] might well be manifestly unreasonable. [78]*

The CA extended this approach to the UNCRPD and made clear that Articles 4(1)(b), 5(3) and 28(2) of that Convention should also inform any interpretation of the ECHR. That is, a decision that is not in '*substantial compliance*' with those provisions might well be manifestly without reasonable foundation [73-74].

In short, *O'Donnell* has reinforced, and indeed expanded, the domestic application of the UK's obligations under the UNCRC and UNCRPD as they apply to both disabled claimants as well as the families who survive them.

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