Neutral Citation No: [2020] NICA 15 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **STE11200** *Delivered:* **26/02/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

Between:

MARINA LENNON

Appellant:

-and-

THE DEPARTMENT FOR SOCIAL DEVELOPMENT

Respondent:

_____

Before: Stephens LJ, Maguire J and Sir John Gillen

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This appeal concerns the provisions of section 39A of the Social Security (Contributions and Benefits) (Northern Ireland) Act 1992 ("the 1992 Act") which is primary Westminster legislation making provision in certain circumstances for surviving spouses to be entitled to a Widowed Parent's Allowance ("WPA"). If a surviving spouse is entitled to WPA then in summary section 39A(5)(b) provides that it shall not be payable whilst the surviving spouse cohabits and section 39A(4) terminates entitlement on remarriage or on the formation of a civil partnership. We will refer to section 39A(5)(b) and section 39A(4) as "*the suspension and termination provisions*." Marina Lennon ("the appellant") became entitled to WPA on the death of her first husband, Barry James McKeown, but that entitlement was suspended whilst she cohabited with John Paul Lennon and terminated on their marriage. In judicial review proceedings commenced by the appellant she contended that the suspension and termination provisions which led first to the suspension of WPA and

then to the termination of WPA were incompatible with her rights under Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), read with Article 8 ECHR and/or Article 1 of the First protocol to, the Convention ("A1P1"). McCloskey J, under citation [2019] NIQB 68 dismissed the application holding that the comparators relied on by the appellant were not in an analogous situation and in the alternative that there was objective justification for the difference in treatment. The appellant now appeals to this court. Mr Lavery QC with Mr Fegan appeared for the appellant and Dr McGleenan QC with Ms Curran for the respondent.

The Facts

[2] On 5 September 1998 the appellant now aged 45 years, married Barry James McKeown. They had one child together born in 2004 who is now aged 16 ("the child").

[3] Between 2004 and 2012 the appellant, her husband Mr McKeown and their child all lived in the same household. In this way their child was cared for and looked after by two adults and those adults were able to make whatever flexible arrangements best suited them given any disability from which either of them suffered. Absent a disability they could both work either full time or part time or one could facilitate the other working by providing the majority of the care for their child. In this way again subject to any disability there was the potential for increasing their joint income or removing the need to obtain child care services from third parties so that one of them could go out to work without incurring that expense. Also the two adults each had financial obligations to their child. From the perspective of both adults and from the perspective of the child there were considerable potential benefits in this "situation."

[4] On 28 October 2012 Mr McKeown died.

[5] By letter dated 7 December 2012 from the Social Security Agency ("SSA"), the body which administers all statutory benefits on behalf of the respondent the appellant was informed that she was entitled to WPA payable from 28 October 2012. The payments amounted to WPA of £91.97 per week to the appellant.

[6] Between 28 October 2012 and 1 October 2014 the appellant and her child lived in a single adult household. The child was cared for and looked after by one adult, the appellant. The flexibility of the arrangements that best suited her and the child were now restricted. Absent a disability only she could work either full time or part time and there was no one in the household to facilitate her working by providing the majority of the care for their child. If the appellant wished to work she might have to incur costs in child care arrangements. Furthermore, now only one adult had financial obligations to the child. From the perspective of the appellant and from the perspective of the child this was a far more restrictive "situation."

[7] In May 2013, the appellant met John Paul Lennon and began a relationship with him.

[8] On 1 October 2014 the appellant and Mr Lennon began to cohabit.

[9] On 13 October 2014 the appellant contacted the SSA to advise that Mr Lennon had moved in on 1 October 2014.

[10] By way of a handwritten letter dated 21 November 2014 the appellant provided the SSA with written confirmation that Mr Lennon had moved in with her on 1 October 2014.

[11] By letter dated 11 December 2014 from the SSA the appellant was informed 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 because they were not married but simply living together. The appellant was further advised that at any time they stopped living together, then the suspension of payment of the WPA would be lifted. Finally, the appellant was advised that should she remarry, then her WPA would no longer be suspended but instead terminated.

[12] The appellant and Mr Lennon delayed getting married because of the financial implications of doing so.

[13] On 28 August 2015 the appellant and Mr Lennon were married. The appellant 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 appellant following her marriage.

[14] Throughout the appellant's cohabitation and subsequent marriage to Mr Lennon the appellant's claim for means-tested benefits has been treated as a joint claim with Mr Lennon.

[15] The appellant and Mr Lennon are in receipt of a number of benefits. The appeal proceeded on the agreed basis that the suspension of WPA meant that the household was £10 per week worse off as the loss in income from WPA was substantially made up by the receipt of other benefits payable to both the appellant and to Mr Lennon.

The respondent's evidence as to the policy of section 39A including the suspension and termination provisions

[16] The respondent relied on the affirmation of Heloise Brown a Principal Officer within the Department for Communities who has shared responsibility for the portfolio of policy and legislation for Social Security, pensions and child maintenance in Northern Ireland. On the basis of her evidence the judge readily identified a policy rationale and aim of section 39A which he stated was that of:

> "distributing finite public funds as equitably as possible and, more specifically, providing financial support to surviving spouses and civil partners (*and their child or children*) 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" (We have added the words in brackets and in italics).

The judge having reviewed the history of the legislation described this as "a policy of longstanding." He considered that it bore "the hallmarks of rationality, fairness and balance."

[17] First we would add that the words in brackets and in italics have been added by this court. The Order 53 Statement did not refer to the child or to children. However it is clear from a full and fair reading of the judgment that the judge had firmly in mind the position of the child. For those reasons we consider it appropriate to make express what is clear from reading the judgment as a whole. Second we consider that the policy is consistent with for instance the Matrimonial Causes (Northern Ireland) Order 1978 ("the 1978 Order"). Prior to marriage WPA is suspended so that if the appellant's cohabitation terminated then she and through her the child, would have the financial support of those payments being reinstated. However, if she remarried then on divorce the child would be a "child of the family" within Article 2(2) of the 1978 Order and there would be the potential for financial provision in favour of the child under Article 23 from the other adult. In this way the financial obligation on marriage passes from the State to the adults but is backed up by means tested benefits. A similar position applies in relation to a civil partnership.

The grounds of challenge

[18] The essential ground of challenge as more clearly articulated on this appeal is that the suspension and termination provisions are discriminatory from the perspective of the child in that WPA was a benefit "for the child and not the appellant" and that the child "was being treated discriminatorily because her mother, the appellant, decided to co-habit and marry again."

Section 39A of the 1992 Act

[19] Section 39A was inserted into the 1992 Act for certain specified purposes on 24 April 2000 and for all purposes on 9 April 2001 by S.I. 1999/3147 (N.I. 11), Art. 52(2); S.R. 2000/133, Art. 2(3)(a), Sch. Pt. I.

[20] It is not necessary to set out the entirety of section 39A. Rather we will refer to the aspects identified by the judge, the key features as identified by Lady Hale at paragraph [14] of *McLaughlin* [2018] 1 WLR 4250 and then we will set out the suspension and termination provisions.

[21] The judge identified that WPA is payable to both widows and widowers and that from 2004 it has been available to the surviving member of civil partnerships (see the Civil Partnership Act 2004). He also stated that it is a contribution-based benefit. As regards eligibility, the judge identified there being in particular two important requirements. 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.

[22] The key features identified by Lady Hale in *McLaughlin* were "the claimant must be under pensionable age at the date of death and the allowance ceases once he or she reaches that age; the deceased spouse or civil partner must have satisfied the prescribed contribution conditions (the details need not concern us); the surviving spouse or civil partner must either be pregnant (in the prescribed circumstances) or be entitled to child benefit in respect of at least one child or qualifying young person who is either (a) the son or daughter of them both , or (b) a child or qualifying young person in respect of whom the deceased was entitled to child benefit immediately before his or her death, or (c) a child or qualifying young person in respect of whom the survivor was entitled to child benefit, provided that the deceased and the survivor were living together immediately before the death; and entitlement is lost if the survivor marries, forms a civil partnership or when he or she cohabits as if married or in a civil partnership."

[23] In so far as relevant the suspension provision contained in section 39A(5) states that "a widowed parent's allowance shall not be payable – … (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."

[24] In so far as relevant the termination provision contained in section 39A(4) states that "the surviving spouse shall not be entitled to the allowance for any period after she or he remarries or forms a civil partnership, …."

The Order 53 Statement, the Notice of Appeal, the Notice of Devolution Issue (Order 120, rule 3) and the Notice that the court is considering potential incompatibility under the Human Right Act 1998 ("HRA")(Order 121, rule 2)

[25] The original statement under Order 53, rule 3(2)(a) of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the rules") ("the Order 53 Statement") was dated 13 January 2015. Prior to the first instance hearing the appellant proposed three further versions of that statement. However before considering those versions points can be made about the original version and the appellant's failure to comply with the rules in relation to Convention rights and the rules in relation to devolution issues:

(a) If the appellant intends to rely on a Convention right or rights then Order 121, Rule 5(1) and (2) required the appellant to state that as a fact in the Order 53 Statement. If she did intend to rely on a Convention right then she was required to specify:

> (i) "details of the Convention right or rights which it is alleged have been (or would be) infringed and details of the alleged infringement."
>
> (ii) "whether the relief sought includes a declaration of incompatibility" and if it did then
>
> (iii) to specify "details of the legislative provision (or provisions) alleged to be incompatible and the grounds on which it is (or they are) alleged to incompatible."

In that part of the original Order 53 Statement headed "Particulars of any claim to rights under the European Convention on Human Rights" it was laconically stated "Breach of (A1P1) … Article 8 … Article 14." There was no attempt to give "details of the alleged infringement." The appellant ignored the obligation to state whether the relief sought included a declaration of incompatibility and also ignored the consequential obligation to specify details.

(b) Order 120, rule 2 requires a party raising a devolution issue to specify "in a notice filed in the Central Office and served on each of the other parties to the proceedings the facts and circumstances and points of law on the basis of which it is alleged that the devolution issue arises in sufficient detail to enable the Court to determine whether a devolution issue arises in the proceedings." In that part of the original Order 53 Statement headed "Notice of any devolution issue" it was laconically

stated "yes" without anything further being added. The appellant ignored her obligation to give details as to the facts and circumstances and points of law on the basis of which it is alleged that the devolution issue arises. This failure to articulate any reasons as to why these proceedings raised a devolution issue continued up to and including the hearing in this court. The eventual position adopted on behalf of the appellant being that there was no devolution issue. Compliance with the provisions of Order 120, rule 2 would have resulted in the proper officer under Order 120, rule 3 causing the matter to be drawn to the attention of the Court for the making of an order under paragraph 5 of Schedule 10 to the Northern Ireland Act 1998 ("NIA 1998") requiring notice of the devolution issue to be given to the Advocate General, the Attorney General for Northern Ireland and the appropriate Minister or department. We emphasise that it was at this stage that proper detailed consideration ought to have been given to the question as to whether there was a devolution issue and if so what it was.

[26] Those two points about the original Order 53 Statement are as to a failure by the appellant to comply with the rules. There are other points to be made about the original Order 53 Statement:

(a) The way in which discrimination under Article 14 read with Article 8 and/or A1P1 was articulated is relevant as it ignored the impact on the child and the comparison with children of "unmarried and non-cohabitating widows." The original Order 53 Statement and indeed all three further versions of it asserted that "the removal of WPA from the (appellant) upon her cohabitation and her re-marriage resulted in the (appellant) being treated less favourably than comparators, to wit unmarried non-cohabitating widows." It is a feature that the discrimination alleged was in respect of the "appellant" not in respect of the "appellant and her child." It is also a feature that the comparators were "unmarried and non-cohabitating widows" without any reference to their children. Both were also features of the Notice of Appeal which again made no reference to the child or to any comparison with children of unmarried non-cohabitating widows.

(b) The original Order 53 Statement also asserted that the suspension of and then the termination of WPA amounted not only to discrimination under Article 14 ECHR read with Article 8 and/or A1P1 but also positively amounted to a breach of both Articles 8 and/or A1P1. There was no tenable basis for such an assertion.

[27] As we have indicated prior to the first instance hearing the appellant proposed three further versions of the Order 53 Statement. These further versions suggested further grounds of challenge. They also deleted grounds.

[28] The final version of the Order 53 Statement dated 22 March 2019 deleted a number of grounds of challenge which were:

(a) the ground relying on Article 14 read with Article 12 ECHR which contended that termination of WPA disproportionately interfered with or impaired the appellant's right to marry.

(b) the ground that the respondent had failed to take into account a relevant consideration namely the requirement that due regard be had to the need to promote equality of opportunity between persons of different marital status or sexual orientation or between men and women generally as required under section 75(1) of the NIA 1998.

(c) the grounds that the suspension of and then the termination of WPA amounted not only to discrimination under Article 14 read with Article 8 and/or A1P1 but also positively amounted to a breach of both Articles 8 and A1P1.

[29] A number of the grounds contained in the final Order 53 Statement were not relied on at the hearing before the judge. Those included the ground that the decision to suspend and then to terminate WPA was "ultra vires of the power and duties of the respondent" and that the decision to suspend and terminate "was unreasonable/irrational." The lack of reliance on these grounds at the first instance hearing no doubt resulted from an appreciation that if the suspension and termination provisions were compatible with the ECHR then suspension and termination of WPA could hardly be ultra vires or *Wednesbury* unreasonable as they are required by those provisions. The real and only issue was whether the suspension and termination provisions were incompatible on the basis of discrimination under Article 14 read with Article 8 and/or A1P1.

[30] On 8 February 2019 the appellant provided drafts of two notices. The first was a devolution issue notice under Order 120 and the second a notice that the court was considering incompatibility under the HRA under Order 121 ("the potential incompatibility notice"). The judge amended the drafts and on 14 February 2019 the court office issued the two notices which were served on the respondent, the Executive Office, the Department of Work and Pensions, the Secretary of State for Northern Ireland and the Attorney General for Northern Ireland. The potential incompatibility notice was in addition served on the Advocate General. None of those served entered an appearance at first instance being content to leave the submissions to those appearing on behalf of the respondent.

[31] The draft of the devolution notice provided by the appellant asserted that she was raising "a devolution issue under paragraph 1(b) of Part 1 of Schedule 10 to the Northern Ireland Act 1998." There was no attempt to explain what that issue was or to give details of it to the court. Paragraph 1(b) of Schedule 10 provides that "in this

Schedule "devolution issue" means—… (b) *a question whether a purported or proposed exercise of a function by a Minister or Northern Ireland department is, or would be, invalid by reason of section 24*; …." There was no attempt to explain what was the purported or proposed exercise of a function nor was there any attempt to explain why it is or would be invalid by reason of section 24 which provides for instance that a "Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act—(a) is incompatible with any of the Convention rights; …." Any notice that did not provide the details required by Order 120, rule 2 would be meaningless to its recipients. As we have indicated the failure to provide details continued in this court. It was suggested by Dr McGleenan that a failure to act by the devolved authorities to remove the alleged discrimination contained in the suspension and termination provisions might raise a devolution issue (see paragraph [54] of *R(DA & DS) v Work and Pensions Secretary* [2019] 1 WLR 3289) but he did not understand Mr Lavery to be making that case on behalf of the appellant. In response Mr Lavery stated that he was not in a position to articulate why these proceedings raised a devolution issue, he did not consider that there was a devolution issue and there was no need for a devolution notice. That stance is to be seen in the context that some 5 years earlier in the original Order 53 Statement those on behalf of the appellant had laconically replied "yes" that the proceedings did raise such an issue.

[32] The judge delivered judgment on 24 June 2019 and the Notice of Appeal is dated 8 August 2019. There was plenty of time to formulate specific and relevant grounds of appeal. The following points arise in relation to the Notice of Appeal:

(a) A central feature of the appeal was the contention that the judge in considering discrimination did not refer to the child nor did he consider the analogous situation of children of "unmarried or non-cohabitating widows." There was no reference to this in the Notice of Appeal though we were assured that it had been raised before the judge at the first instance hearing. The respondent did not seek to contend that the point could not be argued on this appeal and we proceeded to hear that part of the appeal.

(b) Order 120, rule 2 required the appellant to specify in the Notice of Appeal "the facts and circumstances and points of law on the basis of which it is alleged that" a devolution issue arises. This is to be done in sufficient detail to enable this court to determine whether a devolution issue arises in the proceedings which involves consideration as to whether it is frivolous or vexatious (see paragraph 2, Schedule 10 NIA 1998). In this way the court can comply with paragraph 5, Schedule 10 of the NIA 1998 which requires it to give notice. At the stage that the Notice of Appeal was served the appellant was still contending that a devolution issue arose in these proceedings. There was no reference in the Notice of Appeal to a devolution issue and the requirements of Order 120, rule 2 were ignored.

(c) If the appellant intends to rely on a Convention right or rights in relation to the appeal or grounds of incompatibility not relied on by her before the court from whose decision the appeal is brought then Order 121, rule 5(1) and (2) required the appellant to state the fact and specify the details set out at paragraph [25](a) above in her Notice of Appeal. As the appellant did not intend to rely on anything not relied on before the first instance court there was no obligation to do so and she did not do so. However as we will indicate below as a matter of good practice we consider that any issue as to potential incompatibility should be brought to the attention of this court at the earliest opportunity so that a potential incompatibility notice can be served by this court at an appropriate time well in advance of the hearing of the appeal.

(d) We were informed by Mr Lavery that the Notice of Appeal had been copied from one of the earlier Order 53 Statements. This meant that it included grounds that had been deleted (see paragraph [28]) and also grounds which were not advanced before the judge (see paragraph [29]). At the hearing of the appeal Mr Lavery accepted that the grounds of appeal numbered 3-7 inclusive together with the ground 10 should be deleted.

[33] For the reasons which we have set out in paragraph [32] at (a), (b) and (d) and at its mildest we observe that the Notice of Appeal was inadequate. We consider that there was an inappropriate attitude towards its preparation which is to be deprecated particularly given the importance of the issues which are to be seen in the context of the expenditure of public legal aid funds.

[34] The good practice which we consider should be adopted is that if an appeal raises a devolution issue or an issue as to potential incompatibility the appellant has an obligation to bring that to the attention of this court at the earliest opportunity. We consider the earliest opportunity to be at the same time as serving the Notices of Appeal under Order 59, rule 3(4) on all parties to the proceedings. We consider that good practice requires that this court's attention should be drawn to this issue by letter to the Court of Appeal Office which letter should be accompanied by the appellant's draft notices under Order 120 and/or Order 121. That letter should be copied to the solicitors for all the parties to the proceedings.

[35] In advance of the hearing of this appeal this court was not alerted by the appellant that it should consider issuing notices under Order 120 and/or Order 121. The reason why it was not alerted was that the appellant mistakenly believed that notices having been given at first instance there was no need for any notices to be given on appeal. That is incorrect. Section 79 and paragraph 5 of Schedule 10 to the NIA 1998 requires this court to give a devolution notice even if one has been given at first instance. Order 121, rule 2 also requires this court to give a potential incompatibility notice even if one has been given at first instance.

[36] Immediately prior to the hearing of the appeal we raised with the parties the issue of further notices. The initial response was that there was no need given that notices had been served at first instance. There were further exchanges which led at the opening of the appeal to an acceptance that a further potential incompatibility notice ought to have been served and to the stance on behalf of the appellant that as there was no devolution issue there was no need for a further devolution notice. We enquired of the respondent as to the attitude of all those who ought to have been served with the potential incompatibility notice and were informed that all of them had been contacted as a matter of urgency and were content for the appeal to proceed with submissions to be made solely by the respondent. We directed that a further potential incompatibility notice be served but proceeded with the hearing of the appeal. We emphasize that this illustrates the importance of the appellant bringing this issue to the attention of this court at the earliest opportunity rather than leaving the unsatisfactory potential for an adjournment of an appeal to facilitate service of the relevant notices.

The first instance judgment

[37] We will summarise the clear and detailed judgment of McCloskey J as follows:

(a) The judge held that the applicant had a relevant status for the purposes of Article 14 ECHR, namely initially as a cohabiting person and subsequently as a married person otherwise entitled to WPA, for which see paragraphs [39] – [40].

(b) WPA which is paid to the survivor 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. The main purpose but not the only purpose of WPA is the continuing well-being of the affected child. However, the financial benefit conferred by WPA extends to all members of the household, including the surviving spouse, see paragraph [44].

(c) The rationale of the legislation was based on an assumption of financial need where a surviving spouse is a single adult with a dependent child or children; where the survivor forms a new adult relationship by cohabitation or marriage the assumption is one of economic contribution by the new partner, see paragraph [45].

(d) Assumptions and generalisations are a necessary feature of social security legislation, see paragraph [46].

(e) The comparator invoked by the Applicant, namely a single surviving spouse with dependent children, was in an unmistakably and

manifestly different situation to the Applicant when she was cohabiting and then married to Mr Lennon; any contrary contention was 'demonstrably untenable,' see paragraph [47]. On this basis the application for judicial review was dismissed.

(f) The judge went on to consider justification for which purpose he held that there was a readily identifiable policy rationale and aim of equitable distribution of finite public funds, see paragraph [50].

(g) The policy bore the hallmarks of rationality, fairness and balance, and comfortably withstood the application of the 'manifestly without reasonable foundation' test, see paragraph [50]. On this alternative basis he also dismissed the application for judicial review;

(h) The judge went on to state that had a less strict threshold for review applied, the legislative policy would still have survived the challenge, see paragraph [50].

Legal principles in relation to Article 14 ECHR

(a) Article 14 ECHR

[38] Article 14 prohibits discrimination, providing:

> "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."

(b) The Article 14 questions

[39] The authorities make it clear that in order to establish that different treatment amounts to a violation of Article 14 it is necessary to address a series of questions. The judge proceeded on the agreed basis that the payment of WPA falls within the ambit of Article 8 and A1P1. He identified the remaining questions as being:

> "(i) What is the "status" of the (Appellant)?
>
> (ii) Can she lay claim to an "other status" within the embrace of Article 14 ECHR? (The judge recognised the overlap of (i) and (ii))
>
> (iii) If the "other status" hurdle is overcome, is the (Appellant) 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?"

[40] We consider that the formulation of the questions to be addressed can be traced back to paragraph [20] of the judgment of Brooke LJ delivered on 6 March 2002 in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617 as amplified in *R (Carson) v Secretary of State for Work and Pensions* [2002] 3 All ER 994 at page 1010 and paragraph [52]. Lady Hale returned to the questions at paragraph [133] - [134] of her judgment delivered on 21 June 2004 in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 recognising the need for a fifth question. In *Re McLaughlin* [2018] 1 WLR 4250 at paragraph [15] of her judgment delivered on 30 August 2018 Lady Hale stated:

> "As is now well known, this raises four questions, although these are not rigidly compartmentalised:
>
> (1) Do the circumstances "fall within the ambit" of one or more of the Convention rights?
>
> (2) Has there been a difference of treatment between two persons who are in an analogous situation?
>
> (3) Is that difference of treatment on the ground of one of the characteristics listed or "other status"?
>
> (4) Is there an objective justification for that difference in treatment?"

This formulation by Lady Hale in *McLaughlin* was part of a majority judgment with which three members of the Court explicitly agreed, and upon which Lord Hodge in the minority relied at paragraph [61]. Subsequently in their judgments delivered on 28 November 2018 in *R (Stott) v Secretary of State for Justice* [2018] 3 WLR 1831 Lady Black at paragraph [8] and Lady Hale at paragraph [207] provided slightly contrasting formulations of the four questions. Lady Black stated that in order to establish that different treatment amounts to a violation of Article 14, it is necessary to establish four elements:

(a) the circumstances must fall within the ambit of a Convention right;

(b) the difference in treatment must have been on the ground of one of the characteristics listed in Article 14 or "other status";

(c) the applicant and the person who has been treated differently must be in analogous situations;

(d) objective justification for the different treatment will be lacking.

[41] The most recent Supreme Court authority on Article 14 is *R(DA and DS) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289. None of the Justices set out the four questions except Lady Hale who at paragraph [136] stated:

> "In deciding complaints under Article 14, four questions arise: (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 1017, para 51)?"

[42] We recognise that the different formulations of the questions are largely semantic. Ordinarily and subject to that qualification we consider that the most appropriate formulation is that applied by Lady Hale in *McLaughlin* at paragraph [15] given that three other members of the court agreed with her judgment and also that there is nothing in *Stott* or *DA & DS* to cast doubt on its applicability. However there is a degree of latitude and we consider that it was appropriate for the judge to formulate the questions in the way that he did so as to assist in the determination of the Article 14 issue. For our part we consider that Lady Black's formulation at paragraph [8] of *Stott* presents the most appropriate tool for the determination of the issues in this particular case and those are the questions that we will address. We will refer to those questions as "the *Stott* questions."

(c) The requirement for an obvious answer to Stott question (3) and the general approach to the questions

[43] In addressing the four *Stott* questions it is important to bear in mind the observations of Lord Nicholls of Birkenhead at paragraph [3] of *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 A.C. 173 as follows:

> "For my part, in company with all your Lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. *Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in Article 14*. If this prerequisite is satisfied, *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" (emphasis added).

From this it can be seen that questions (1) and (2) of the four *Stott* questions are prerequisites. Question (3) which relates to "analogous situations" may be so obvious that the difference in treatment withstands scrutiny on that ground alone. If it is not so clear then a different approach is called for which is consideration of question (4). We proceed on the basis that in considering question (3) unless the answer is obvious that there is no analogous situation then we should proceed to question (4).

(d) Ambit

[44] Lady Hale stated at paragraph 16 of *McLaughlin* that "Article 14 does not presuppose that there has been a breach of one of the substantive Convention rights, for otherwise it would add nothing to their protection, but it is necessary that the facts fall "within the ambit" of one or more of those: see eg *Inze v Austria* (1987) 10 EHRR 394 , para 36."

[45] Ambit is relevant to the question of an analogous situation and to justification.

(e) Status

[46] Article 14 does not prohibit all differences in treatment. The discrimination which Article 14 prohibits is 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*" (emphasis added). It can be seen from Article 14 that only differences in treatment based on an identifiable characteristic, or "status" are capable of amounting to discrimination. Article 14 then lists a number of specific grounds which constitute "status." However, the ECtHR in *Clift v United Kingdom* stated that the list is "illustrative not exhaustive" as is shown by the words "*any ground such as*" and the inclusion of the phrase "*any other status*" (emphasis added). It went on to recall, at paragraph [56], that "the words 'other status' (and a fortiori the French 'toute autre situation') have generally been given a wide meaning." In *Stott* the Supreme Court conducted a detailed examination of the meaning of "other status" in Article 14. Lady Black who delivered the comprehensive leading judgment observed that at paragraph [56] of *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 the ECtHR set out a passage about status in relation to which courts return repeatedly. The passage is as follows:

> "The court first points out that Aarticle 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other."

We will refer to this passage as the *Kjeldsen* test of looking for a "personal characteristic" by which persons or groups of persons were distinguishable from each other. At paragraphs [56] and [63] of *Stott* Lady Black identified the following position in relation to "other status" from the jurisprudence of the House of Lords and the Supreme Court which is also to be found in the jurisprudence of the ECtHR:

(i) The possible grounds for discrimination under Article 14 were not unlimited but a generous meaning ought to be given to "other status."

(ii) The *Kjeldsen* test of looking for a "personal characteristic" by which persons or groups of persons were distinguishable from each other was to be applied.

(iii) Personal characteristics need not be innate, and the fact that a characteristic was a matter of personal choice did not rule it out as a possible "other status."

Lady Black went on to list further propositions as to "other status" that could be derived from the jurisprudence of the House of Lords and the Supreme Court. She

then commented on them in the light of jurisprudence of the ECtHR. For the purposes of this appeal it is not necessary to consider those propositions

[47] At paragraph [39] in *DA & DS* Lord Wilson commenting on the detailed examination of the meaning of "other status" in Article 14 in *Stott* stated that in "the event all members of the court other than Lord Carnwath JSC confirmed (in *Stott*) that its meaning was broad …." Lord Carnwath at paragraph [108] of his judgment in *DA & DS* acknowledged that the majority in *Stott* had "adopted a relatively broad view of the concept of "status." Lord Hodge at paragraph [126] in *DA & DS* stated that "the boundaries of "other status" in Article 14 is a subject on which there is, as yet, little clarity."

[48] For the purposes of this appeal it is not necessary to further analyse this issue.

(f) Analogous situation

[49] What is required is that the appellant should demonstrate that, having regard to the particular nature of the complaint, her situation was "analogous, or relevantly similar" to the person who is treated differently. It need not be identical.

(g) The impact of the nature of the status on justification

[50] The nature of an individual's status influences the standard of review. This can be traced back to the judgment of Lord Walker at paragraph [5] in *R(RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 with whom Lords Hope and Rodger, and, on this point, Neuberger, agreed. Lord Walker stated that:

> 'Personal characteristics' is not a precise expression and to my mind a binary approach to its meaning is unhelpful. 'Personal characteristics' are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by Articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within Article 14

> (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify…."

[51] The nature of the status influencing the standard of review finds expression in the judgment of Lord Neuberger at paragraph [56] in *RJM* that the court should be very slow to substitute its own view on justification, "*especially as the discrimination is not on one of the express, or primary grounds"*. Lord Mance at paragraph [14] also stated that the discrimination in RJM was not on one of the core-protected or "suspect" grounds; rather, it was by reference to the fact that they were homeless. In *DA & DS* the Supreme Court was concerned with the lawfulness of provisions relating to the revised benefits cap, limiting the total amount of benefits payable in one claim. It was argued that the cap discriminated against a variety of claimants, including lone parents with children under five or two years old, and the children of lone parents with a child under five or two. Lord Carnwath, with whom Lords Reed and Hughes agreed, explained at paragraph [121] that "although I have accepted that the various groups identified by the claimants can be regarded as meeting the "status" requirement for the purposes of Article 14, they are far from the "core" grounds to which special protection is given under that Article, and in relation to which the court should be especially slow to substitute its view for that of the executive."

(h) The focus and the test in relation to justification

[52] In *A v Secretary of State for the Home Department* [2005] 2 AC 68 Lord Bingham of Cornhill stated in paragraph [68]: "What has to be justified is not the measure in issue but the difference in treatment between one person or group and another." The focus in relation to justification should not be on sections 39A(4) and 39A(5)(b) but rather on the difference in treatment brought about by those sections.

[53] In *DA & DS* at paragraph [65] Lord Wilson stated "… in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it." He went on at [66] to state "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." That is the test to be applied.

The *Stott* questions

[54] We turn to consider the four *Stott* questions and in doing so give consideration to the central issue raised on behalf of the appellant that the judge in considering discrimination did not refer to the child nor did he consider the analogous situation of children of "unmarried or non-cohabitating widows."

(a) Whether the circumstances fall within the ambit of a Convention right

[55] In relation to the first *Stott* question as to whether the circumstances "fall within the ambit" of a Convention right there was no issue before McCloskey J or in this court that the circumstances in this case fall within the ambit of both Article 8 and A1P1 ECHR. The reason why it is in the ambit of both of these Articles sets the proper context for the Article 14 issues, see *Stott* at paragraph [16] and *McLaughlin* at paragraph [16] letters E to F. The Convention does not require member states to establish WPA but where domestic law provides for surviving spouses to be entitled to WPA that entitlement is within the ambit of both Article 8 and A1P1. The reasons for this were set out by Lady Hale at paragraph [137] of her judgment in *(DA & DS)* as follows:

> "There is nowadays no doubt that entitlement to state benefits, even non-contributory means-tested benefits, is property for the purpose of …A1P1, which protects property rights. … as Lord Wilson JSC explains (para 36), benefits which enable a family to enjoy "a home life underpinned by a degree of stability, practical as well as emotional, and thus the financial resources adequate to meet basic needs, in particular for accommodation, warmth, food and clothing" are clearly one of the ways ("modalities") whereby the state manifests its respect for family life and therefore fall within the ambit of Article 8: see *Petrovic v Austria* (1998) 33 EHRR 14 and *Okpisz v Germany* (2005) 42 EHRR 32."

The reason why it is within ambit having the effect of setting the proper context for the Article 14 issues was also expressed by Lady Hale who continued at paragraph [137] by stating:

> "That we are concerned here, not only with the right to property, but also with the right to respect for family life is clearly relevant to the issue of justification."

Furthermore, at paragraph [16] of her judgment in *McLaughlin* Lady Hale stated that whether the circumstance was within the ambit of more than one Convention right "could matter, in relation both to whether the claimant and her children are in an analogous situation to a surviving spouse or civil partner and their children and to the justification for the difference in treatment between them." Context is important not only in relation to justification but also in relation to an analogous situation.

[56] As the circumstances of this case fall within the ambit both of Article 8 and A1P1 means that under Article 14 differential treatment in relation to the payment of WPA to one person, as compared with another, may gave rise to a potential complaint.

[57] The answer to the first *Stott* question is that the circumstances do fall within the ambit of both Article 8 and A1P1.

(b) Whether the difference in treatment was on the ground of one of the characteristics listed in Article 14 or "other status"

[58] The appellant contends that her status is first that of a cohabitating widow and then her status became that of a widow who had married. The appellant also contends that the status of her child was first as a child of a cohabitating widow and then became a child of a widow who had married.

[59] There is no doubt that there was differential treatment on these grounds in so far as WPA was first suspended and then terminated. However, the status of a cohabitating widow and of a widow who had married does not fall within any of the specific grounds listed in Article 14 so the appellant can only bring herself within the protection of that Article if her differential treatment could be said to be on the ground of "*other status*."

[60] In *McLaughlin* Lady Hale stated at paragraph [31] that:

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

There was no dispute in this case that the appellant falls within "other status" as a *widow who has married*. There was also no dispute and we accept that the appellant falls within "other status" on the basis of *a widow who is cohabitating*. There was also no dispute and we accept that the status of her child fell within "other status" as a child of the appellant with both statuses.

[61] We would observe that the appellant's status is not defined solely by the difference in treatment of which complaint is made. Her personal or identifiable

characteristics are referable to her emotional attachments to and her marriage to her first husband Mr McKeown and then by her emotional attachments to, her cohabitation with and her marriage to her second husband Mr Lennon.

[62] The answer to the second *Stott* question is that the difference in treatment was on the ground of "other status" within Article 14.

(c) Is the appellant and the person who has been treated differently in analogous situations?

[63] The situation of the appellant and of her child is taken essentially from their status. First she is a widow who is cohabitating and her child is the child of a widow who is cohabitating. Then her status became a widow who has married and her child is the child of a widow who has married. From her perspective and in relation to both situations she is no longer a single parent looking after a child on her own but rather she has the support of another adult with the potential benefits that can bring. From the child's perspective she is no longer a child being looked after by a single parent but rather has two adults in the household again with the potential benefits that can bring.

[64] The comparators put forward by the appellant is "to wit, unmarried and non-cohabitating widows" to which has been added and "their child or children." The comparators are from the adult's perspective a single parent looking after a child and from the child's perspective a child being looked after by a single parent.

[65] The withdrawal of WPA is within the ambit of both Article 8 and A1P1 and therefore whether the situations are analogous should be informed by consideration of both family life and property.

[66] The judge held, we consider correctly, that it was obvious that the Article 8 private lives of these two situations were not analogous. A household consisting of a single parent and a child is simply not analogous to that of a household in which there are two adults and a child. We have set out in paragraphs [3] and [6] the most obvious differences between the two households. The finding that two Article 8 situations are not analogous does not rely on a consideration of the policy underlying section 39A.

[67] We also consider that the two situations are not analogous on consideration of the ambit of A1P1. Again the financial position of a single parent and a child in a household is completely different from that of a household in which there are two adults and a child. Again the finding that two A1P1 situations are not analogous does not rely on a consideration of the policy underlying section 39A.

[68] We reject the contention that the judge failed to consider the position of the child or the position of a child or children of comparators. We have explained in [17] that it is clear from a reading of his judgment as a whole that he did consider their

positions. In any event as we have explained whether one analyses from the perspective of the child or from the perspective of the adults or from perspective of both the situations are obviously not analogous.

[69] We also reject the appellant's contention that WPA was a benefit "for the benefit of the child and not the appellant" so that in considering an analogous situation one should concentrate exclusively on the position of the child in comparison with the position of a child or children of the comparators. First we consider that WPA is mainly but not exclusively for the benefit of the child. Second a focus on this issue ignores the wider situation of a child in a single parent household in comparison to a child in a household with two adults.

[70] For those reasons we consider that the judge was correct to dismiss the application for judicial review and we dismiss this appeal.

(d) Whether objective justification for the different treatment is lacking

[71] The judge found that the difference in treatment was justified. The appellant contends that the judge was incorrect to rely on the long standing nature of the policy giving rise to the difference in treatment given that the duration of a policy does not necessarily mean that the policy is justified. We reject this ground of appeal. The judge was not relying on the duration of the policy but rather was explaining that this was not ex post facto justification, see *Re Brewster* [2017] 1 WLR 519 at paragraphs [50]-[52], [59] and [64]. He specifically considered the policy to be rational, fair and balanced, and it was for these reasons, not its longevity which led him to conclude that it was justified.

[72] We consider that the judge was correct to find that the difference in treatment has an objective and reasonable justification as it pursues the legitimate aim set out in paragraph [16] which is not manifestly without reasonable foundation. The reason for restricting the benefit in this manner is clearly set out in detail in the affirmation of Heloise Brown. WPA is an earnings-replacement benefit, designed to replace lost earnings of a spouse which could not be replaced by the survivor by virtue of their particular difficulties in accessing the labour market due to childcare responsibilities. Where the claimant cohabits or remarries, payment ends as the surviving spouse has another adult with whom he or she can share the financial burden and from whom they might expect some financial support. The aim of sections 39A(4) and 39A(5)(b) is therefore to ensure public funding is allocated as effectively as possible, in line with the purpose of WPA. In achieving that aim the respondent is entitled to rely on assumptions and generalisations. We also consider that the means employed bear "a reasonable relationship of proportionality" to the aims sought to be realised.

[73] We dismiss the challenge to the judge's conclusion that the difference in treatment was justified.

Conclusion

[74] We dismiss the appeal and will hear counsel in relation to costs.