IN THE UPPER TRIBUNAL **Appeal No. CG/1616/2019**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

JG

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Deputy Upper Tribunal Judge Rowland

Decision date: 28 July 2021
Decided on consideration of the papers

DIRECTIONS

I defer the making of a decision in this case until after the making of a remedial order under section 10 of the Human Rights Act 1998 in the light of the declarations of incompatibility made under section 4 of that Act by the Supreme Court in *In re McLaughlin* [2018] UKSC 48; [2018] 1 W.L.R. 4250 and the Administrative Court in *R. (Jackson) v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin); [2020] 1 W.L.R. 1441.

I direct the Secretary of State to make, within one month of the remedial order being made, a brief submission as to the implications it has for the final disposal of this appeal.

I do not reserve this case to myself.

REASONS

1. This is an appeal, brought by the claimant with permission granted by Upper Tribunal Judge Levenson, against a decision of the First-tier Tribunal dated 21 December 2018, dismissing her appeal against a decision of the Secretary of State dated 24 November 2016 to the effect that the claimant was not entitled to bereavement benefit following the death of her partner because she was not legally married to him at the time of his death on 14 October 2016.

2. The First-tier Tribunal recorded that it was common ground that the Appellant and her partner had been in a long-term partnership for 12 years and, at the time of his tragic death in a road traffic accident, they were living together with their son in a flat that they had bought together. It was also common ground that the Secretary of State's decision that the claimant was not entitled to any form of bereavement benefit because she had not been married to her partner was in accordance with the

provisions of the Social Security Contributions and Benefits Act 1992 but that, in the light of the Supreme Court's decision in *In re McLaughlin* [2018] UKSC 48; [2018] 1 W.L.R. 4250, section 39A of that Act was incompatible with the European Convention on Human Rights insofar as it precluded any entitlement to widowed parent's allowance by a surviving unmarried partner of a person who had died. However, it was submitted by the Secretary of State that the declaration of incompatibility made by the Supreme Court under section 4 of the Human Rights Act did not entitle the First-tier Tribunal to disregard or override the legislation. The claimant did not make any submission to the First-tier Tribunal in reply to the Secretary of State's submission and the First-tier Tribunal dismissed her appeal, accepting the Secretary of State's submission and applying the legislation as it stood.

3. The claimant's grounds of appeal to the Upper Tribunal were drafted by the Merton and Lambeth Citizens' Advice Bureau. The appeal is brought on a very narrow point. It is accepted that the First-tier Tribunal was not able to provide a remedy for the breach of the claimant's human rights, but it is submitted that, rather than simply dismissing the appeal, the First-tier Tribunal should have ensured that the claimant would not be deprived of such remedy as Parliament might subsequently provide. Reliance is placed on *NA v Secretary of State for Work and Pensions (BB)* [2019] UKUT 144 (AAC) at [115] and [116]. Reference is made to the similarity between widowed parent's allowance and bereavement support payment which replaced it in 2017 and I think that the Advice Bureau had in mind Parliament amending the legislation in respect of the higher rate of bereavement support allowance in the light of *In re McLaughlin* but the claimant being unable to take advantage of any such amendment in the light of the First-tier Tribunal's decision and the time limit for making a new claim. Reference is also made to section 27 of the Social Security Act 1998 and it is pointed out that, while section 27 has the effect that decisions of the Secretary of State made in the light of a decision of the Upper Tribunal or a court in another case have effect from the date of the decision of the Upper Tribunal or court and cannot have effect from any earlier date, that section does not impose such a limitation on decisions of tribunals or courts in other cases brought before the relevant decision of the Upper Tribunal or court but decided after it.

4. The Secretary of State opposes the appeal, but her submission-writer has not really addressed the limited ground upon which the appeal is brought (and also appears to have been unaware of the Administrative Court's decision in *R. (Jackson) v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin); [2020] 1 W.L.R. 1441 that had then recently been handed down).

5. In her reply, the claimant has said that she has been told by the Advice Bureau that it is no longer able to represent her. She pointed out that she still has her son to look after and that, at the time, she was trying to find another representative. She was given until 24 December 2020 to make any further observations but has not done so. Both parties have said that they do not seek an oral hearing. I am satisfied that a hearing is not necessary at this stage of the proceedings.

6. There have been two significant developments since Judge Levenson gave permission to appeal. First, the Administrative Court has accepted in *Jackson* that

the approach taken in *In re McLaughlin* should be applied to the higher rate of bereavement support payment and it issued a declaration of incompatibility to the effect that "[s]ection 30(4)(a) of the Pensions Act 2014, read with section 30(1), is incompatible with Article 14 of the European Convention on Human Rights read with Article 8 in so far as it empowers the Secretary of State to order by regulations that Bereavement Support Payment be paid at a higher rate in the case of a person who is pregnant or entitled to child benefit, only if they are a spouse or civil partner of the deceased". Secondly, and more importantly, the Secretary of State has very recently provided to the Parliamentary Joint Committee on Human Rights a draft of a remedial order to be made under section 10 of the Human Rights Act 1998 in the light of both *In re McLaughlin* and *Jackson*. The Joint Committee is seeking written submissions on the draft. It is likely to be some months before the final remedial order is made.

7. As a general proposition, there is much to be said for the point made by the Advice Bureau to the effect that, when determining an appeal against a claimant on the basis of legislation that has been the subject of a declaration of incompatibility, a tribunal needs to ensure that it does not do so in a way that might prevent the claimant from taking full advantage of a remedial order or other legislation designed to remove the incompatibility. As suggested in *NA v Secretary of State for Work and Pensions (BB)*, that may, in practice, require a tribunal to deal with the issues before it as a preliminary point and then to consider postponing giving a final decision on the appeal until the incompatibility is removed, perhaps making additional findings of fact that might then become relevant. In the present case, it was not necessary for the First-tier Tribunal to make additional findings of fact, as it appears not to have been in dispute that the claimant's partner and she were living together as if they were married or civil partners, and it clearly explained why it could not provide a remedy at that time. However, it is arguable that it should have postponed giving a final decision. Whether that is really necessary in any particular case will depend on the circumstances of the case and it will often not be apparent when the First-tier Tribunal makes its initial decision because it will also depend not only on the remedial action (if any) to be taken but also on what incidental, supplemental or consequential provision is made to make that action effective. It is unlikely that the First-tier Tribunal will be able to anticipate exactly what action will be taken. This case provides a useful illustration.

8. It was unnecessary for the Advice Bureau to refer to bereavement support payment in this case because the claimant's partner died before 6 April 2017 and so, even if she was enabled through amendments to the legislation to make a claim for some form of bereavement benefit only after that date, the appropriate benefit would still be widowed parent's allowance rather than bereavement support payment (see section 39A(1)(a) of the Social Security Contributions and Benefits Act 1992, as amended). That is why the draft remedial order would amend sections 39A and 39C of the 1992 Act as well as section 30 of the Pensions Act 2014 and regulations made under the 2014 Act. Thus, *Jackson* is strictly irrelevant to this appeal. On the other hand, I accept that that does not affect the main point made by the Advice Bureau, which would apply in some measure to widowed parent's allowance as well as bereavement support payment. That point was that being enabled to make a claim after the incompatibility had been removed might be of limited value due to the limited extent to which claims may usually be backdated.

9. However, if a remedial order were to be made in the same terms as the current draft, leaving the appeal open would have proved to be both unnecessary and ineffective. The draft remedial order would remove the incompatibility by amending the current legislation with effect from 30 August 2018 (the date of the Supreme Court's decision in *In re McLaughlin*) and it would avoid the problem anticipated by the Advice Bureau by extending the time for making a claim in respect of any part of the period beginning on that date and ending on the date that the order would come into force. Claimants would have twelve months from the latter date in which to make their claims. Even if the time for making a claim were not extended, leaving the appeal open would have been ineffective because an amendment to legislation is a change of circumstances and, where it comes into effect after the date of a decision under appeal to the First-tier Tribunal – as it would in this case under the draft remedial order – the First-tier Tribunal is not entitled to take it into account (see section 12(8)(b) of the Social Security Act 1998 which provides that the First-tier Tribunal may not take account of circumstances not obtaining at the date of the Secretary of State's decision under appeal to it). A new claim would, on the other hand, be possible because a change of circumstances after a decision that there is no entitlement to benefit is, due to the effect of section 8(2) of the Social Security Act 1998, a potential ground for making a new claim rather than a ground for revising or superseding that decision.

10. On the other hand, if the remedial order were to remove the incompatibility from 9 February 2016 (the date of the decision of the High Court in Northern Ireland in *In re McLaughlin*, which was reversed by the Court of Appeal in Northern Ireland but then effectively reinstated by the Supreme Court), that would be a change of circumstances that occurred before the Secretary of State made the decision under appeal in this case (24 November 2016) and would have the effect of retrospectively rendering the First-tier Tribunal's decision erroneous in point of law. Although the Secretary of State may supersede her own decisions on the ground that they were, or have become, erroneous in point of law, for obvious reasons she does not have the power to supersede decisions of tribunals or courts on that ground, save under section 26 of the Social Security Act 1998 (compare, as regards the present case, regulation 6(2)(b)(i) and (c) of the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991)). Unless there were some further consequential provisions enabling the Secretary of State to correct what had become an error, it is therefore arguable that section 17(1) of the Social Security Act 1998 (which makes provision for the finality of decisions) would have the effect that the erroneous decision that the claimant was not entitled to widowed parent's allowance would stand in respect of the period from 14 October 2016 (the day of the claimant's partner's death) until 24 November 2016, even if provision were made for claimants to make late claims, whereas, if it had left the appeal open, the First-tier Tribunal would have been able to give its final decision under the legislation as retrospectively amended.

11. This may point to a possible flaw in the draft remedial order. It seems likely that some claimants who were what the draft order calls "cohabiting partners" will have made unsuccessful claims for widowed parent's allowance or bereavement support payment and equally unsuccessful appeals following the publicity surrounding *In re McLoughlin* and it might be desirable to make specific provision so that such claimants are not prejudiced by having done so. It might perhaps be

sufficient to provide that the Secretary of State may supersede a decision of a tribunal or court on the ground that it has become erroneous in point of law as a consequence of the remedial order, with effect from the date that the tribunal's or court's decision had effect, but there may be better ways of achieving what is desired.

12. It is also not entirely clear to me why the date from which the amendments would come into effect under the draft remedial order is the date of the Supreme Court's decision in *In re McLoughlin*, rather than the date of the High Court's decision in that case. It was the High Court that first made a declaration of incompatibility – in terms very similar to those of the declaration of incompatibility made by the Supreme Court – and tribunals and courts across the United Kingdom are generally encouraged to act consistently when construing the same, or identical, legislation (see *Secretary of State for Work and Pensions v Deane* [2010] EWCA Civ 699 at [26] and [27] and, indeed, it may be noted that the present case was delayed before the First-tier Tribunal to await the conclusion of the Northern Ireland litigation). One result appears to be that the draft order would have the effect that the present claimant, who made her claim promptly following her partner's death – only a few months after the Northern Ireland High Court's decision – and has been pursuing her claim ever since, is left without any remedy in respect of the period between his death and the Supreme Court's decision. This is perhaps an alternative way of putting the point made by the Advice Bureau by reference to section 27 of the Social Security Act 1998. It is arguably one thing to make decisions of the Secretary of State effective from the date of the Supreme Court's decision in cases where the claimant did not have tribunal proceedings on foot at that date; it may be another thing to do so when the claimant did have such proceedings on foot at that date and is denied an effective remedy in respect of part of the period relevant to those proceedings. However, this is now a matter for the Secretary of State and Parliament, rather than for the Upper Tribunal.

13. Having regard to all these issues, I consider that I should leave this appeal open and that the Upper Tribunal should not finally determine it until the remedial order has been made, just in case material changes are made to the draft. Once the remedial order has been made, it should be clear whether there would have been any point in the First-tier Tribunal leaving the appeal before it open and I hope that it will be possible for the Upper Tribunal to give a very brief final decision in this case, either dismissing the appeal because the claimant's remedy lies in making a new claim or allowing the appeal and substituting its own decision for that of the First-tier Tribunal. Accordingly, I give the Directions above.

Mark Rowland
Deputy Judge of the Upper Tribunal
Signed on the original on 28 July 2021