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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AN APPLICATION FOR JUDICIAL REVIEW BY FEARGAL MAGENNIS

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WEATHERUP J

[1] This is an application for judicial review of the decisions of the Child Support Agency and the Department of Social Development which result in the applicant being assessed for child maintenance payments at a rate of 30% of net weekly income under the Child Support (Northern Ireland) Order 1991 rather than at a rate of 15% under the amended scheme contained in the Child Support Pensions and Social Security Act (Northern Ireland) 2000. Mr O'Hara QC and Dr McGleenan appeared for the applicant and Mr McCloskey QC and Mr McMillen appeared for the respondents.

Child Support under the 1991 Order.

[2] The Child Support Agency was established when the Child Support (Northern Ireland) Order 1991 came into effect on 5 April 1993. The equivalent legislation in Great Britain is the Child Support Act 1991. The scheme was beset with difficulties from the beginning and in July 1999 a White Paper "A New Contract for Welfare – Children's Rights and Parents Responsibilities" led to the introduction of the Child Support Pensions and Social Security Act (Northern Ireland) 2000, parts of which came into effect on 3 March 2003. The equivalent legislation in Great Britain is the Child Support Pensions and Social Security Act 2000.

[3] The applicant's son was born on 2 August 1994 and the applicant separated from the mother of his son in 1998. The CSA has

collected child maintenance payments from the applicant's employers since March 2001. Under the 1991 Order the applicant was assessed as liable to pay child support maintenance at 30% of net weekly income amounting initially to £78 per week. With the introduction of the 2000 Act a new method of calculation was introduced by amendment of the 1991 Order which would have required the applicant to make payments of 15% of net weekly income. However the 2000 Act only applied to new cases commenced after 3 March 2003 and accordingly the applicant was required to continue maintenance payments at the previous rate. While in the circumstances of the applicant's case the 2000 Act would result in a reduction of liability, the detailed rules are such that some cases would result in increased liability.

[4] Section 28 of the 2000 Act provides that the Department of Social Development may by Regulations make transitional provisions as it considers necessary and expedient in connection with the coming into operation of the relevant part of the 2000 Act. The Department made the Child Support (Transitional Provisions) Regulations (Northern Ireland) 2001 which provide that maintenance assessments under the 1991 Order may be superseded by a new amount or a transitional amount. The Regulations have not been commenced. Accordingly no new amount or transitional amount applies to the applicant and he continues to be liable for the old amount. In essence the applicant challenges the failure of the Department to bring into effect the new arrangements in relation to cases first assessed before 3 March 2003.

Child Support under the 2000 Act

[5] When the 2000 Act was introduced it was intended that initially it would only apply to new cases and that eventually it would also apply to old cases. Behind the amendments made under the 2000 Act was the introduction of a new computer system. It was decided that there were three conditions to be satisfied before the transfer of the old cases to the new scheme. The first condition was that Government be satisfied that the new system was working well. A number of statements were made by Ministers in the House of Commons outlining the view of Government on the working of the new system. John Millar responsible for the Northern Ireland operation of the CSA states the present position on affidavit on behalf of the CSA and the Department:

> "The new scheme is not yet working well. It will be a matter of public knowledge that the

> CSA has had very substantial difficulties in operating the legislation effectively even under the new system. At present over a quarter of a million applications have yet to be processed to be brought within the statutory scheme. The system is also beset with substantial problems with non-resident parents failing to make payments of cases that already have been processed. Government has decided that it must be a priority to ensure that persons who fall within the new scheme have their applications processed within a reasonable period. Equally it is necessary to ensure the arrangements already set up for payment are enforced. Until these objects are met the resources are simply not available to convert the old cases into new cases. This is despite the expenditure of very large sums of money. In this regard the Secretary of State responsible for the child support system in Great Britain has allocated, in 2006, an additional £120m which is to go towards improving the child support system over the next three years."

[6] The second condition for the transfer of old cases to the new scheme is that the computer system must be able to carry out bulk transfer of cases to the new scheme in an accurate manner. The available computer system has been unable to carry out the transfer of cases with an acceptable level of accuracy. In March 2006 enhancements were made to the computer system. The enhancements did not correct all the defects. John Millar states the present position:

> "It is not possible for me, on the basis of the information that I have available, to give the court any meaningful indication as to when the computer system would be capable of carrying out a bulk conversation within acceptable degrees of accuracy."

[7] The third condition for transfer of the old cases to the new scheme is that the old scheme cases must be in a fit state to be transferred. A very high volume of old scheme cases contained incomplete or inaccurate data. It is estimated that of more than half

a million old scheme cases in the UK to be converted to the new scheme one third of a million would need to be "data cleansed" and even after that more than 100,000 would need to be clerically converted due to other system issues.

[8] Accordingly the respondents contend that the three conditions for transfer of the old cases into the new scheme have not been met. Concerns have been expressed that premature transfer could lead to complete administrative chaos. The position has been kept under constant review. It is the Government's intention to take the legislative steps necessary to allow for bulk transfer as soon as that is feasible.

Review of the 1991 Order and the 2000 Act

[9] With the ongoing problems from the introduction of the new scheme on 3 March 2003 Sir David Henshaw was commissioned to conduct a review and he produced a report to the Secretary of State for Work and Pensions in July 2006. The report, "Recovering Child Support – Routes to Responsibility", recognised that the child support system was failing as a result of policy and operational issues and that the system should be redesigned with a new organisation established to deliver child support. The Henshaw recommendations led to a White Paper in December 2006 on "A New System of Child Maintenance". The review has led to further legislation.

[10] Since the applicant commenced his application for judicial review the Child Maintenance and Other Payments Bill 2007 was introduced in the House of Commons on 5 June 2007. This became the Child Maintenance and Other Payments Act 2008 and certain provisions of the 2008 came into force on 10 June and 14 July 2008. A Child Maintenance and Enforcement Commission will replace the Child Support Agency and new calculation methods will be adopted.

[11] The Child Maintenance and Other Payments Act 2008 does not apply to Northern Ireland, however equivalent provisions are to be found in the Child Maintenance Act (Northern Ireland) 2008 which was enacted by the Northern Ireland Assembly on 2 July 2008. The 2008 legislation will amend the 1991 Order to change the calculation of maintenance. The basic rate will be 12% of gross weekly income for one child, 16% for two children and 19% for three or more children. The 2008 Act enables the Department to require

existing cases to transfer to the new scheme or to leave the statutory scheme, so far as future accrual of liability is concerned.

[12] The Department anticipates that new applications under the 2008 scheme will operate from 2010/11 and that existing cases under the 1991 scheme and the 2000 scheme (that apply to applications before and after 3 March 2003 respectively) will be transferred. The new Commission will decide the order in which earlier cases will move into the 2008 scheme and it is proposed that this process will take place between 2010 and 2013. The prospects for a transfer of the applicant's liability to a later scheme have receded further.

Conversion of 'old' cases to 'new' cases.

[13] In 2004 a migration and conversion strategy was considered in Great Britain and in Northern Ireland. Migration referred to the proposed movement of data on the old system to the new system and conversion referred to the change of the data into a form that allowed the new system to calculate an assessment under the new rules. The question arose as to whether it would be feasible to transfer all of the 35,000 old cases in Northern Ireland directly into the new scheme. A feasibility study commenced in July 2004. Certain difficulties were identified including the initial view of the Social Security Policy and Legislation Division of the Department in Great Britain that the proposal for the total transfer of Northern Ireland cases would amount to a deviation from the long established principle of parity with Great Britain and accordingly they could not support the proposal.

[14] A discussion document on "Early Conversion of NI Case Load to New Scheme" in October 2004 explored the feasibility of two options for converting the old cases in Northern Ireland to the new scheme. The first option considered closing down the existing cases and building them onto the new computer system as new applications, effectively bypassing the migration stage. The second option involved bringing forward the effective date from which all existing cases would be converted.

[15] Meanwhile in GB the development of the migration and conversion strategy opted for setting up a pilot scheme with an initial 10% migration and conversion. In January 2005 a paper was presented to the GB Minister setting out the preferred option and outlining the problems to be overcome. In February 2005 the Northern Ireland Minister endorsed the proposal that the 35,000 old cases in Northern Ireland should all be included in the 10% of cases

brought into the GB pilot. However GB officials advised that they could justify the migration and conversion of old cases lodged during the year before the introduction of the new scheme on 3 March 2003 and could not justify selection of old cases on a geographical basis, thus rejecting the inclusion of all old cases in Northern Ireland in the pilot. Undeterred, Northern Ireland officials continued planning for 100% migration and conversion of Northern Ireland cases if a UK wide pilot went ahead.

[16] The GB Minister commissioned the Shreeveport review and the final report, "Review of the Migration and Conversion Strategy", was produced in April 2005. The report placed in doubt the viability of the migration and conversion strategy. At the same time the appointment of a new Chief Executive of the Child Support Agency in GB and the strategic review of the Agency's performance, organisation and infrastructure led to the migration and conversion strategy in GB and Northern Ireland being placed on hold. In due course the Henshaw Report was commissioned, which reported in July 2006. In November 2006 the migration and conversion project in GB was officially closed down. As outlined above, the eventual outcome was the Child Maintenance and Other Payments Act 2008 and the Child Maintenance Act (Northern Ireland) 2008.

Grounds for judicial review.

[17] The applicant's grounds for judicial review are:-

> (i) The CSA and/or Department of Social Development have acted unlawfully in that by the refusal to apply the basic rate of child maintenance payments appropriate to this case as specified in the Child Support Pensions and Social Security Act (Northern Ireland) 2000 the public authorities are deducting 15% more of the applicant's net income than they are entitled to by law and are consequently in breach of the applicant's rights pursuant to Article 1 of the First Protocol of the European Convention on Human Rights and section 6(1) of the Human Rights Act 1998.
>
> (ii) The CSA and/or Department will continue to deduct maintenance from the applicant at a level of 30% of his net income for a period which may continue for the duration of his liability for child maintenance notwithstanding the clear legislative intent outlined in the Child Support Pensions and Social Security (Northern Ireland) 2000. This requirement constitutes an arbitrary and excessive interference with his

property rights contrary to Article 1 of the First Protocol of the European Convention on Human Rights.

[18] Article 1 of the First Protocol provides –

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one should be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[19] There are three rules in Article 1 of Protocol 1. The first rule, in the first sentence, is the general principle of peaceful possession of property. The second rule, in the second sentence, permits deprivation of property on certain conditions. The third rule, in the second paragraph, permits the State to control property for certain purposes. Deprivation under the second rule and control under the third rule are instances of interference with the first rule of peaceful possession.

Previous challenges to the failure to convert 'old' cases to 'new' cases.

[20] The issue of the compatibility of the CSA scheme with Article 1 of the First Protocol was considered by the European Commission of Human Rights in Burrows v United Kingdom (27558/95). The Commission stated that Article 1 of Protocol 1 was primarily concerned with the formal expropriation of assets for public purposes and not with the regulation of rights between persons under private law, unless the State were to lay hands or authorise a third party to lay hands on a particular piece of property for a purpose which was to serve the public interest. Accordingly the Commission doubted that there had been a deprivation of property within the meaning of the second sentence of Article 1 of Protocol 1 as no property had been taken from the applicant by the State to

serve a public purpose. However the Commission assumed for the purposes of the application that there had been an interference with the applicant's peaceful enjoyment of his possessions under the first sentence of Article 1 Protocol 1.

[21] The Commission observed that in all contracting States there was legislation governing private law relations between individuals which included rules which determined the effects of those legal relations with respect of property and in some cases compelled a person to surrender possession to another. Examples included the division of inherited property, the division of matrimonial estates and in particular the seizure and sale of property in the course of execution. Such a rule could not in principle be considered contrary to Article 1 Protocol 1. However the Commission had to make sure that in determining the effect of property on legal relations between individuals the law did not create such inequality that one person could be arbitrarily deprived of property in favour of another.

[22] The Commission considered that the payments made had been in accordance with law. There was a debate on the facts of the case as to whether the applicant's liability had been wrongly assessed and the Commission assumed that it was in accordance with the law. The Commission further considered whether the scheme was in the public interest and noted that the measures were not intended solely for the benefit of children but for the benefit of the taxpayer in general who bore the burden of paying for single parents claiming social welfare benefits. Accordingly the aims of reducing taxation and increasing parental responsibility were considered in the public interest for the purposes of Article 1 Protocol 1. Further the Commission considered whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim. Taking account of the percentage of gross income deducted and of the disposable income available to the applicant the Commission was satisfied that the operation of the scheme was proportionate. Accordingly the claim was found to be inadmissible.

[23] In R (Qazi) v Office of the Child Support Commissioner and Secretary of State for Work and Pensions [2004] EWCA (Civ) the Court of Appeal in England and Wales dealt with a refusal of the Child Support Commission to apply the 'new' assessment method to an 'old' case. The Court dismissed an appeal against a refusal of permission to apply for judicial review of the decision of the Child Support Commission in relation to the payment assessed by the CSA. The applicant relied on Article 1 of Protocol 1 and Brooke LJ stated that there was no help for the applicant in the Convention.

The applicant contended that it was unfair that the Government had brought in new Regulations which were of benefit to those against whom new orders had been made but had not yet brought them into effect in relation to the applicant. It was submitted that the legislature intended to spread the benefit of these new provisions once their effect had bedded down and it was unfair that just because the Department's computer systems were not capable of making the change as swiftly as people would have wished that the applicant should be penalised. Brooke LJ concluded that he could see nothing in the European Convention on Human Rights which in any way inhibited the Government from bringing in staged changes in the Regulations when resources permitted them to do so.

[24] A further attempt to achieve a transfer to the 'new' system was rejected by the Child Support Commissioner in R (CS) 3/07. A non-resident parent applied to the Secretary of State to be transferred from the old CSA scheme to the new CSA scheme. The Commissioner held that it was not open to a decision-maker to make a conversion calculation under the transitional Regulations since the relevant provisions for doing so had not been commenced.

[25] A more recent attempt to achieve a transfer to the new system occurred in R (Hayes, Owen and Bridal) v Secretary of State for Work and Pensions [2007] EWHC 2623 (Admin). Davis J refused permission to apply for judicial review of the refusal to transfer the applicant from the old CSA scheme to the new CSA scheme. It was contended that the failure to introduce the transitional provisions and to secure the transfer of the applicant from the old scheme into the new scheme was unfair. Davis J stated that the statutory power was simply a discretionary power to make transitional and transitory provisions and other such consequential provisions and there was no legal duty by virtue of the statutory provisions to implement the transitional arrangements. The applicant contended that there must come a point in time when the position is reached whereby as a matter of fairness or other general legal obligation that the Secretary of State must introduce the relevant provisions enabling people such as the applicant to be transferred to the new scheme. However Davis J stated that it was for the Secretary of State to decide when that point had been reached and he had made the decision by reference to whether or not the scheme had been assessed as working well, which he concluded was properly a matter for the Secretary of State. Davis J was referred to the ruling of Morgan J in granting leave in the present case and he commented that the present case had been significantly coloured by invocations of human rights arguments which had been disclaimed in the case he was considering.

Executive decisions to introduce legislative schemes.

[26] The effect of legislation granting an executive power to commence a statutory scheme was considered by the House of Lords in R (Fire Brigade Union) v Secretary of State for the Home Department (1995) 2 All ER 244. In 1964 a non-statutory criminal injuries compensation scheme was set up under the prerogative. The Criminal Justice Act 1988 contained a statutory scheme and included a provision that it was to come into force on a day to be appointed by the Secretary of State. By 1993 the statutory scheme had not been brought into effect but a White Paper proposed to introduce a new tariff scheme. The House of Lords held that there was no legally enforceable duty to bring the statutory scheme into force since the Home Secretary had a discretion to decide to bring the provisions into effect when it was appropriate to do so. His obligation was to keep under review the question of the bringing into force of the statutory scheme. In the event the House of Lords held that it was an abuse of power for the Home Secretary to act inconsistently with the duty to keep under review the introduction of the statutory scheme by introducing an alternative tariff scheme.

[27] On the nature of the Home Secretary's power Lord Mustill stated at page 262h:

> "Parliamentary Government is a matter of practical politics. Parliament cannot be taken to have legislated on the assumption that the general state of affairs in which it was thought desirable and feasible to create the power to bring a new regime into effect with necessarily persist in the future. Further study may disclose that the scheme had unexpected administrative flaws which would make it positively undesirable to implement it as enacted, or (for example) it might happen that a ruling of the European Courts of Human Rights would disclose that persistence with the scheme would contravene the international obligations of the United Kingdom. Financial circumstances may also change, just as the Secretary of State maintains that they have changed in the present case; the scheme may prove unexpectedly expensive, or a newly existing or perceived need for financial stringency may leave insufficient resources

> to fund public expenditures which might otherwise be desirable."

[28] It will be assumed, as in Burrows v United Kingdom, that there has been an interference with the applicant's peaceful enjoyment of property by the deduction of payments under the 'old' 1991 scheme. The deductions are in accordance with law. Further, the deductions are in the public interest in reducing taxation and increasing parental responsibility. The issue is whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim. The means employed include the executive decision making that has resulted in a failure to implement the legislative scheme under the 2000 Act, as it might otherwise apply to the applicant, and thereby reduce the applicant's liability.

[29] Consideration of proportionality includes the concept of deference or latitude accorded by the Court to the public authority that is exercising the decision making power in question. Lord Carswell in Tweed v Parades Commission for Northern Ireland (2006) UKHL 53 adopted the comment in Fordham's Judicial Review Handbook (4th Edition at paragraph 58.5) that "Hand in hand with proportionality principles is a concept of latitude which recognises the court does not become the primary decision-maker in matters of policy, judgment and discretion so that a public authority should be left with room to make legitimate choices. The width of the latitude (and the intensity of the review which it dictates) can change, depending on the context and circumstances."

[30] The context and the circumstances will involve an acknowledgement that the executive arm of government may be better placed to make assessments in relation to administrative arrangements, available resources and practical and financial constraints. In R (Carson & Reynolds) v Secretary of State for Work and Pensions [2005]UKHL 37, in considering justification for alleged discrimination against pensioners living abroad, Lord Walker at paragraph 78 adopted the words of Laws LJ in the Court of Appeal –

> "in any particular area the decision-making power of this or that branch of government may be greater or smaller, and where the power is possessed by the legislature or executive, the role of the courts to constrain its exercise may correspondingly be smaller or greater. In the field of what may be called macro-economic policy, certainly including the distribution of public funds upon retirement pensions, the

> decision-making power of the elected arms of government is all but at its greatest, and the constraining role of the courts, absent a florid violation by government of established legal principles, is correspondingly modest. I conceive this approach to be wholly in line with our responsibilities under the Human Rights Act 1998. In general terms I think it reflects a recurrent theme of the Strasbourg jurisprudence, the search for a fair balance between the demands of the general interest of the community and the protection of individual rights: see *Sporrong v Sweden* (1982) 5 EHRR 35."

[31] The applicant contends that transfer of Northern Ireland cases from the old scheme to the new scheme could have been achieved. At one stage the Northern Ireland Minister approved a proposal for the inclusion of all Northern Ireland cases in a UK pilot scheme. This met with resistance in GB on the basis that it would contravene the "parity principle" for benefits in Northern Ireland and the rest of the UK. In the event the migration and conversion strategy was not implemented, so it never fell to be determined whether the strategy might be operated in a manner that tested the parity principle. Nor has any Minister accepted that the transfer of Northern Ireland cases could proceed regardless of any transfers in the rest of the UK. The requirements for the commencement of transfers applied equally to Northern Ireland cases.

[32] The executive has identified that the transfer of old cases to a new scheme requires the existing system to be working well, the computer system being able to cope with the transfers and the old cases being in a fit state to transfer. These requirements impact on the particular judgment of the Minister as to the commencement of the transfer of old cases to a new scheme by raising issues relating to effective administration, both of the child support system and of the computer system, to the financial resources to be applied to both and to judgments of the legislature as to content of the child support scheme. The Court must recognise the constraints on judicial intervention that apply where decision making in the elected arms of government concerns issues of effective administration, financial resources and political judgment. These are issues where, to adopt the words of Laws LJ, "…. the decision making power of the elected arms of government is all but at its greatest, and the constraining role of the courts …. is correspondingly modest."

[33] That the relevant authorities have been unable to get to grips with the statutory child support system since its introduction is apparent from consideration of the history of the scheme. That the bulk transfer of old cases into the new system would lead to additional administrative confusion is also apparent. That, as a result of the failure to transfer the applicant's case to the new scheme, the applicant has been placed at a financial disadvantage is not in question. The relevant Minister is best placed to determine when the transfer of old cases to the new scheme may take place. That the relevant Minister has judged that that point has never been reached is beyond doubt.

[34] The applicant's challenge is limited to interference with the right to property under Article 1 of Protocol 1. The applicant is one of a substantial number of persons adversely affected by the failure to implement a transfer to the new system, who include not only non resident parents who would incur reduced liability but also resident parents who have not secured increased payments. In effect the failure to commence the transfer has been occasioned by the practical impossibility to date of achieving the purpose of the legislation. This is an instance where, to apply the words of Lord Mustill, the child support system has administrative flaws that make it positively undesirable to implement a provision involving the transfer of old cases to a new system, until such time as that can be carried out effectively. The balance of community and individual interests must fall in favour of maintaining the existing system until it is capable of accommodating the transfer of old cases to a new system. The applicant has not established a breach of Article 1 of Protocol 1. The application for judicial review will be dismissed.