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| **Neutral Citation No: [2020] NICA 36**<br><br>*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Ref:* **STE11265**<br><br>*ICOS No:* ***19/053072***<br><br>*Delivered:* **10/8/2020** |

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**MICHAEL O'DONNELL**

**Appellant;**

**and**

**DEPARTMENT FOR COMMUNITIES**

**Respondent.**

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**Before: Morgan LCJ, Stephens LJ and O'Hara J**

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**STEPHENS LJ (delivering the judgment of the court)**

**Introduction**

[1] A Social Security Appeal Tribunal ("the tribunal") referred to this court a question as to whether the provisions of sections 29 and 30(1)-(3) of the Pensions Act (Northern Ireland) 2015 ("the 2015 Act") are incompatible with Article 14 read with Article 8 of and/or Article 1 of the First Protocol ("A1P1") to the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). That issue as to incompatibility also raises a devolution issue in that a provision is outside the competence of the Northern Ireland Assembly if it is incompatible with any convention rights and the 2015 Act is an Act of the Northern Ireland Assembly. These incompatibility and devolution issues arose as sections 29 and 30(1)-(3) of the 2015 Act impose a requirement of actual payment of Class 1 or Class 2 National Insurance Contributions by a deceased spouse or civil partner as one of the conditions of the surviving spouse or civil partner being entitled to Bereavement Support Payment ("BSP"). Mrs Pauline O'Donnell had been unable to work throughout her working life due to disabilities and therefore could not and did not "pay" any Class 1 or Class 2 National Insurance Contributions although she was "credited" with contributions. She could have but did not make Class 3 (voluntary)

contributions but even if she had these would not have met the contribution condition for BSP. She died on 31 July 2017. The Department for Communities ("the respondent") declined the application for BSP made by her surviving spouse, Mr Michael O'Donnell, ("the appellant") as "your wife did not pay enough National Insurance Contributions." The appellant appealed to the tribunal contending that the contribution condition that Class 1 or Class 2 National Insurance Contributions have been "paid" by the deceased spouse or civil partner were unjustifiable discriminatory treatment of the appellant and of their children on account of the disability of Pauline O'Donnell in circumstances where she could not work throughout her working life due to her disabilities and therefore could not pay Class 1 or Class 2 National Insurance Contributions. The appellant describes this as "unlawful indirect associative disability discrimination" contrary to Article 14 read with Article 8 of and/or A1P1 to the ECHR.

[2] On 22 February 2019, in accordance with Schedule 10 Paragraph 8 of the Northern Ireland Act 1998 ("the NIA") and Order 120 Rule 6 of the Rules of the Court of Judicature (Northern Ireland) 1980, the tribunal adjourned the appeal and referred to this court the following question:

> "Are the provisions of Sections 29 and 30(1)-(3) of the Pensions Act (NI) 2015 incompatible with Articles 8, 14 and Protocol 1 Article 1 of the European Convention on Human Rights, as provided by the First Schedule to the Human Rights Act 1998?"

The question is confined to the facts of this reference which involves a deceased individual who as a result of disabilities could not work throughout her working life and therefore could not pay Class 1 or Class 2 National Insurance Contributions. The reference does not extend to consideration of a situation where the deceased individual who as a result of disabilities was less likely to have been able to work and therefore less likely to have paid Class 1 or Class 2 National Insurance Contributions.

[3] The incompatibility and devolution issues required this court to serve notices on amongst others the Attorney General for Northern Ireland. This court in *Lennon v Department for Social Development* [2020] NICA 15 at paragraphs [25] – [36] gave guidance as to the formulation of devolution and incompatibility issues and the need for appropriate notices (see also *JR80's Application* [2019] NICA 58 at paragraph [4]). A notice of incompatibility has been served in accordance with Order 121 rule 2 of the Rules of the Court of Judicature (Northern Ireland) 1980. A devolution notice has been served in accordance with section 79 and paragraph 5 of schedule 10 to the

Northern Ireland Act 1998 ("the NIA") and in accordance with Order 120. No appearances have been entered to either of these notices. We proceed on the basis that the recipients are content to leave the submissions to those appearing on behalf of the respondent.

[4] Ms Doherty QC and Mr Aidan McGowan appeared on behalf of the appellant instructed by the Law Centre (NI). Mr McGleenan QC and Mr McAteer appeared on behalf of the respondent instructed by the Crown Solicitor's Office. We are grateful to counsel and solicitors for their assistance.

**The reference and the evidence filed in relation to it**

[5] The appellant's appeal to the tribunal was brought under Article 13 of the Social Security (Northern Ireland) Order 1998.

[6] The appellant's assertion that there was incompatibility also raised a devolution issue and under paragraph 8 to schedule 10 of the NIA a "tribunal from which there is no appeal shall refer any devolution issue which arises in any proceedings before it to the Court of Appeal in Northern Ireland; and any other tribunal may make such a reference." As Article 15(1) of the Social Security (NI) Order 1998 provides for an appeal from the tribunal to the Commissioner the tribunal had a discretion rather than an obligation to refer the devolution issue to this court. We consider that the Tribunal was correct to exercise discretion to refer as the issue was critical to the tribunal's decision. It is a feature of the reference that whereas some facts were agreed between the parties before the tribunal both parties submitted evidence in this court. Ordinarily all factual issues should be resolved before exercising discretion to refer. This is consistent with the general principle that this court is concerned with issues of law and that ordinarily fact finding is a matter for the tribunal at first instance. Such an approach could also help avoid referrals in cases where it may ultimately prove to be the case that referral was not required at all due to the way in which the factual issues are resolved. Finally, once the facts have been found it clarifies whether the point at issue is of critical importance to resolution of the case.

[7] In this court, the respondent introduced evidence in the form of the affidavit dated 23 January 2020 of Una McConnell of the respondent's Social Security Policy and Legislation division which addressed issues such as the legal and policy background of bereavement benefits from 1925 to the present day; an account of the Equality Impact Assessment to which the Pensions Bill (NI) 2015 was subjected; an overview of relevant Committee evidence and Parliamentary debates; an

explanation of the national insurance credits system; an explanation of the policy of parity; and the issue of justification.

[8] In this court, the respondent also introduced in evidence the first witness statement of Helen Walker dated 6 December 2019 which had been introduced in evidence in the High Court in England and Wales in *R (On the Application of Jackson) v Secretary of State for Work and Pensions* [2020] EWHC 183 Admin; [2020] 1 WLR 1441. Ms Walker is employed as a Deputy Director (Life Events and Disadvantage) in the Labour Market, Families and Disadvantage Directorate within the Department for Work and Pensions ("the Department"). There was also a further affidavit from Una McConnell dated 17 June 2020 which exhibited a considerable volume of further documentation.

[9] It is apparent from the evidence introduced in this court that the contribution condition in sections 29 and 30 of the 2015 Act is extremely modest. In effect the condition is satisfied if the deceased spouse or civil partner works and pays Class 1 or Class 2 National Insurance Contributions for 6 months. This means that approximately 75% of potential claimants will meet the contribution condition.

[10] We set out a summary of Una McConnell's evidence in relation to the policy of parity which evolved from the recommendations of the 1942 Beveridge Report that there should be a National Insurance Scheme across GB and Northern Ireland. This involved separate but corresponding legislation in both jurisdictions. The policy ensures that a person in Northern Ireland has the same benefit entitlements as his or her counterpart in Great Britain. This facilitates free movement within the UK, and ensures that individuals have access to the same benefits, regardless of location and irrespective of whether Northern Ireland can itself generate sufficient revenue to fund the benefits. Since 1948 social security and pensions have remained in parity with successive new benefits and changes to entitlement conditions for existing benefits being adopted in both jurisdictions. Some minor differences have existed from time to time largely due to extraneous factors, for example, the housing benefit scheme reflects the different system of local taxation. Under the NIA social security and child maintenance are both "transferred matters" and are the full responsibility of the devolved Government. However section 87 NIA requires the Secretary of State with responsibility for social security and the equivalent Northern Ireland Minister to consult each other with a view to securing single systems of social security, child support and pensions for the United Kingdom. This provision is the basis for Northern Ireland maintaining parity with the UK in respect of social security, child support and pensions. Parity is not inflexible and there is scope for the devolved government in NI taking a divergent course. However there are both practical issues and funding consequences. The practical issue is that Northern

Ireland is dependent on the Department for Work and Pensions computer systems. At an operational level, the social security systems in Great Britain and Northern Ireland have developed in parallel, and virtually all the social security benefits paid in Northern Ireland are processed on IT systems provided and operated by the Department for Work and Pensions. Any divergence from this would incur modification costs which could be substantial. Northern Ireland could not afford to create and maintain its own IT system; nor, given parity, would such an approach represent value for money. There would also be financial implications for the devolved administration of breaking "parity" with the rest of the UK if this resulted in increased expenditure.

[11] The provisions in sections 29 and 30(1)-(3) of the 2015 Act ensure adherence to the parity principle as they are almost identical to sections 30 – 31(1)-(3) of the Pensions Act 2014 which extends to England and Wales and to Scotland. Any differences are not material.

[12] We set out some of Una McConnell's evidence in relation to the equality impact assessment in relation to the Pensions Bill. The assessment considered the position where the deceased was disabled stating that there are many different parts of the social security system available which would have provided them with support whilst they were alive. Similarly, where the survivor is disabled, there are many different parts of the social security system available to provide them with support. The assessment concluded that it was not expected that there would be any adverse impact on persons with a disability "because if a bereaved person needs additional support on the grounds of not being able to work as a result of disability it will come from other areas of the social security system." It is clear that this assessment did not address the circumstances of this reference in which the adverse impact cannot be compensated by support to the appellant from other areas of the social security system as he is not disabled. There was no consideration in the equality impact assessment of the proposition that if the deceased was disabled so as to be unable to work and to meet the contribution condition then there would be an indirect associative impact on the able-bodied spouse, civil partner and children. Put simply the respondent did not evaluate the likely impact of the contribution condition on surviving spouses or civil partners with young children in circumstances where the deceased was disabled so as to be unable to meet the condition. This means that the respondent did not assess or take into account the best interests of the children as part of its overall consideration in breach of article 3.1 of the United Nations Convention on the Rights of the Child ("the UNCRC"). It also means that the respondent did not comply with its obligations under UN Convention on the Rights of Persons with Disabilities ("the UNCRPD").

[13] The affidavit of Una McConnell also addressed the consultation process, the government's consideration of the consultation responses and the policy of the government that entitlement to bereavement benefits is dependent upon actually having paid contributions. It was stated that many of the consultation responses suggested that the contribution condition should cover national insurance credits. In other words, they suggested that a claimant should be entitled to BSP when the deceased had not actually "paid" any National Insurance Contributions. Una McConnell stated that the consultees were therefore suggesting what the appellant in this case is suggesting, that where the deceased has paid no National Insurance Contributions but obtained national insurance credits due to disability, the contribution condition should be met for the survivor. After that consultation response a submission was sent to Ministers which made a recommendation not to pursue the option of including credits when calculating entitlement. It recognised that including credits would improve the coverage of BSP. However, it noted that including credits would: (1) mean only a very small number of people would not be entitled (be excluded), (2) significantly undermine the contributory principle and (3) be inconsistent with the Government policy of making work pay. As we have indicated the contribution condition is extremely modest so that 75% of potential claimants will meet that condition. If the contribution condition also included credits then some 99% of potential claimants would meet that condition. In this way it is clear that including credits would mean that only a very small number of people would not be entitled. However in relation to (1) it can be seen that the respondent specifically recognised that it would be excluding some 24% of potential claimants by not including credits. It is also apparent that the cohort of 24% would consist of both those who were able to work but chose not to do so and those who through disability were unable to work throughout their working life. In this way it is suggested that the respondent in deciding not to include credits treated the severely disabled in exactly the same way as those without disabilities which amounted to a failure to treat differently persons whose situations were significantly different. In short the severely disabled who could not work were equated to, parcelled with and treated in exactly the same way as those without disabilities who could work but chose not to do so. In relation to (3) it was submitted that:

> "the Government believed that work is the best way to help claimants financially and in many other ways. Claimants should be able to get the benefits of working. This is one of the fundamental principles behind Universal Credit and other benefits. Limiting Bereavement Support Payment to cases where NICs have actually been paid helps ensure that claimants get the benefit of working. If Credits were covered

too, there would be no advantage to working from a bereavement benefit point of view."

Una McConnell stated that the Minister considered the submission and then agreed with the proposed way forward. She also stated that:

> "Bereavement Support Payment is not a benefit which is intended to provide disabled people with support. It is a benefit which is intended to provide short term support to a claimant who has been bereaved. The support it provides derives from the work of the deceased. It is the deceased's NI Contributions which give entitlement to the benefit."

[14] Ms Walker stated that BSP is not an income replacement nor is it intended to cover everyday living expenses. Rather the purpose of BSP is to help towards the immediate extra costs incurred due to bereavement, rather than to contribute to everyday living costs or to provide income replacement. She stated that support with living costs following bereavement (for spouses or civil partners and their children) is provided through other social security benefits such as contributory Jobseeker's Allowance ("JSA"), Employment and Support Allowance ("ESA"), Universal Credit ("UC") or Child Benefit, Housing Benefit ("HB") depending on the circumstances. She explained that BSP is paid in an initial lump-sum payment followed by a short-term period of monthly instalments; the instalments are payable for no more than 18 months; it is non-means tested; its value does not vary depending on the number of children; when BSP is payable at the higher rate, that rate is the same regardless of the number of children for which the beneficiary is responsible. It also continues to be payable at the higher rate even if, subsequently, a claimant receiving the higher rate ceases to be responsible for children; it does not cease on marriage, remarriage or formation of a civil partnership; BSP is payable on account of the bereavement; it does cease for the vast majority of periods where a claimant is imprisoned. Ms Walker also stated that BSP is payable at two different rates and that these rates reflect the Government's estimate that the costs of bereavement are different for people in different situations. The rates are set in the BSP Regulations which at the date of Ms Walker's statement were:

(a) Standard rate: £2,500 for the lump sum payment and £100 for each of the monthly instalments.

(b) Higher rate: £3,500 for the lump sum payment and £350 for each of the monthly instalments. This is payable to bereaved spouses and civil partners who were either pregnant or entitled to child benefit at the time of the bereavement, or became entitled to child benefit after the

bereavement in respect of a child or young person who had been living with the claimant or the deceased spouse or civil partner at the time of their death.

[15] Ms Walker also stated that the aim of reform to bereavement payments was to simplify the provision of bereavement benefits and to harmonise them with the rest of the welfare system. She stated that UC is a comprehensive benefit designed to meet everyday living needs and that the previous bereavement benefits were intended to meet these same needs (particularly Widowed Parent's Allowance ("WPA")) and that this overlap was both duplicative and needlessly complicated. Accordingly in order to simplify the welfare system (such that the different benefits met discrete needs) the Department's policy preference was to confine the new bereavement benefit to address just the short-term, additional costs associated with bereavement rather than to cover living needs which UC would meet in circumstances where the death caused the loss of spousal or civil partner income. In this way BSP would focus on short term support and UC would provide longer term income replacement support where it was needed.

[16] Also in this court the appellant provided evidence in the form of the affidavit of his legal representative, Owen McCloskey, Legal Officer of Law Centre (NI) which asserted that Pauline O'Donnell's national insurance "credit" contributions would have met the contribution condition for WPA which was a previous system of bereavement benefits under the Social Security Contributions & Benefits Act (Northern Ireland) 1992 ss.21-23. There was also an affidavit from the appellant which set out the personal background of the deceased and how her death and the lack of BSP has impacted upon the financial, physical and emotional well-being of the appellant and the children.

[17] Finally it was asserted by the appellant that if BSP had been paid the total amount which he would have received was £9,800 over 18 months.

**Factual background**

[18] The appellant who was born on 16 March 1973 married Pauline O'Donnell (nee McArdle) on 27 May 1995. They had four children two of whom are presently under 18 and three of whom live in the family home.

[19] Pauline O'Donnell who was born on 4 July 1976 had become disabled at the age of 6 or 7. When she was 12 years old her condition was diagnosed as Friedreich's Ataxia which affects the nervous system and is a rare inherited degenerative disorder. It causes progressive damage to the nervous system. It leads

to numerous complications including, to name but a few, impaired muscle coordination that worsens over time, scoliosis and heart disease. There is no known treatment for the disorder. In relation to Pauline O'Donnell it caused a steady decline in her condition over the years with progressive ataxia and weakness. The disorder affected her heart function for which she was followed up serially with cardiology services. She required substantial assistance for her neurological disability throughout her life and was also followed up serially with neurological services. She used a wheelchair from the age of 18 and required a hoist for transfers. She had dysarthria and distal weakness in her hands. There was a history of contractures at her ankles. In 2002 or 2003 the appellant gave up his job to care for his wife who then needed full time care.

[20] Between 2014 and 2017, Pauline O'Donnell was in receipt of Employment Support Allowance. During this period she benefited from the compensatory arrangements so that Class 1 National Insurance were automatically made in lieu of earnings-related Class 1 National Insurance Contributions. This meant that she was "credited" with rather than "paying" National Insurance Contributions. It is agreed that the National Insurance Contributions with which she was "credited" would have met the contribution condition for BSP except that they were "credited" rather than "paid."

[21] It is agreed that as a result of her substantial neurological disability she was never able to work throughout the period of her "working life." The appellant states and the respondent accepts that her inability to work was "not that she did not wish to do so" as she "really wanted to have a normal life but her condition prevented her from doing that." It is accepted that despite her wish to work she did not have the required physical capacity to meet the demands of work. It is also agreed that as a consequence she could never meet the contribution condition of payment of Class 1 or Class 2 National Insurance Contributions so that her surviving spouse would never be entitled to BSP in the event of her death. It is also agreed that if the appellant had been entitled to BSP it would have been at the higher rate with the specific aim of assisting and benefitting not only the appellant but also the children when the family might be under its greatest strain.

[22] On 31 July 2017, at the age of 41, Pauline O'Donnell died as a result of cardiac issues associated with Friedreich's Ataxia.

[23] At the date of her death, those living in the family home were Michael and Pauline O'Donnell and three of their four children. The eldest child lives in Donegal. Since Pauline O'Donnell's death the appellant has continued to provide care and support for the three children who remain in the family home.

[24] On 7 August 2017, an application for BSP was made by telephone by the appellant to the respondent's Bereavement Support Team.

[25] On 14 August 2017, the respondent refused the application for BSP on the basis that Pauline O'Donnell did not meet the National Insurance Contribution condition under sections 29 and 30 of the 2015 Act. The appellant was notified of this decision by letter dated 21 August 2017 which simply stated that this was "because your wife did not pay enough National Insurance Contributions."

[26] On 31 August 2017, the appellant wrote to the respondent seeking reconsideration of the claim.

[27] On 1 September 2017, a Macmillan Specialist Palliative Care Team wrote to the respondent supporting the appellant's request for reconsideration. Amongst other matters they brought to the attention of the respondent that Pauline O'Donnell had been "credited" with Class 1 National Insurance Contributions under Employment Support Allowance in lieu of earnings-related Class 1 National Insurance Contributions.

[28] On 7 September 2017, the Department conducted a reconsideration but found no reason to revise the original decision. They sent a letter to the appellant on this date confirming their decision.

[29] On 4 October 2017, the appellant submitted an appeal to the tribunal against the refusal of BSP on the grounds that the devolved statutory provisions that excluded him from entitlement were in breach of Article 14 ECHR when read with Article 8 and A1P1.

[30] On 22 February 2019, the tribunal referred the question to this court under Schedule 10, paragraph 8 of the Northern Ireland Act 1998 and adjourned the appeal before it pending this courts determination of the reference.

**The legislative history**

[31] There has been an evolution in relation to the payment of bereavement benefits which is set out at paragraphs [4] – [12] of the judgment of Lady Hale in *Re McLaughlin* [2018] 1 WLR 4250. We gratefully adopt the account in those paragraphs.

[32] Prior to the 2015 Act one of the bereavement benefits was known as WPA and the relevant statutory provision in Northern Ireland was the Social Security

Contributions and Benefits (Northern Ireland) Act 1992 as amended by the Welfare Reform and Pensions (Northern Ireland) Order 1999 and by the Civil Partnership Act 2004.

[33] There are some differences between WPA and BSP. In relation to WPA an exception was made so that individuals in receipt of ESA with "credited" National Insurance Contributions could qualify for WPA without having actually "paid" contributions. Pauline O'Donnell would have satisfied this condition and the appellant would have qualified for WPA under the previous statutory regime. Furthermore under the previous regime individuals could make Class 3 (voluntary) contributions to improve their national insurance record if they did not have sufficient Class 1 or 2 contributions. Again in this way persons unable to work and unable to "pay" Class 1 or Class 2 National Insurance Contributions could satisfy the contribution condition so that their spouse or civil partner would be entitled to BSP in the event of their death.

**The 2015 Act**

[34] The heading to section 29 is "Bereavement Support Payment" and in so far as relevant section 29(1) provides that a "person is entitled to a benefit called bereavement support payment if—

(a) the person's spouse or civil partner dies,

(b) the person is under pensionable age when the spouse or civil partner dies,

(c) the person is ordinarily resident in Northern Ireland, or a specified territory, when the spouse or civil partner dies, and

(d) the contribution condition is met (see section 30)."

The application for BSP by the appellant met the requirements in (a) – (c) given that Pauline O'Donnell had died, the appellant was under pensionable age and was ordinarily resident in Northern Ireland when she died. The respondent declined to pay BSP on the basis that the contribution condition in (d) had not been met.

[35] Section 29(2) provides that the "Department must by regulations specify—(a) the rate of the benefit, and (b) the period for which it is payable." The Bereavement Support Payment (No.2) Regulations (NI) 2019 provides for two rates of payment of BSP. Under regulation 4 the higher rate is paid to a person with children. It is

accepted that BSP assists and benefits the children as well as the spouse or civil partner.

[36] The reason why the respondent declined to pay BSP to the appellant requires consideration of the contribution condition in section 30. That section is headed "Bereavement support payment: contribution condition and amendments." In so far as relevant section 30(1) provides that for "the purposes of section 29(1)(d) the contribution condition is that, *for at least one tax year during the deceased's working life*—

(a) he or *she actually paid Class 1 or Class 2 National Insurance Contributions*, and

(b) those contributions give rise to an earnings factor (or total earnings factors) equal to or greater than 25 times the lower earnings limit for the tax year" (emphasis added).

[37] It can be seen that the contribution condition requires *actual payment* by the deceased during her *working life* of Class 1 or Class 2 National Insurance Contributions. Section 30(4) provides that in section 30 "working life" has the meaning given by section 121(1) and paragraph 5(8) of Schedule 3 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992. The definition is that "a person's working life is the period between— (a) (inclusive) the tax year in which he attained the age of 16; and (b) (exclusive) the tax year in which he attained pensionable age or died under that age." It is common case that throughout the whole of Pauline O'Donnell's working life she was unable to work due to disabilities and that she could not and did not actually pay Class 1 or Class 2 National Insurance Contributions for at least one tax year during her working life. It is accepted that she did not meet the contribution condition in section 30(1)(a).

[38] The contribution condition also requires an earnings factor (or total earnings factors) equal to or greater than 25 times the lower earnings limit for the tax year. Section 30 (2) provides that "Earnings factor" is to be "construed in accordance with sections 22 and 23 of the Contributions and Benefits Act." For the purposes of this reference it is accepted that Pauline O'Donnell did not meet the earnings factor and therefore did not meet the contribution condition in section 30(1)(b).

[39] There is an exception to the contribution condition in section 30(3). The impact of that exception is that if the deceased spouse or civil partner had not met the contribution condition but died as a result of personal injuries or disease sustained at work then the contribution condition is treated as having been met. In

this way if a young spouse or civil partner died at work on say his or her first day in paid employment without having paid a single Class 1 or Class 2 National Insurance Contributions then the contribution condition would not prevent the surviving spouse or civil partner from obtaining BSP. The respondent's explanation for this exception is that it maintained the close relationship between the contribution condition and employment.

[40] There is no exception to the contribution condition in respect of a deceased spouse or civil partner with severe disabilities. The earlier exception of "credits" rather than "payments" of Class 1 or 2 National Insurance Contributions was removed. The respondent contends that this earlier exception significantly undermined the contributory principle and was "inconsistent with the Government policy of making work pay." The respondent asserts that if "credits" were sufficient to satisfy the contribution condition for BSP then "there would be no advantage to working from a bereavement point of view."

[41] The issue is whether the contribution condition is unjustifiably discriminatory in respect of a deceased spouse or civil partner with such severe disabilities that they are unable to work throughout their working life.

**The formulation of the complaint in this reference**

[42] Article 14 discrimination covers two categories of case. First, treatment of persons in analogous situations so that *like cases are treated alike*. Second, a failure to treat differently persons whose situations are significantly different so that *different cases are treated differently*. In *Thlimmenos v Greece* (2001) 31 EHRR 15 at paragraph [44] the ECtHR said:

> "The court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when states treat differently persons in analogous situations without providing an objective and reasonable justification. However, the court considers that this is not the only facet of the prohibition of discrimination in Article 14. *The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification failed to treat differently persons whose situations are significantly different.*" (emphasis added)

Those two categories of case were endorsed by the Supreme Court in *R (DA and DS) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289 at paragraphs [40]-[45], [48], [104]-[109], [139]-[140] and [159]. The second category of case gives "rise to positive obligations for the Contracting States to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different" see *JD and A v United Kingdom* [2020] H.L.R. 5 at paragraph [84].

[43] Adjudication in relation to Article 14 discrimination requires the court to consider four questions although these are not rigidly compartmentalised, see *Re McLaughlin* [2018] 1 WLR 4250 at paragraph [15], *R (Stott) v Secretary of State for Justice* [2018] 3 WLR 1831 at paragraphs [8] and [207] and *Lennon v Department for Social Development* [2020] NICA 15 at paragraphs [39] – [42]. The third question identified by Lady Hale in *DA and DS* at paragraph [136] was:

> "(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*?" (emphasis added).

This formulation of question (iii) reflects that Article 14 covers two categories of case. First, treatment of persons in analogous situations so that *like cases are treated alike*. Second, a failure to treat differently persons whose situations are significantly different so that *different cases are treated differently.*

[44] Both categories of Article 14 discrimination case require that the alleged discrimination arose from a relevant "status." Furthermore both categories require the identification of a relevant "comparator" who does not share "that status" with whose treatment that of the claimant can be compared. In the first category the comparison is with those who are similarly situated to determine whether the complainant has been treated differently. In the second category the comparison is with those whose situation is relevantly different to determine whether the complainant has been treated in the same way. Whether a case is a first or second category case will assist in informing the choice of comparator.

[45] The appellant's complaint had been formulated before the tribunal as a second category case but in this court it was formulated as a first category case.

[46] Before the tribunal in the appellant's skeleton argument of 17 January 2019 it was contended that Article 14 covers two categories of case: (a) Different treatment

of persons in analogous situations; and (b) Failure to treat differently persons whose situations are significantly different. Reliance was placed on *Thlimmenos v Greece* at paragraph 44 with the consequence that the appellant's case was said to be within the second category. The appellant submitted to the tribunal that the contribution condition was discriminatory "because it applied equivalently to everyone, and this is unfair to people with severe disabilities who are less likely to be able to comply with the contribution condition."

[47] Under this formulation the appellant's complaint is that he and his children have been treated similarly to those whose situation is relevantly different with the result that they should have been treated differently. The details of that comparison being that:

(a) The Article 14 status of the appellant and of his children are respectively the spouse of and the children of the deceased who was severely disabled so that she was unable to work and therefore unable to satisfy the contribution condition;

(b) The appellant and his children have been treated similarly to the spouse of and the children of a deceased who was not disabled but rather was able to work and was able to but did not satisfy the contribution condition; and

(c) The appellant and his children ought to have been treated differently given the severe disabilities of the deceased.

[48] In this court, in the appellant's skeleton argument of 9 March 2020, there was no reliance on the second category identified in *Thlimmenos*. Rather it was contended that the question was whether there has been a difference in treatment between two persons who are in an analogous situation. It was submitted that the status was "spouses of people with severe disabilities" and the comparison was that:

> "The appellant's spouse has died. The respondent refuses to pay BSP. The appellant is therefore treated less favourably than an individual whose spouse has died and is provided with BSP."

Under this formulation the comparison group is with successful applicants for BSP whose deceased spouse or civil partner had made the specified level of National Insurance Contributions. This in turn led the respondent to submit that the appellant was not in an analogous situation to the comparators as Pauline O'Donnell

had not met the contribution condition whereas those in the comparator had done so. It also led the respondent to submit that the difference in treatment was not on the basis of "other status" as opposed to a failure to meet the contribution condition. Finally it led the respondent to justify the concept of payment of National Insurance Contributions rather than justification of the effect of excluding from BSP the surviving spouse or civil partner of a deceased who could never work and could never satisfy the contribution condition.

[49] We recognise that the difference between first and second category cases could be termed "turning his claim inside out" see *R (DA and DS)* at paragraph [40]. However we consider that formulating the complaint on the basis of the second category identified in *Thlimmenos* brings focus to the comparator group, to status and to the lack of difference in treatment which is to be justified. We also consider that it brings focus to the positive obligations under the ECHR for the State to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different which positive obligation should be informed by the State's obligations under the UNCRC and the UNCRPD. On that basis we conclude that the natural formulation of the complaint in this reference is that the appellant and the children have been treated similarly to those whose situation is relevantly different, with the result that they should have been treated differently. On this basis it is the emphasised words in question (iii) that are relevant.

**Legal principles in relation to Article 14 ECHR**

[50] Article 14 prohibits discrimination, providing that:

> "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*." (emphasis added)

**(a) The Article 14 questions**

[51] In order to address the question as to whether there has been unjustifiable discrimination contrary to Article 14, Lady Hale in *DA and DS* 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)?" (We will refer to these questions as ("the *DA and DS questions*").

These questions are a slightly different formulation than given by Lady Hale in *Re McLaughlin* [2018] 1 WLR 4250 at paragraph [15]. However, we consider the *DA and DS questions* to be the appropriate ones to be used in a case involving the second category of discrimination identified in *Thlimmenos*.

**(b) Ambit**

[52] Question (i) requires consideration as to whether the subject matter of the complaint falls within the ambit of one of the substantive Convention rights. In relation to ambit 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."

[53] In *Lennon v Department for Social Development* at paragraphs [45] and [55] this court stated that "ambit is relevant to the question of an analogous situation and to justification." In relation to an analogous situation, it informs the comparator with other people who are similarly situated but do not share that status. In relation to justification, the nature of an individual's status influences the standard of review, see *Lennon* at paragraphs [50] – [51].

**(c) Status**

[54] Question (ii) requires consideration as to whether the ground upon which the complainants have been treated differently from others constitute a "status."

[55] It can be seen that Article 14 does not prohibit all differences in treatment and that it is only differences in treatment based on an identifiable characteristic or "status" which are capable of amounting to discrimination. The characteristics are "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property (and) birth." Disability is not one of those characteristics. However, Article 14 also prohibits differences in treatment based on "*other status*." In *R (Stott) v Secretary of State for Justice* [2018] 3 WLR 1831, the Supreme Court conducted a detailed examination of the meaning of "other status." In *R (DA and DS) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289, Lord Wilson commenting on that examination 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'."

[56] The status need not be the status of the complainant as indirect associative discrimination is sufficient. In this reference, the deceased's spouse was the person who was disabled and who was directly affected in that she could never have paid Class 1 or Class 2 National Insurance Contributions so as to provide an entitlement to BSP for her husband and her children in the event of her death. However, both the appellant and the children have been indirectly affected by the alleged discrimination involving Pauline O'Donnell. This is sufficient, see *Guberina v Croatia* (2018) 66 EHRR 11 at paragraph [79]. In that case, the ECtHR found that the alleged discriminatory treatment of the applicant on account of the disability of his child was a form of disability-based discrimination covered by Article 14 of the Convention. It stated that "art. 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics."

[57] We consider that disability clearly falls within the broad meaning of "other status." In *Guberina* at paragraph [76], the ECtHR stated that "… a person's health status, including disability and various health impairments fall within the term "other status" in the text of art. 14 of the Convention." (See also *Burnip v Birmingham City Council* [2013] PTSR 117 paragraph [13] and *JD and A v United Kingdom* at paragraph [82]). We also consider that if there is discrimination it falls within indirect associative discrimination. Finally, in relation to status, we would observe

that the appellant's status is not defined solely by the difference in treatment of which complaint is made but rather by the severe congenital disability of Pauline O'Donnell.

**(d) Differential treatment and comparators**

[58] Both formulations of question (iii) requires the identification of relevant comparators.

[59] In accordance with the first formulation of question (iii), the comparator is with a deceased spouse who has paid Class 1 or Class 2 National Insurance Contributions. The difference is that whilst Pauline O'Donnell did not contribute the comparator did do so. The respondent accepts that there has been differential treatment between the two groups identified by the appellant but says that those with whom he seeks to compare himself are not in an analogous situation. The respondent submits that "those whose deceased spouse paid National Insurance Contributions and worked prior to death are in a different situation from those who did not." Does the fact of contribution break down the analogy so that they are not relatively similar situations? We consider in relation to comparability between these two situations the mere fact that Pauline O'Donnell did not contribute to the system is not decisive, see paragraph [101] of *Belli and Arquier-Martinez v Switzerland* (Application no.65550/13). The situation of Pauline O'Donnell is not identical, but is sufficiently comparable to a deceased spouse or civil partner who did contribute. However that difference of contribution should be taken into account in relation to justification.

[60] In accordance with the second formulation of question (iii), the comparator is with a deceased spouse not subject to disability who was able to work and to pay Class 1 or Class 2 National Insurance Contributions but did not do so. It can be seen that under this formulation the comparator group does not have the difference of having actually paid Class 1 or Class 2 National Insurance Contributions. We consider that this emphasises that the contributory principle is relevant to justification rather than to the identification of the comparator.

**(e) Justification**

[61] Question (iv) sets the test for justification for differentiating between persons in similar situations or not differentiating between persons in significantly different situations. For the purposes of Article 14, a difference of treatment based on a prohibited ground is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is no

"reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see *JD and A v United Kingdom* at paragraph [83]).

[62] 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*" [emphasis added]. On this basis we consider that the focus in relation to justification should not be on the measures in issue in this reference namely sections 29 and 30(1)-(3) of the 2015 Act but rather on the difference in treatment or applying *Thlimmenos* the lack of difference in treatment brought about by those sections.

[63] The Supreme Court in *DA & DS* considered the test for respecting the Government's determination of where the public interest lay. Lord Wilson delivering the lead judgment stated at paragraph [65] "… 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" (emphasis added). However, he went on at paragraph [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*" (emphasis added).

From paragraph [66], it can be seen that the proactive examination is as to whether the foundation is *reasonable* not whether it is *manifestly unreasonable*. This is followed by the word "fanciful" to describe the proposition that the foundation could pass examination if *unreasonable* but not *manifestly* so. It is clear that paragraph [66] is an important limitation on the formula demonstrating that the emphasis is on the court's proactive assessment of whether the foundation is reasonable.

[64] The acceptance that the test to be applied is "manifestly without reasonable foundation" was limited to the justification of the adverse effects of rules for entitlement to welfare benefits. That limitation was confirmed by the Supreme Court in *Gilham v Ministry of Justice* [2019] UKSC 44 at paragraph [34].

[65] Since *DA & DS*, the ECtHR in *JD and A v United Kingdom* appeared to confine the test to respect for the (Government's) policy choice as not "manifestly without reasonable foundation" to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality. The ECtHR stated:

> "88. However, as the court has stressed in the context of art.14 in conjunction with art.1 Protocol 1, although the margin of appreciation in the context of general measures of economic or social policy is, in principle, wide, such measures must nevertheless be implemented in a manner that does not violate the prohibition of discrimination as set out in the Convention and complies with the requirement of proportionality (see *Fábián*, cited above, § 115, with further references). Thus, even a wide margin in the sphere of economic or social policy does not justify the adoption of laws or practices that would violate the prohibition of discrimination. *Hence, in that context the Court has limited its acceptance to respect the legislature's policy choice as not "manifestly without reasonable foundation" to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality* (see *Stec*, cited above, §§ 61–66; *Runkee and White*, cited above, §§ 40–41 and *British Gurkha Welfare Society v United Kingdom* (44818/11) , § 81, 15 September 2016).
>
> 89. Outside the context of transitional measures designed to correct historic inequalities, the court has held that given the need to prevent discrimination against people with disabilities and foster their full participation and integration in society, the margin of appreciation the States enjoy in establishing different legal treatment for people with disabilities is

> considerably reduced (see *Glor v Switzerland* (13444/04) , § 84, ECtHR 2009), and that because of the particular vulnerability of persons with disabilities such treatment would require very weighty reasons to be justified (see *Guberina* , cited above, § 73). …." (emphasis added).

If the "manifestly without reasonable foundation" test was to be limited to a transitional measure forming part of a scheme carried out in order to correct an inequality then it would not be applicable in this case. However, this reference concerns welfare benefits in which this court is bound by the decision in *DA & DS* so that the test which we apply even though the provisions in sections 29 and 30 of the 2015 Act are not transitional is the test of "manifestly without reasonable foundation." The appellant recognises that this court is bound to apply the manifestly without reasonable foundation test whilst reserving his position on whether, in light of the ECtHR decision in *JD and A* that is the correct test to apply.

[66] The nature of an individual's status influences the standard of review by which we mean the standard of the court's proactive examination of what is reasonable. Lord Walker at paragraph [5] in *R(RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 set out how personal characteristics are more like a series of concentric circles. Lord Hope and Lord Rodger, and, on this point, Lord Neuberger, agreed. Lord Walker stated that "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…." In this reference, the respondent submits that the status relied on is "far from a core characteristic" and that it is at "the outer orbit of the concentric circles that require protection." We disagree. Lord Walker included congenital disabilities within the circle of the most personal characteristics which are innate, largely immutable, and closely connected with an individual's personality so within the most sensitive area where discrimination is particularly difficult to justify. Furthermore in *JD and A v United Kingdom* at paragraph [89] the ECtHR stated that "… because of the particular vulnerability of persons with disabilities such treatment would require very weighty reasons to be justified (see *Guberina*, cited above, § 73)." *DA & DS* makes it clear that in applying the manifestly without reasonable justification test the court will proactively examine whether the foundation is reasonable. In the area of disability discrimination it is particularly difficult to justify the foundation as reasonable and so much simpler to establish that it is manifestly without reasonable foundation.

[67] Mr McGleenan submitted that as this reference involved "indirect associative disability discrimination" as opposed to direct disability discrimination that there

should be a less intense standard of review of what is manifestly without reasonable foundation. It was argued that as the appellant and his children were not disabled there was a valid distinction between indirect associative discrimination and direct discrimination involving a disabled individual. We consider that Mr McGleenan seeks to establish a distinction without any material difference. The court at the stage of justification is required to consider the discrimination whether it be direct or indirect. It is just as inappropriate indirectly on an associative basis to discriminate against an individual because of the disability of a deceased spouse as it is to directly discriminate against the deceased spouse. The central cause of the discrimination is and remains the congenital disability. We reject Mr McGleenan's submission.

**(f) Distinction between the State's consideration of and justification of adverse treatment**

[68] The courts proactive examination is of the reasons put forward by the State for countenancing "the adverse treatment." This is an obligation which rests on the court. The State may have given consideration to the adverse treatment but in addition the State has to explain why it seeks to justify the adverse treatment as reasonable and in turn the court has an obligation to proactively examine and decide whether the adverse treatment has been justified. In this way, the State's duty to consider adverse treatment must not be elided with the State's duty to explain why it seeks to justify the adverse treatment. This means that even if the decision maker has undoubtedly considered the question whether to treat like cases alike or different cases differently, the court still needs to give its own careful proactive scrutiny as to whether there is a reasonable basis for the adverse treatment. As stated in *R (on the application of TD, AD and Patricia Reynolds) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618 at paragraph [53] "the question of justification for an interference with a Convention right is a substantive question and not merely a process question" so that "… it will not suffice that a decision-maker has taken a relevant consideration into account. What matters is whether the ultimate decision taken is or is not objectively justified."

**(g) What is the impact in relation to justification if the State has not considered and therefore has not countenanced the adverse treatment?**

[69] In *R (on the application of TD, AD and Patricia Reynolds)*, Singh LJ delivering the judgment of the court also stated that "Conversely, unlike in domestic public law cases, it will not necessarily be fatal if a decision-maker has failed to take into account an issue under the Convention. It is the compatibility of the outcome of the process with Convention rights which has to be assessed by the Court, not the process by which that outcome was reached." In this way, even if the State has not considered

and therefore has not countenanced the adverse treatment prior to introducing the measure in question it is still open to it to seek to justify the adverse treatment as reasonable. However, whether an issue has been considered by a decision-maker prior to making the decision may affect the weight which the court should give to the views of the decision-maker when coming to its own assessment of the issue of justification, see *Re Brewster* [2017] UKSC 8; [2017] 1 WLR 519, at paragraph [64]. In this way, "where the question of the impact of a particular measure on social and economic matters has not been addressed by the government department responsible for a particular policy choice, the imperative for reticence on the part of a court tasked with the duty of reviewing the decision is diminished."

**(h) Is there a sole question in relation to justification or is it appropriate to use the four "Bank Mellat" questions in relation to proportionality?**

[70] Mr McGleenan, relying on the majority judgment in *DA & DS* submitted that there was now a "sole question" in relation to justification once the state has put forward its reasons for having countenanced the adverse treatment. The sole question being whether "the complainant (has) demonstrated that the reason was manifestly without reasonable foundation?" On that basis, Mr McGleenan submitted that it was no longer appropriate to consider the four questions set out by Lord Reed in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 at 790 – 791 paragraph [74]. In that paragraph and after referring to the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103 as providing "the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning" Lord Reed stated:

> "that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. …. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

Lord Reed also stated that the attraction of these four questions "as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit."

[71] We agree that the majority in *DA & DS* did not use this "heuristic tool" by breaking down the assessment into distinct elements. However, that is not to say that they decided that this tool or technique should never be used in addressing the sole question as to whether the complainant has demonstrated that the reason was manifestly without reasonable foundation. The technique or tool after all is meant to be informative or illuminating. We also note that Lady Hale in *DA & DS* used this tool (see paragraphs [152] – [157]) and did so despite agreeing with the manifestly without reasonable foundation test (see paragraph [132]) and without any of the other members of the court taking issue with her having used it. Furthermore, this tool or technique had been used in *R (Tigere) v Secretary of State for Business, Innovation and Skills (Just For Kids Law intervening)* [2015] 1 WLR 3820 at paragraph [33] and no member of the court in *DA & DS* took issue with its adoption in that earlier case. Finally, the fourth *DA & DS* question set out by Lady Hale at paragraph [136] in *DA & DS* summarises the *Bank Mellat* questions. No other member of the court disagreed with this formulation of the fourth *DA & DS* question and both Lady Hale and Lord Kerr relied upon it.

[72] We consider that it is appropriate to use this tool or technique in answering the sole question as to whether the complainant has demonstrated that the State's reasons for having countenanced the adverse treatment was manifestly without reasonable foundation. That conclusion leads on to the question posed by Lord Kerr at paragraph [173] of *DA & DS* which was "Has the manifestly without reasonable foundation formula any part to play in the answer to be given to any of" the *Bank Mellat* questions? In his dissenting judgment, Lord Kerr acknowledged that in *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 he was one of those who accepted that the manifestly without reasonable foundation test applied to all of the stages in the proportionality analysis. However, relying on *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016, he stated that he was wrong to have done so. He concluded that "… certainly so far as concerns the final stage in the proportionality analysis, the manifestly without reasonable foundation standard should not be applied." For our part, whilst acknowledging the considerable force and coherence of Lord Kerr's dissenting judgment, we are bound by the majority decision in *DA & DS* so that the manifestly without reasonable foundation formula applies to all four *Bank Mellat* questions.

**(i) Impact of the UK's International obligations**

[73] Article 3 of the UNCRC provides: "1. In all actions concerning children, whether undertaken by … courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The status of international conventions and the recommendations of committees set up to oversee them was considered by the Supreme Court in *A and B v Secretary of State for Health* [2017] 4 All ER 353 by Lord Wilson (giving the judgment of the majority) at paragraphs [34] and [35]. It was also considered in *DA & DS* in which case Lord Wilson stated at paragraph [71] "the ECtHR has made it clear that, where relevant, the content of another international Convention, in particular one relating to human rights such as the UNCRC, should inform interpretation of the Human Rights Convention: *Neulinger v Switzerland* (2010) 54 EHRR 31, paras 131 and 132." In paragraph [72], Lord Wilson added that "it follows that, when relevant, the content of the UNCRC can inform inquiry into the alleged violation of article 14 of the Convention, when taken with one of its substantive rights" and in paragraph [78] stated that "a foundation for the decision not made in substantial compliance with article 3.1 might well be manifestly unreasonable." We consider that if a decision has been made which is not in *substantial* compliance with an international obligation this *might well* but does not inexorably lead to the conclusion that the decision is manifestly without reasonable foundation.

[74] Article 4(1)(b) of the UNCRPD requires Contracting States to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs or practices that constitute discrimination against persons with disabilities." Article 5(3) provides that, "In order to promote equality and eliminate discrimination, state parties shall take all appropriate steps to ensure that reasonable accommodation is provided." Article 28(2) provides that, "State Parties recognise the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realisation of this right…." As with the UNCRC, the UNCRPD should inform interpretation of the ECHR and a foundation for the decision not made in substantial compliance with UNCRPD might well be manifestly unreasonable.

**(j) Section 3 HRA interpretative obligation**

[75] Section 3(1) HRA under the heading "Interpretation of legislation" provides that "(so) far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." It is suggested on behalf of the appellant that it is open to this court to read

sections 29 and 30 of the 2015 Act in such a way that they are rendered compatible by for instance interpreting section 30 as covering national insurance credits as well as actual payments.

[76] At paragraph [39] of *Gilham v Ministry of Justice* [2019] UKSC 44, Lady Hale delivering the judgment of the court stated that in "*Ghaidan v Godin-Mendoza* [2004] 2 AC 557, the House of Lords held that the interpretive duty in section 3 of the Human Rights Act 1998 was "the primary remedy" and that "what is 'possible' goes well beyond the normal canons of literal and purposive statutory construction." Further, that "what was possible by way of interpretation under EU law was a pointer to what was possible under section 3(1)."

[77] The pointer as to what is possible by way of interpretation under EU law arises because the obligation to interpret in conformity with Community law is to do so "as far as possible" see *Marleasing v La Comercial Internacional de Alimentacion* [1992] 1 CMLR 305. In UK law doing so as far as possible includes a court or tribunal reading words into a statute or into regulations to give effect to EU legislation which the statute was evidently intended to implement, see *Pickstone v Freemans PLC* [1988] 2 ALL ER 803 and *Litster v Forth Dry Dock and Engineering Company Limited* [1989] 1 ALL ER 1134 and *Ghaidan v Godin-Mendoza* [2004] 2 AC 57. Lord Rodger of Earlsferry in *Ghaidan* at paragraph [121] stated:

> "When the court spells out the words that are to be implied, it may look as if it is 'amending' the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute."

The limit is that it is not possible to "go against the grain" of the legislation in question, see also *Gilham* at paragraph [39]. In *HM's Application* [2014] NIQB 43 at paragraph [51] in a passage with which we agree Treacy J after reviewing the authorities stated "…the limits of the interpretive Section 3 obligation include where the interpretation contended for 'goes against the grain of the legislation' / is contrary to some fundamental aspect of the legislation or where it would create some far-ranging practical effects which would be outwith the competency of the judiciary."

**(k) Remedy**

[78] If this court finds that there has been unjustifiable discrimination and if a convention-compliant interpretation is not possible then the question arises as to what is the appropriate remedy.

[79] The 2015 Act is subordinate legislation made in exercise of powers conferred by the NIA which is primary legislation. Under section 4(3)–(5) HRA this court may make a declaration of incompatibility in relation to subordinate legislation if it is "made in the exercise of a power conferred by primary legislation" and if "…the primary legislation concerned prevents removal of the incompatibility." The NIA does not prevent the removal of the incompatibility. A declaration of incompatibility is not available as a remedy.

[80] It is appropriate to consider the consequences if this court answers the question in the affirmative insofar as the contribution condition results in less favourable treatment of spouses, civil partners and children of deceased individuals with disabilities who throughout their working life have been unable to work. The consequence is that section 6(1) HRA will be engaged and it will be unlawful for any public authority to apply the incompatible parts of sections 29 and 30 of the 2015 Act. In *Northern Ireland Commissioner for Children and Young People's Application for Judicial Review* [2009] NI 235 Girvan LJ in delivering the judgment of this court stated at paragraph [17] that

> "Where subordinate legislation enacted under the Northern Ireland Act infringes Convention rights, the simple consequence is that the courts must disregard the subordinate legislation if to enforce it would infringe a Convention right."

The authority relied on by Girvan LJ for that principle was *Re P (adoption: unmarried couple)* [2008] NI 310 in which at paragraph [116] Lady Hale stated:

> "Section 6(1) of the HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, unless required to do so by a provision in primary legislation: section 6(2). A court is a public authority for this purpose: section 6(3). If this were a provision of primary legislation which the court considered incompatible with a Convention right, the court would be bound to consider whether it was possible to interpret it so as to remove the incompatibility: see section 3(1). If this is not possible, the court will have the power, but not the duty to make a declaration of incompatibility, see section 4(2). So far as I am aware in all the cases in which either the interpretative duty in section 3 has been used or a declaration of incompatibility made under section 4 it has been reasonably clear that the Strasbourg court would hold that United Kingdom law was incompatible with the Convention … Where a provision of subordinate legislation is incompatible with the Convention rights, the remedies are different: section 3 applies but section 4 does not. The courts are free simply to disregard subordinate legislation which cannot be interpreted or given effect in a way which is compatible with the Convention rights. Indeed, in my view this cannot be a matter of discretion. Section 6(1) requires the court to act compatibly with the Convention rights if it is free to do so."

[81] That principle is beyond doubt as a consequence of Lady Hale delivering the judgment of the Supreme Court in *RR v Secretary of State for Work and Pensions* [2019] 1 WLR 6430. The Supreme Court confirmed that section 6(2) HRA, which provided an exception to section 6(1) for acts which were required by primary legislation, did not apply to acts which were required by subordinate legislation. Therefore, on a true construction of section 6 HRA, a public authority was required to disregard a provision of subordinate legislation which resulted in a breach of a Convention right unless it was impossible to do so, for example because it was not clear how the statutory scheme could be applied without the offending provision.

[82] We consider that by answering the question in the affirmative in the way that we have described the tribunal (and all other public authorities) would be bound by

section 6(1) HRA to disregard the incompatible parts of sections 29 and 30 and to allow the appellant's appeal against the refusal of BSP since that refusal was based on the offending provision.

**The DA and DS questions**

[83] We turn to consider the four *DA and DS questions*

**(l) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights**?

[84] There was no issue in this court that the subject matter of the complaint fell within the ambit of both Article 8 and A1P1 ECHR. The Convention does not require member states to establish BSP but where domestic law provides for surviving spouses to be entitled to BSP 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* in relation to WPA 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."

[85] As the circumstances of this case fall within the ambit both of Article 8 and A1P1 it 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. It also means that failing to differentiate where the situations are significantly different may give rise to a potential complaint.

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

**(m) Does the ground upon which the complainants have been treated differently from others constitute a "status"?**

[87] The appellant contends that his status is the spouse of a deceased who was severely disabled so that she was unable to work and therefore unable to pay Class 1 or Class 2 National Insurance Contributions. The appellant also contends that the status of his children was the children of a deceased who was severely disabled so that she was unable to work and therefore unable to pay Class 1 or Class 2 National Insurance Contributions. Both constitute indirect associative statuses within article 14.

[88] The respondent contends that the difference in treatment arose from the fact that Pauline O'Donnell "did not work and did not make any National Insurance Contributions." We consider that this ignores the reason why she did not work and did not make any National Insurance Contributions which was due to her severe congenital disability. We consider that there was differential treatment on the grounds of the appellant's and the children's status as the contribution condition could never be satisfied by the deceased due to her severely disabled status.

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

**(n) 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*?**

[90] The deceased who as a result of disability could not work and could never meet the contribution condition was treated in exactly the same way as an individual who could work and who could meet the contribution condition but did not do so. This means that the appellant and his children have been treated in the same way as others whose situation was significantly different by reason of the disability of the deceased. The 2015 Act has not differentiated between persons in significantly different situations and there has been a failure to treat differently persons whose situations are significantly different. The discrimination is by comparison to non-disabled persons.

[91] The answer to the third *DA and DS question* is that the appellant and his children have they been treated in the same way as other people not sharing their status whose situation is relevantly different from theirs.

**(o) 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?**

[92] In order to justify what would otherwise be the discriminatory effect of a rule governing entitlement to welfare benefits, the respondent has first to put forward its reasons for having countenanced the adverse treatment. The adverse treatment which is to be justified is the exclusion from any entitlement to BSP of a spouse or civil partner and of their children when the deceased was never able to work due to disabilities. Once the respondent has put forward its reasons then we would propose to use the technique or tool of the *Bank Mellat* questions in order to answer the sole question as to whether the complainant has demonstrated that the reason or reasons were manifestly without reasonable foundation.

[93] The respondent has not acknowledged the discriminatory effect and quite simply has put forward no reason for having countenanced the adverse treatment. In a discrimination case, what must be justified is the difference in treatment or in this reference the lack of difference in treatment and not merely the underlying policy. The factors relied on by Mr McGleenan which can be summarised as (a) incentivising work (b) protecting the contributory principle and (c) simplifying the benefits system justify the underlying policy but they do not justify the failure to treat the severely disabled differently from those without disabilities. It is the failure to treat them differently that needs to be justified. There was no discussion prior to the 2015 Act of making an exception for those who could not work throughout their working life due to disabilities. This means that there was no justification at the time of the failure to make an exception for this category of disabled person. That is not conclusive but what is conclusive is that there has been no after the event attempt at justifying why such an exception could not be made. We consider that none of these reasons addresses the adverse treatment. The factors relied on by the respondent constitute explanations as to why the contribution condition is included in the legislation. They do not constitute justification for the discriminatory effect of the contribution condition when applied to spouses of people with severe disabilities who were never able to work throughout their working life. These factors explain the measure but they do not provide justification for the discriminatory effect of the measure.

[94] That is sufficient to conclude this reference but we consider it appropriate also to use the *Bank Mellat* questions as a tool or technique to answer the sole question.

[95] Is the objective of the measure sufficiently important to justify the limitation of a protected right? As we have indicated the legitimate aims of the contribution principle can be summarised as (a) incentivising work (b) protecting the contributory principle and (c) simplifying the benefits system. Those reasons were articulated on behalf of the respondent in the following way

(a) to incentivise work;
(b) to make work pay;
(c) to avoid the stigma associated with claiming means-tested benefits;
(d) to simplify the contributory condition;
(e) to avoid undermining the contributory principle; and
(f) to comply with the parity policy.

We consider that all of these are legitimate aims.

[96] Is the measure rationally connected to the objective. We consider that it is.

[97] The third and fourth questions can be considered together. The third question is whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. The fourth question is whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

[98] In answer to those questions, we consider that the policy in its application to those who through disability are unable to work throughout their working life is manifestly without reasonable foundation. It is just not reasonable to suggest that one can incentivise a severely disabled person to work if through their disability they cannot work. Alternatively, to put it another way, that is manifestly without reasonable foundation. Furthermore, one cannot make work pay if through disability the individual cannot work. There is no stigma attached to credits of national insurance if a person is disabled. No one is going to think worse of a disabled person who can never work if they do not do so and receive credits rather than making payments. The contributory principle for BSP is extremely modest and that extremely modest application of the principle is not undermined by an exception being made in relation to those who through disability cannot contribute throughout their working life. An exception would simply amount to recognition that those who cannot contribute should not be excluded. That does undermine the close relationship between the contribution condition and employment merely recognising that the severely disabled are at a substantial disadvantage if they cannot work throughout their working life. It is entirely possible to make an

exception without undermining the contributory principle as is shown by section 30(3) of the 2015 Act. The policy of parity may explain why in Northern Ireland the relevant provisions have been adopted given that they were adopted in England and Wales but that policy does not serve to justify the impugned difference in treatment. Unjustifiable discrimination is not justified by parity. In answer to question three, we consider that a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. That less intrusive measure was to create an exception for those never able to work through disability and therefore never able to pay Class 1 or Class 2 National Insurance Contributions. In answer to the fourth question, the severity of the measures effect on the associated rights of the persons whose deceased spouse or civil partner was never able to work through disability was clearly disproportionate to the likely benefits of the impugned measure.

[99] We also consider that the respondent has failed to comply with the positive obligation to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different. This failure is confirmed by the respondent's breach of its obligation to comply with UNCRC and the UNCRPD, which informs interpretation of the ECHR.

[100] As Lord Reed stated, in "essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure." We consider that the adverse impact is disproportionate. The answer to the fourth *DA and DS question* is that the respondent has failed to justify the similarity in treatment of those with and those without severe disabilities so that the contributory principle in so far as it effects those individuals who through disability cannot work throughout their working life is manifestly without reasonable foundation.

**Section 3 interpretation and remedy**

[101] We do not consider it appropriate to read sections 29 and 30 of the 2015 Act by interpreting section 30 as covering national insurance credits as well as actual payments. That would potentially open entitlement to BSP to the spouse or civil partner or child of a disabled deceased who was less likely to work and less likely to pay Class 1 or Class 2 National Insurance Contributions. This reference has not considered that category of individual but rather has been confined to consideration of a deceased who as a result of her disabilities has been unable to work throughout her working life. Any interpretation of section 30 should be limited to the facts of this reference.

[102] Ms Doherty in her skeleton argument dated 25 May 2020 submitted that this court could interpret section 30 of the 2015 Act to include an exception for people with severe disabilities. It was submitted that:

> 14. Section 30(3) provides that the contribution condition is to be treated as met if the deceased was an employed earner and died as a result of a personal injury at work.
>
> 15. The Court could use subsection 3 to read in a similar exception to the effect that, "For the purposes of section 29(1)(d) the contribution condition is to be treated as met if the deceased was unable to comply with s30(1) due to disability"

We consider that this proposed exception is not limited to the facts of this reference which solely concerns a deceased who as a result of disabilities was unable to work throughout her working life. We have considered reading in a more limited exception that makes that clear. It would be in the following terms:

> "For the purposes of section 29(1)(d) the contribution condition is to be treated as met if the deceased was unable to comply with section 30(1) throughout her working life due to disability."

The outcome of this reference is that is the exception which should be read into the 2015 Act.

**Conclusion**

[103] We can reach no other conclusion than that section 29(1)(d) of the 2015 Act should be read and given effect so that the contribution condition is to be treated as met if the deceased was unable to comply with section 30(1) throughout her working life due to disability. Reading and giving effect to the 2015 Act in this manner means that it is compatible with Article 14 ECHR read in conjunction with Article 8 and A1P1.

[104] We will hear counsel in relation to costs.