

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. My decision is that the decision of the tribunal held on 18 January 2002 was not erroneous in law. I accordingly do not allow this appeal.

2. The claimant, a woman born in 1949, claimed widow's benefit by a claim received on 7 February 2001. Her partner (who was an Irish citizen and who had come to the UK in 1957) had died on 30 May 2000. It is not in dispute that for some 15 years before her partner's death the claimant and her partner had lived together in a stable relationship as if they were husband and wife: they had not, however, married. The claimant's claim was disallowed on the grounds that it had not been established and could not be presumed that there was a valid marriage between the claimant and her partner and that, accordingly, widow's benefit was not payable to the claimant based on the contributions of her late partner because it had not been proved that she was his widow. The tribunal, before which the claimant was represented by Mr Hoggart, of a local Welfare Benefits Advice Unit, in a conspicuously clear decision disallowed the claimant's appeal. Leave to appeal was granted by the chairman.

3. An oral hearing of the appeal was requested and the request was granted by a Commissioner. At the oral hearing the claimant was again represented by Mr Hoggart and the Secretary of State by Mr James, Solicitor. I am grateful to them both for their submissions.

4. The law relating to widow's benefit is set out in Sections 36, 37 and 38 of the Social Security Contributions and Benefits Act 1992. Each of those sections refers to "a woman who has been widowed" and to that woman's "late husband". As a pure matter of construction those phrases contemplate that there must have been a marriage, whether actual or to be presumed, between the woman claimant and her late partner. No other reading of those sections is possible. There was no marriage, whether actual or presumed, between the claimant and her partner. Accordingly as a matter of domestic English law the claim must fail.

5. Mr Hoggart, in his able submissions both written and oral, however submitted that I was constrained to a different conclusion by virtue not only of EU Law, but also by virtue of the European Convention of Human Rights. Although he placed the latter Convention in the forefront of his arguments, it is convenient if I deal with his submissions on EU law first, since if those submissions had the weight which he ascribed to them, then it might be that the direct effect of EU law would have to be taken into account.

6. His primary submission was that in Scotland a valid marriage could be proved by "cohabitation with habit and repute", that the vast majority of those that could take advantage of this provision would be Scottish by origin and that, accordingly, the in England rules which did not permit such proof of marriage were discriminatory and contrary to Article 12 (ex6) E.C. Treaty (which prohibits any discrimination on the grounds of nationality), and Article 3 of Regulation (EEC) No. 1408/71. He also made reference to a Council Directive 79/7 EEC (relating to the principle of equal treatment for men and women in matters of social security).

7. For the purposes of dealing with Mr Hoggart's submissions, I accept (although I emphasise that this has not been proven) that if the claimant and her partner had cohabited in Scotland they would have succeeded in establishing marriage by virtue of cohabitation with

habit and repute. I also accept his submission that the vast majority of those unmarried cohabiting in Scotland are likely to be of Scottish origin. I do not, however, accept that there is any form of discrimination on the ground of nationality within Article 12. First, there is no such creature as "Scottish nationality". Persons are not citizens of Scotland, but U.K. citizens. If Scottish nationality does not exist, there cannot be discrimination on nationality grounds. Secondly, although the vast majority of those who may take advantage of the Scottish marriage rules may be by origin primarily Scottish, that does not mean that there is discrimination on grounds of origin: the Scottish rules of cohabitation with habit and repute apply to anybody, of whatever nationality, who resides in Scotland.

8. Regulation 1408/71 is concerned with the harmonisation of EU social security benefits in the context of the freedom of movement of workers. The fact that the claimant's partner was an Irish citizen would not of itself seem to engage the Regulation, given that he had come to the UK in 1957. I shall, however, assume the Regulation might be engaged.

Article 3 of Regulation 1408/71 provides

"... persons residing in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State."

No possible discrimination has been made out. Two UK citizens living together in England cannot take advantage of the Scottish marriage rules. Two UK citizens living together in Scotland might be able to take advantage of Scottish marriage rules. Two Belgian citizens living together in England cannot take advantage of the Scottish marriage rules. Two Belgian citizens living in Scotland might be able to take advantage of the Scottish marriage rules. In the words of the Article persons residing in the territory of one of the Member States (the UK) are subject to the same obligations and enjoy the same benefits under the legislation of the UK as the nationals of the UK.

9. Finally, as regards Directive 79/7, to which Mr Hoggart made brief reference, and which relates to equal treatment between men and women in social security matters it is expressly provided by Article 3(2) that the Directive shall not apply to provisions concerning survivors' benefits, into which category widow's benefits fall.

10. I am therefore satisfied that there is no EU legislation which impinges on this case. I should add that there is no EU law provision which directly prohibits discrimination on the grounds of marital status.

11. I turn now to Mr Hoggart's arguments based on the Convention. There is a preliminary point. Arguments based on Convention law before the Commissioner, where primary legislation is in issue (as is the present case), cannot be of any direct benefit to a claimant since the Commissioner has no power to make a declaration of incompatibility under the Human Rights Act 1998. Notwithstanding this, I go on to consider Mr Hoggart's arguments.

12. Mr Hoggart's first argument was that the legislation relating to widow's benefits discriminated against unmarried couples and that such discrimination was unlawful by virtue of Article 14 of the Convention. Before I can consider whether Article 14 can be prayed in aid, I have first to consider whether any other Article of the Convention might arguably be said to be engaged. I am satisfied that Article 1 of protocol 1 to the Convention is engaged – on the footing that widow's benefits are a pecuniary right – see Willis v. U.K. [2002]

35 E.H.R.R. 21. I am also prepared to assume that Article 8 (respect for family life) is also engaged – see the decision of Moses J. in *R (Hooper) v. DWP* [2002] EWHC 191 (currently under appeal to the Court of Appeal). Given that I accept that two substantive Articles of the Convention might be engaged, I can turn to consider whether Article 14 of application in the present case. As stated above, Mr Hoggart's first submission was that the legislation relating to widow's benefits was discriminatory against unmarried couples. I consider that that argument is precluded by the relatively recent admissibility decision in *Shackell v. U.K.* (decided on 27 April 2000) where the European Court of Human Rights held inadmissible a claim by an unmarried woman to widow's benefit. Mr Hoggart sought to distinguish that case on the grounds that the court was looking at the wrong comparators and should have used as comparators the economic dependence of both married and unmarried woman on their partners while they were alive and the unfairness of allowing one group but not the other to benefit from the financial support after the partner's death. Attractively as he put his argument I cannot accept Mr Hoggart's submission. Although the Court recognised that there was an increased social acceptance of stable personal relationships outside the traditional notion of marriage it nonetheless held that marriage remained an institution which was widely accepted as conferring a particular status on those who enter it and that the situation of the unmarried applicant was not comparable to that of a widow. Further, the Court made it clear that it was still within a State's margin of appreciation to promote marriage by way of benefits of limited nature for survivors of married, as opposed to unmarried, couples. I recognise that the Convention is a living document and its interpretation may change over the years: however *Shackell* is such a recent decision that there are no possible grounds on which I would be entitled not to follow it.

13. As a second string to his Convention law bow, Mr Hoggart ran again the argument based on discrimination between those living in Scotland and those living in England as regards marriage by cohabitation with habit and repute. I am satisfied that this argument does not run in the Convention law context, as well as in the EU context. For the reasons given above in paragraph 7 any discrimination based on nationality is illusory. Nor is there any discrimination on the grounds of residence: Scotland treats all those residing in Scotland as subject to the same rules of matrimony. Discrimination on the grounds of residence only potentially arises where country A says that X, a person residing in country B, cannot be treated the same as those residing in country A simply because X resides in country B. As Burnton J. succinctly stated in *R (Carson) v. Secretary of State for Work and Pensions* 2002 EWHC 978 [2002 3 All ER 994] at paragraph 55 "discrimination does not arise when different regions apply different rules without discrimination to all those within the region".

14. For the above reasons I do not allow this appeal.

(Signed) **A Lloyd-Davies**
 Commissioner

(Date) **12 June 2003**