

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. These are my decisions in three appeals, each of which concerns a claim by a male claimant to widow's benefit following the death of the claimant's wife before 9 April 2001. These three appeals are in the nature of test cases: there are many other applications and appeals before the Commissioners which have been deferred or stayed pending these decisions.

2. In summary, my decision is that no man who claims widow's benefit in respect of a spouse who died before 9 April 2001 is entitled under British social security legislation to any payment of widow's benefit.

3. Widow's benefit was defined by section 20(1)(e) of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act"), prior to its amendment by the Welfare Reform and Pensions Act 1999 ("the 1999 Act"), as comprising widow's payment, widowed mother's allowance and widow's pension. Before 9 April 2001 section 36 of the 1992 Act provided for the payment of widow's payment, section 37 for the payment of widowed mother's allowance and section 38 for the payment of widow's pension, in each case to women who fulfilled certain statutory criteria. I set out the relevant statutory provisions in an appendix to this decision. Those provisions may be summarised as follows -

- (a) Section 36 of the 1992 Act provided for the payment of widow's payment (a lump sum which, immediately before 9 April 2001, was £1,000) payable to a woman who was under pensionable age when her husband died and whose late husband had satisfied certain national insurance contribution conditions.
- (b) Section 37 provided for widowed mother's allowance, a weekly sum payable to a woman who qualified: in general terms this was a widow who was entitled to child benefit in respect of a child and whose late husband had satisfied certain national insurance contribution conditions.
- (c) Section 38 of the 1992 Act provided for the payment of widow's pension, a weekly sum payable to a woman who qualified: in general terms this was a widow who (i) was over the age of 45 but under the age of 65 at the date of her late husband's death or (ii) ceased to be entitled to widowed mother's allowance between those two ages and whose late husband satisfied certain national insurance contribution conditions.

By virtue of regulation 19(2) of the Social Security (Claims and Payments) Regulations 1987 a claim for widow's benefit had to be made within three months "beginning with any day on

which, apart from satisfying the condition of making a claim, the claimant is entitled to the benefit concerned". The effect of this three-month limitation was that if widow's payment was not claimed within three months of the date of the deceased husband's death it was wholly lost, and arrears of widowed mother's allowance and widow's pension could not be claimed for more than three months before the date on which a valid claim was made.

4. On 9 April 2001 a new regime was introduced by the 1999 Act for all people (both men and women) whose spouse died on or after 9 April 2001. Three new benefits became available.

- (a) Section 54 of the 1999 Act, which inserted a new section 36 into the 1992 Act, provided for a bereavement payment to replace widow's payment. Bereavement payment is a lump sum payment of £2,000 payable to those widows and widowers who qualify: in general terms these are widows and widowers whose late spouse satisfied certain national insurance contribution conditions.
- (b) Section 55 of the 1999 Act, which inserted a new section 39A into the 1992 Act, provided for widowed parent's allowance to replace widowed mother's allowance. Widowed parent's allowance is a weekly sum payable to those widows and widowers who qualify: in general terms these are those who were entitled to child benefit in respect of a child and whose late spouse satisfied specified national insurance contribution conditions. Additionally, section 55 inserted section 36A in the 1992 Act, which provides that any widower whose wife died before 9 April 2001 and who had dependent children as at 9 April 2001 is eligible for widowed parent's allowance so long as similar qualifying contribution conditions are met. This is so irrespective of when the widower's late wife died. However a widower cannot claim widowed parent's allowance in respect of any period prior to 9 April 2001.
- (c) Section 55 of the 1999 Act, which inserted a new section 39B into the 1992 Act, also provided for bereavement allowance to replace widow's pension. This is a weekly sum, payable for not more than 52 weeks after the relevant death, to those widows and widowers who qualify: in general terms these are those who were over 45 but under pensionable age at the time of their spouse's death and whose late spouse satisfied certain national insurance contribution conditions.
- (d) In order to preserve existing rights, section 55 of the 1999 Act contained provisions preserving entitlement to widowed mother's allowance and

widowed pension for those women whose husbands had died before 9 April 2001.

The time limits for claiming the new benefits are the same as those for widow's benefit, save that the time for claiming bereavement payment was extended to 12 months with effect from 1 April 2003.

5. The provisions contained in the 1999 Act eliminated any differentiation between men and women in respect of claimants whose spouses died on or after 9 April 2001. However, those provisions did not alter the position for those men whose wives died prior to that date, with the limited exception of widowed parent's allowance.

6. In broad terms, the issue that arises in the appeals with which I am now concerned is whether, by virtue of the Human Rights Act 1998 and the European Convention on Human Rights ("the Convention"), men whose wives died before 9 April 2001 can claim widow's benefit. Although the Department accepts (see R(Hooper) v Secretary of State for Work and Pensions) [2003] 1 WLR 2623 at [18]) that the former regime of widow's benefit constituted discrimination on the grounds of sex which would infringe Article 14, together with Article 8 (relating to respect for family life), of the Convention (with the exception of widow's pension for which it maintains there was objective justification), it does not concede that the admitted discrimination affords men affected a remedy in the courts of the United Kingdom. This dispute has given rise to three sets of litigation. First, there are proceedings in the European Court of Human Rights: here a number of claimants, who achieved declarations of admissibility, have entered into friendly settlements with the UK Government; one case Willis v. United Kingdom [2002] 35 E.H.R.R. 21 has been decided against the UK Government; and a number of others are still pending resolution. Secondly, there are the proceedings in the cases of R (Hooper and Others) v. Secretary of State for Work and Pensions: this litigation ("the Hooper litigation") started in the Administrative Court before Moses J, whose judgment, given in February 2002, is to be found at [2002] EWHC 191; the judgment of Moses J was appealed to the Court of Appeal, whose judgment is reported at [2003] 1 WLR 2623; each side has now successfully petitioned the House of Lords for permission to appeal to the House of Lords. My understanding is that these appeals are due to be heard by the House of Lords at the end of 2004. Thirdly, there are the appeals and applications before the Social Security Commissioners.

7. It is important to appreciate the differences in jurisdiction which arise because of the different routes taken by claimants. In the European Court of Human Rights, if an application has been found admissible, if no friendly settlement is reached and if the Court finds that there has been a violation of any Article of the Convention, it may, if it finds it appropriate, award compensation by way of just satisfaction – as happened in the case of Willis (where the Court found a violation of Article 14, taken with Article 1 of Protocol 1, in respect of widow's payment and widowed mother's allowance). In the Hooper litigation (now under appeal to the

House of Lords), the remedies potentially available to the claimants (if their appeals succeed) include either a declaration that the primary legislation is incompatible with the Convention under section 4 of the Human Rights Act 1998 or damages under section 8 of that Act. Before the Social Security Commissioners, however, the jurisdiction is more limited. The powers of a Commissioner are set out in section 14 of the Social Security Act 1998 and are restricted to determining appeals from appeal tribunals. Even if the Commissioner allows an appeal, he can only either remit the case to a new tribunal or substitute his own decision by giving the decision which a tribunal could have given; in turn a tribunal can only give a decision which a Departmental decision-maker could have given; and a Departmental decision-maker can only give decisions which are authorised by the relevant social security legislation, whether contained in statute or in subordinate legislation. A Commissioner has no power to declare primary legislation incompatible with the Convention; nor does he have power to award damages or the payment of compensation. Accordingly, although the issues canvassed before the European Court of Human Rights and in the Hooper litigation are wide-ranging, before the Commissioner the issues that can properly be determined are much more limited: essentially, since primary legislation is in issue, the Commissioner is restricted to interpreting that legislation by reference to recognised rules of interpretation.

8. The existence of the Hooper litigation (which, as I have mentioned above, is still continuing) has meant that the proceedings before the Commissioners have been prolonged. The first hearing before me took place on 29 January 2002. At that hearing the claimants in CG/1467/2001 and CG/1895/2001 were represented by Mr Stagg of Counsel, instructed by the Bar Pro Bono unit; the Department was represented by Mr Chang of the Office to the Solicitor. That hearing was adjourned to allow evidence to be filed and to enable a further representative claimant to be added, so as to ensure that all categories of claimant were covered. The adjourned hearing was held on 23 April 2002, where Mr Stagg again represented the claimants (a third representative appeal, CG/2065/2001, having been found) and the Department was represented by Miss Stratford of Counsel. It became apparent at that hearing that the Court of Appeal in the Hooper litigation was, contrary to a suggestion previously made, going to consider the central question which arose before me. I accordingly stayed the proceedings until the conclusion of all appellate proceedings in the Hooper litigation. The Court of Appeal gave its judgment in June 2003. Although that judgment dealt with a number of issues, only one of those issues, relating to the interpretation of sections 36 to 38 of the 1992 Act ("the interpretation question") was of relevance to the questions before the Commissioner. As I have mentioned above, the House of Lords granted each party to the Hooper litigation leave to appeal to the House of Lords. Following directions from me, the Secretary of State confirmed in March this year that none of the parties to the Hooper litigation sought to disturb the findings of the Court of Appeal on the interpretation question; accordingly it seemed to me that that finding would stand, regardless of the findings of the House of Lords on the other issues before it. I therefore consider that I may proceed to decide the appeals before me.

9. The issue that I have to decide is whether the provisions of sections 36 to 38 of the 1992 Act can be interpreted in a gender neutral way so as to permit men, as well as women, to claim the benefits provided by those sections. It was conceded before me that, before the coming into force of the Human Rights Act 1998, the relevant sections could not be construed

in anything other than their natural meaning, that is to say, to confer entitlement to benefit upon widows only. The phrase “a woman who has been widowed” used in the relevant sections, coupled with other gender-specific language, is sufficient to exclude the operation of section 6(b) of the Interpretation Act 1978 which provides:

“In any Act, unless the contrary intention appears ... words importing the feminine gender include the masculine.”

On the then rules of statutory interpretation, sections 36 to 38 of the 1992 Act show the necessary “contrary intention” to exclude the masculine gender and hence to prevent men from being awarded the relevant benefit.

10. It was, however, argued before me that, following the Human Rights Act 1998 coming into force on 2 October 2000, the position had changed. The argument may be summarised as follows:-

(a) Since it was conceded that Article 8 of the Convention was engaged the question of whether sections 36 to 38 of 1992 Act violate Article 14 (relating to discrimination) is clearly in issue.

(b) Section 3(1) of the Human Rights Act 1998 requires that primary legislation must be read and given effect in a way which is compatible with convention rights so far as it is possible to do so.

(c) Accordingly section 6(b) of the Interpretation Act 1978 should be read in a way which permits the language of sections 36 to 38 to be construed as gender neutral.

11. Moses J in the Hooper litigation rejected this argument – see EWHC [2002] 191 at [156-161]. The Court of Appeal in its judgment in the Hooper litigation, referred to the question raised by this argument as “the first issue” (see [2003] 1 WLR 2623 at [16]). Its judgment on the first issue was in the following terms:

“The first issue

[26] We agree with Moses J that the principles to be applied when considering the effect of section 3 of the 1998 Act are encapsulated in the following statements. In *R v A (No 2)* [2002] 1 AC 45, 68, para 44 Lord Steyn said:

‘In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a *clear* limitation on Convention rights is stated *in terms*, such an impossibility will arise ...’

However, in *R v Lambert* [2002] 2 AC 545, 585, para 79, decided about 1½ months after *R v A (No 2)*, Lord Hope of Craighead observed that section 3(1) preserves the sovereignty of Parliament: ‘It does not give power to the judges to overrule decisions which the language of the statute shows have been taken on the very point at issue by the legislature.’ Later he observed, at p 586, para 81:

‘But the interpretation of a statute by reading words in to give effect to the presumed intention must always be distinguished carefully from amendment. Amendment is a legislative act. It is an exercise which must be reserved to Parliament.’

[27] Section 6 of the Interpretation Act 1978 provides:

“In any Act, unless the contrary intention appears, - (a) words importing the masculine gender include the feminine; (b) words importing the feminine gender include the masculine ...”

[28] In our judgment ‘the contrary intention’ appears emphatically from the provisions of sections 36 to 38 of the 1992 Act. As Moses J observed, the sections draw a distinction between men and women and husbands and wives. This distinction is particularly marked in section 37, which includes, in the conditions entitling a woman to widowed mother’s allowance, pregnancy by her late husband and artificial insemination with the semen of some person other than her husband. It is quite impossible to read references to the feminine gender in these sections as including the masculine. Moses J so held, and we agree with him.”

The judgment of the Court of Appeal on the interpretation question is binding on me. This has been conceded, with some reluctance, by Mr Stagg. Since, as I understand the position, this part of the judgment of the Court of Appeal is not subject to challenge in the Hooper litigation in the House of Lords and since the other issues raised in the Hooper litigation are not justiciable before the Commissioner, the result is that before the Commissioner claims by widowers to widow's benefit cannot succeed.

12. There is a further point, which bears only upon those men whose claims to widow's benefit were decided by a decision-maker prior to 2 October 2000. Section 8(2) of the Social Security Act 1998 provides:-

“Where at any time a claim for a relevant benefit [which includes widow's benefit] is decided by the Secretary of State –

- (a) the claim shall not be regarded as subsisting after that time; and
- (b) accordingly, the claimant shall not (without making a further claim) be entitled to the benefit on the basis of circumstances not obtaining at that time.”

In respect of those claims which were decided before 2 October 2000 the decision-maker was therefore precluded from considering the effect of the Human Rights Act 1998 since that Act was not in force and hence was not a circumstance obtaining at the time of the decision. If the Act could not be considered, it follows that any argument based on section 3 of the Act could also not be considered. This conclusion is fortified by the decision of the House of Lords in Wilson v. First Country Trust Ltd (No. 2) 2003 3 WLR 568, where it was held that the interpretative obligation imposed by section 3 should not have effect so as to alter existing rights and obligations of parties to an agreement made before Section 3 came into force; by parity of reasoning section 3 could not be prayed in aid to alter rights and obligations arising out of an administrative decision made before section 3 came into force.

13. I now turn to consider the individual cases before me.

14. In CG/1467/2001, the claimant (who was born in 1945) claimed widow's benefit on 4 May 2000 in respect of his wife who died on 30 November 1998. His claim was out of time for widow's payment; he had however, dependent children and hence sought widowed mother's allowance. His claim was rejected by a decision-maker on gender grounds on

5 May 2000. The claimant appealed. An appeal tribunal sitting on 19 October 2000 decided that, having regard to a "breach of the Convention", the claimant was entitled to the equivalent of widow's benefit. The Secretary of State appeals with the leave of a chairman. The decision of the tribunal was erroneous in law both because the legislation cannot be read to create the award made and because the decision appealed against was made before 2 October 2000. I set the decision of the tribunal aside and substitute my own decision, namely, that the claimant is not entitled to widow's benefit.

15. In the case of CG/1895/2001 the claimant (who was born in 1953) claimed widow's benefit on 28 November 2000 in respect of the death of his wife who died on 23 November 1995. His claim was out of time for widow's payment; he sought widow's pension. His claim was rejected on 6 December 2000. The claimant appealed. An appeal tribunal held on 10 April 2001 dismissed the claimant's appeal. I granted leave to appeal. For the reasons I have given above the decision of the tribunal is not erroneous in law and I dismiss the appeal: the tribunal correctly concluded that the claimant was not entitled to widow's benefit.

16. In CG/2065/2001 (the case which was joined between the first and second hearings of these appeals) the claimant (who was born in 1954) claimed widow's benefit on 27 September 2000 in respect of his wife who died on 17 August 2000. His claim was for widow's payment and widowed mother's allowance. His claim was rejected on 26 October 2000. He appealed. A tribunal sitting on 9 February 2001 dismissed the claimant's appeal. I granted leave to appeal. For the reasons given above I dismiss the claimant's appeal. The tribunal was correct to find that the claimant was not entitled to widow's benefit and its decision was not erroneous in law.

17. I am grateful to those who have made submissions (both written and oral) to me: in particular I appreciated the thoroughness and clarity with which Mr Stagg, who was instructed on a pro bono basis, presented his case and supporting documentation.

(Signed) A Lloyd-Davies
Commissioner

(Date) 24 May 2004

APPENDIX

Social Security Contributions and Benefits Act 1992

Benefits for widows and widowers

Widow's payment.

36.—(1) A woman who has been widowed shall be entitled to a widow's payment of the amount specified in Schedule 4, Part II if—

(a) she was under pensionable age at the time when her late husband died, or he was then not entitled to a Category A retirement pension under section 44 below; and

(b) her late husband satisfied the contribution condition for a widow's payment specified in Schedule 3, Part I, paragraph 4.

(2) The payment shall not be payable to a widow if she and a man to whom she is not married are living together as husband and wife at the time of her husband's death.

(3) A widow's payment is payable only in cases where the husband dies on or after 11th April 1988 (the coming into force of section 36(1) of the 1986 Act, which introduced the widow's payment by making provision corresponding to this section).

Widowed mother's allowance.

37.—(1) A woman who has been widowed shall be entitled to a widowed mother's allowance at the rate determined in accordance with section 39 below if her late husband satisfied the contribution conditions for a widowed mother's allowance specified in Schedule 3, Part I, paragraph 5 and either—

(a) the woman is entitled to child benefit in respect of a child falling within subsection (2) below; or

(b) the woman is pregnant by her late husband; or

(c) if the woman and her late husband were residing together immediately before the time of his death, the woman is pregnant as the result of being artificially inseminated before that time with the semen of some person other than her husband, or as the result of the placing in her before that time of an embryo, of an egg in the process of fertilisation, or of sperm and eggs.

(2) A child falls within this subsection if one of the conditions specified in section 81(2) below is for the time being satisfied with respect to the child and the child is either—

(a) a son or daughter of the woman and her late husband; or

(b) a child in respect of whom her late husband was immediately before his death entitled to child benefit; or

(c) if the woman and her late husband were residing together immediately before his death, a child in respect of whom she was then entitled to child benefit.

(3) The widow shall not be entitled to the allowance for any period after she remarries, but, subject to that, she shall continue to be entitled to it for any period throughout which she satisfies the requirements of subsection (1)(a), (b) or (c) above.

(4) A widowed mother's allowance shall not be payable—

- (a) for any period falling before the day on which the widow's entitlement is to be regarded as commencing for that purpose by virtue of section 5(1)(k) of the Administration Act; or
- (b) for any period during which she and a man to whom she is not married are living together as husband and wife.

Widow's pension.

38.—(1) A woman who has been widowed shall be entitled to a widow's pension at the rate determined in accordance with section 39 below if her late husband satisfied the contribution conditions for a widow's pension specified in Schedule 3, Part I, paragraph 5 and either—

- (a) she was, at the husband's death, over the age of 45 but under the age of 65; or
- (b) she ceased to be entitled to a widowed mother's allowance at a time when she was over the age of 45 but under the age of 65.

(2) The widow shall not be entitled to the pension for any period after she remarries, but, subject to that, she shall continue to be entitled to it until she attains the age of 65.

(3) A widow's pension shall not be payable—

- (a) for any period falling before the day on which the widow's entitlement is to be regarded as commencing for that purpose by virtue of section 5(1)(k) of the Administration Act;
- (b) for any period for which she is entitled to a widowed mother's allowance; or
- (c) for any period during which she and a man to whom she is not married are living together as husband and wife.

(4) In the case of a widow whose late husband died before 11th April 1988 and who either—

- (a) was over the age of 40 but under the age of 55 at the time of her husband's death; or
- (b) is over the age of 40 but under the age of 55 at the time when she ceases to be entitled to a widowed mother's allowance,

subsection (1) above shall have effect as if for "45" there were substituted "40".