Bulletin 194
[Sitting]

PLH

Commissioner's File No: CG 2054/04
(Heard with CG 1614/05 & 1823/05)

SOCIAL SECURITY ACTS 1992-1998

APPEAL FROM DECISION OF APPEAL TRIBUNAL ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

CG 2054/04 *Claimant's Name:*
Claim for:
Appeal Tribunal: Bristol
Tribunal Case Ref:
Tribunal date:
Reasons issued:

[ORAL HEARING]

1. In each of these three cases the question is whether the claimant, an elderly widower, was rightly refused a bereavement payment under the amended section 36 **Social Security Contributions and Benefits Act 1992** on the national insurance contributions of his late wife. This arises because at the time she died they were both well over pensionable age and she was already drawing her own retirement pension, this being derived in part from her own contributions made when she went out to work, but increased under a special provision to the (higher) level of the married woman's pension she could otherwise have been drawing on her husband's contributions in any case. The issues of law on which the answer depends in these and other similar cases are whether the terms of the present social security legislation provide for any entitlement to a bereavement payment in such circumstances, and if not whether the position is altered by the **Human Rights Act 1998**. My conclusion is that in each case the answer has to be in the negative, for the reasons I will attempt to explain below.

2. I held a combined oral hearing of all three appeals. Darius A'Zami of counsel appeared under the Free Representation Unit scheme for the claimants in the first two cases, each of whom was appealing against the decision of an appeal tribunal to confirm the rejection of his claim. (In the first case the claimant himself has now passed away, but the claim and the appeal were quite properly pursued for the benefit of his estate.) Tim Buley of counsel, instructed by Mr L Scoon of the solicitor's office, Department for Work and Pensions, appeared for the Secretary of State; as the

respondent in each of the first two appeals, and the appellant in the third, where the appeal tribunal had reversed the original rejection of the claim and substituted a decision awarding the benefit. The claimant in the third case did not appear separately at the hearing, but I took into account the contentions made on his behalf at the earlier written stage of the procedure. The case was well argued on both sides by Mr A'Zami and Mr Buley and all the points bearing on all three cases were dealt with in the course of argument and the supplemental written submissions I allowed them to make after the hearing.

3. The "bereavement payment" here at stake is an insured benefit now consisting of a single lump sum cash payment of £2,000, payable to a widow or widower on the contributions of her or his deceased spouse if the conditions in section 36 are met. Two of those conditions are uncontroversial and there is no doubt that they were met in respect of each of these claimants: under section 36(1)(b) each deceased spouse did satisfy the contribution condition for this benefit, which was that she she must in at least one year of her working life have paid national insurance contributions equivalent to not less than 25 times the lower earnings limit for that year (in other words, just under six months'-worth of minimum basic contributions); and under section 36(2) none of the claimants was living with another unmarried partner at the time of his late wife's death.

4. The difficulty comes with the condition in section 36(1)(a) under which:

> **"36. (1) A person whose spouse dies ... shall be entitled to a bereavement payment if –**
>
> **(a) either that person was under pensionable age at the time when the spouse died or the spouse was then not entitled to a Category A retirement pension under section 44 below;"**

In other words there is no entitlement to a bereavement payment, even though the contribution and other conditions are met, when the widow or widower seeking to claim is over pensionable age at the time of the contributing spouse's death and that spouse was then getting his or her own Category A retirement pension.

5. The origins of this condition are historical. It derives from the condition that has always applied to this benefit provision throughout its various incarnations, right back to its origin as the "widow's allowance" in section 17(1)(a) **National Insurance Act 1946** which provided that:

> **"... a widow shall be entitled to widow's benefit if the husband satisfied the relevant contribution conditions, and –**

(a) in the case of a widow's allowance, if at the husband's death either he was not entitlement to a retirement pension or she was under pensionable age;"

At that time the contribution conditions were very much more exacting: they were the same as for the husband's own retirement pension. The widow's allowance was a flat rate weekly allowance payable to her for the 13 weeks immediately after the husband's death: for this period it was the most generous weekly benefit provided by national insurance, nearly 40% higher than the rate of a single person's retirement pension. Its purpose was to tide a widow over the short-term financial consequences of the loss of a breadwinner, at a time when he was still working or had otherwise not yet become entitled to draw retirement pension, or she herself was still under pensionable age so she could not start to get a retirement pension on his contributions from the date of his death. If they were both over pensionable age and he was already on retirement pension (which at that time would have meant he had retired from regular work) there was not the same need to deal with the short-term effect of the sudden loss of full earnings coming into the household: the widow then qualified at once for the single person's retirement pension on her late husband's contributions, and the separate widow's allowance was not provided.

6. For the first 40 years of the national insurance scheme this remained the way the system worked; apart from piecemeal changes in 1966 when the 13 weeks for which widow's allowance was provided were doubled to 26, and in 1973 when the contribution condition for this benefit was cut down from that for the retirement pension itself to the present comparatively minimal level. However in 1986 the then Government decided to replace the weekly allowance with a single lump sum of £1,000, the widow's allowance provision then in section 24 **Social Security Act 1975** being simply converted to provide for the single payment instead: section 36 **Social Security Act 1986**, in force from 4 April 1988. The substituted provision however reproduced, without alteration, the previous condition as to the surviving widow being under pensionable age when her late husband died or he then not being entitled to retirement pension on his own contributions. The same condition was simply carried forward through each successive re-enactment of the provision, and still stands essentially unaltered in the present (amended) form of section 36 of the 1992 Act, the benefit now being extended to surviving spouses of either sex from 9 April 2001 by virtue of section 54, **Welfare Reform and Pensions Act 1999**.

7. It may I think fairly be doubted whether the original rationale for the condition in section 36(1)(a) has any real bearing on the truncated nature of what now survives of this benefit. Even though the amount of the payment has been increased to

£2,000 that amount, while no doubt welcome enough, would hardly do much nowadays towards the cost of keeping a household going for three or six months after the sudden loss of a working breadwinner; and the kind of things the sum now paid is adequate to cover (perhaps the cost of a decent funeral, and maybe a bit left over for a few one-off expenses, but no more) arise whatever the age of the surviving spouse, and whether the deceased contributor was drawing his or her pension or not.

8. Though I do not myself consider the retention of this condition particularly logical for the bereavement payment as now constituted, there is in my judgment no real doubt that each of the claimants here is caught by it. Each was himself well over pensionable age at the date his late wife died, and there can also be no doubt on the material before me that in each of the three cases she was drawing a pension, in part derived from her own national insurance contributions, which in terms of the legislation was a "Category A retirement pension".

9. As no doubt with many couples of this kind of age, each claimant's late wife had had some periods of paid employment during her life, but not enough to give her a full contribution record. The contributions and credits from these periods of employment were enough in each case to give her a partial Category A retirement pension in her own right (which means they were not less than about 25% of a full record, because otherwise she would not have qualified for a Category A pension at all), but not enough for it to exceed the level of the Category B married woman's pension she could otherwise have got anyway on her husband's contributions (equal to about 60% of the Category A rate for a single person). The Category A retirement pension of a married woman in those circumstances was given an automatic "top up" to bring its weekly amount up to the equivalent of that Category B pension. The special provision that did this was originally in section 53 of the 1992 Act and applied only to married women, but from 1995 that was replaced by the gender-neutral but otherwise exactly similar section 51A, applying to all married people with category A pension entitlements falling short of the category B amount they could alternatively get on the contributions of their spouse.

10. There is no doubt that as a matter of fact in each of these cases the claimant's wife had had her own Category A pension topped up under that special provision, and that was the pension she was receiving at the date of her death. Although such a pension can be viewed as in reality something of a composite or hybrid, derived partly from the contributions of each spouse (an impression reinforced by the use of a separate "ABL" administrative code in the records of the Pensions Service, which makes

it look different from either a Category A or a Category B pension), there can be no dispute that in terms of the legislation a pension increased under this provision to the Category B level is and remains a Category A retirement pension. Under what is now section 51A(2) it is that pension which the section expressly says must be increased to the level of the other: it does not say the Category A pension must be taken away and another one given instead.

11. The tribunal which decided the third case in favour of the claimant therefore plainly misdirected itself in holding that "there must be a difference between something which is categorised as A and that which is categorised as ABL", and making that the basis for its decision that the claimant met the conditions for an award of bereavement payment: see the decision notice and statement of reasons at pages 37 to 39 of file CG 1823/05. If one looks at the legislation that is simply not the way it works; and the Secretary of State's appeal in that case is entitled to succeed on that ground.

12. Mr A'Zami's first argument therefore adopted a different approach. Accepting, as was indisputable, that each claimant's late wife had been entitled to a Category A retirement pension at the time of her death, he submitted that the claimants were still not caught by the condition in section 36(1)(a) because she was not entitled to such a pension "under section 44 below".

13. The point made is that under section 44 of the 1992 Act the only entitlement to a Category A retirement pension expressly provided for is for a person satisfying the contribution conditions for a full Category A retirement pension, which require a complete or virtually complete contribution record; that is far more years of contribution than any of these ladies had: see section 44(1)(b), and the conditions themselves in paragraph 5 of Part I of Schedule 3 to that Act. To identify the entitlement of a person with only a partial contribution record, which gives them a pension for life but at a scaled down rate, one has to refer to a separate section, section 60, which allows regulations to provide for persons to be entitled to (among others) Category A retirement pensions in cases where the contribution conditions are only partly satisfied, and to the regulations made under that section which prescribe the reduced benefits for such cases: **Social Security (Widow's Benefit and Retirement Pensions) Regulations** 1979 SI No. 642. These provide for entitlement to an appropriately reduced basic Category A retirement pension so long as the insured person's contribution record is over a minimum threshold, approximately 25% of the equivalent of a full working life. Thus, says Mr A'Zami, the only people who have entitlement to a Category A retirement pension "under section 44" of the 1992 Act are those with a full contribution record whose

entitlement is defined by section 44 pure and simple. Anyone who has paid contributions but does not meet the condition specified in Schedule 3 of having paid them over the whole or virtually the whole of a full working life must derive their entitlement from elsewhere. Consequently, even though the entitlement may be only minimally reduced, if a person with such a Category A retirement pension dies, his or her spouse will not be shut out from receiving a bereavement payment on those same contributions by virtue of section 36.

14. Applying normal principles of statutory construction I have to reject this argument. It seems to me that Mr Buley must be right in saying that the effect of section 60 is not to provide a freestanding source of entitlement to a Category A pension of a different kind, but merely to relax and modify the conditions for an entitlement to a Category A retirement pension which, in its modified form, still depends on the main provision in section 44. It remains that section which defines when an insured contributor's entitlement starts, and for what period it continues, and what it actually consists of: a basic pension payable at a weekly rate, and an additional pension payable where the person concerned has sufficient earnings-related contribution factors. Although the Act contains no express definition of the expression "Category A retirement pension", if one wants to know what such a pension actually is, it is to section 44 one must look.

15. Mr A'Zami's argument in my judgment loads too much on the added words "under section 44 below" in the reference to a Category A retirement pension in section 36. The origin of those words can be traced back to a well-meaning attempt by the draftsman of the Social Security Act 1975, which was a consolidating Act, to introduce cross-references by way of helpful signposts in his legislation. Thus the retirement pension condition for a widow's allowance in section 24(1)(a) of that Act was expressed in the words "or he was then not entitled to a Category A retirement pension (section 28);", and this technique was used elsewhere in the same Act referring to the main provisions identifying Category A and Category B retirement pensions respectively: see, e.g., section 15(2) setting out the conditions for an invalidity pension. Those parenthetical additions in a consolidating Act could not however in my judgment have effected a substantive alteration in the actual conditions for benefit themselves. These must have remained the same as in the previously effective legislation, in the Social Security Act 1973: where the condition for widow's allowance in section 19(1)(a) was expressed simply in the terms "or he was then not entitled to a Category A retirement pension;"; or for that matter in the corresponding invalidity benefit conditions

in section 11, where the references are simply to "Category A retirement pension" and "Category B retirement pension" without any additions.

16. Reflecting the nature of the condition as it was then, and had been throughout its life back to section 17(1)(a) National Insurance Act 1946 ("if ... he was not entitled to a retirement pension"), the effect both before and after the 1975 consolidation was thus clearly in my judgment that if the deceased spouse was at his death entitled to any Category A retirement pension on his own contributions (which in practice could mean anything from 25% to the full weekly rate of such a pension), his wife if herself of pensionable age could not get a widow's allowance on his contributions.

17. Furthermore that remained the case with the benefit when it was turned from a weekly allowance into a single lump sum by section 36 **Social Security Act 1986.** That section made the substitution by simply reproducing the same conditions as before in the amended form of section 24 Social Security Act 1975, including the parenthetical reference to section 28 after the words "Category A retirement pension", with absolutely no indication in the 1986 Act itself or the Fowler White Paper which preceded it ("Reform of Social Security", Cmnd. 9691) of an intention, least of all on the part of the Government of the day, to make the condition suddenly more generous and begin paying the benefit out for the first time to the widows of Category A retirement pensioners with up to 99% contribution records, when this had never been done before.

18. The words "under section 44 below" on which Mr A'Zami relies appear for the first time in the 1992 Act, which was a further consolidation. Throughout that Act the draftsman expresses his cross-references to other sections or subsections in the form "section 29 below ... subsection (1) above ... section 28 above" and so forth (see, e.g. sections 28, 29 themselves); and the change from the 1975 consolidator's "(section 28)" to his 1992 successor's "section 44 below" in the conditions in what is now section 36 was in my judgment clearly nothing more than stylistic. Nor in my judgment can there be any more justification for construing the alterations made to that section in the 1999 Act to convert the widow's payment into the gender-neutral bereavement payment as having made some substantive alteration to the condition so as to create an entitlement that did not exist before, for the spouse of a Category A pensioner at anything up to 99% of the full rate to get a payment. On the contrary, in my judgment the plain intention of the 1999 alterations was to place the two sexes on a footing of equality from the appointed day, 9 April 2001, but otherwise leave the conditions for the benefit itself undisturbed.

19. Each of these claimants therefore fails in my judgment to meet the condition in section 36(1)(a) which excludes a surviving spouse over pensionable age from a bereavement payment on the contributions of his or her deceased wife or husband when the wife or husband was already a Category A retirement pensioner.

20. An alternative argument developed in the course of the hearing and in the subsequent written submissions was that although the top-up provision in the former section 53 had been the one actually applied in each case, and that had been the basis of the actual awards of pension made to each deceased wife (and not challenged by way of appeal, so the relevant determinations as to entitlement would have become conclusive under section 60 Social Security Administration Act 1992 or section 17 Social Security Act 1998), it should not have been so. Instead, the provisions of section 43 of the 1992 Act should have operated, to turn the Category A pension on her own contributions back into a Category B one on those of her husband again; and in each case that section should be treated as having done so, and as overriding the provisions already referred to. Then the result would be that the condition in section 36(1)(a) relating to a category A pension would not be infringed and a bereavement payment would be payable after all.

21. Section 43, which is another provision with a long history, deals with cases where a person is entitled to more than one retirement pension at the same time, and provides so far as material as follows:

> **"43. (1) A person shall not be entitled for the same period to more than one retirement pension under this part of this Act ...**
>
> **(2) [not material]**
>
> **(3) a person who, apart from subsection (1) above, would be entitled –**
>
> > **(a) to both a Category A retirement pension and one or more Category B retirement pensions under this Part for the same period, ...**
>
> **may from time to time give notice in writing to the Secretary of State specifying which of the pensions referred to in paragraph (a)... he wishes to receive.**
>
> **(4) If a person gives such a notice, the pension so specified shall be the one to which he is entitled in respect of any week commencing after the date of the notice.**
>
> **(5) If no such notice is given, the person shall be entitled to whichever of the pensions is from time to time the most favourable to him (whether it is the pension which he claimed or not)."**

22. Therefore, it is suggested, although the two pensions the deceased spouse could otherwise have got (the Category A on her own contributions topped-up under

section 51A/53, and the Category B on her husband's contributions in its own right) were identical in weekly amount, she could during her lifetime have given a notice to receive the same amount of weekly pension as a Category B rather than a Category A one. Rightly I think, Mr Buley on behalf of the Secretary of State did not dispute that *if* any of these ladies had in fact given such a notice, the condition in section 36(1)(a) would not have operated to prevent her husband getting a bereavement payment on her death, because she would not then have been getting a category A pension. Therefore, said Mr A'Zami, pressing his advantage, although none had in fact given such a notice to opt for category B, each should be treated under section 43(5) as if she had done so, and by virtue of section 43 that was the one she was entitled to. That provision must apply since of two benefits that were otherwise identical it was obviously more favourable to have the one that qualified your spouse for a lump sum death benefit, instead of the one that did not. Who, if given the choice for example by an insurance company, would not choose the pension policy carrying a death benefit as "more favourable", in preference to an otherwise identical one without? The words "most favourable to him" were easily wide enough to allow this construction and it provided a convenient route to avoiding a capricious anomaly, whereby entitlement to a lump sum bereavement payment was otherwise made to depend on the pure chance of whether the deceased spouse had happened to make a formal election that most people would regard for practical purposes as entirely unnecessary.

23. I confess to some sympathy with this line of argument but in my judgment it is an avenue that is blocked by the decision of the Court of Appeal in *Secretary of State for Work and Pensions v. Nelligan* [2004] 1 WLR 894, [2003] EWCA Civ. 555. That decision as I understand it holds that section 43, and in particular section 43(5), have a narrower effect than might appear at first sight, and operate (in conjunction with the rule in section 1 **Social Security Administration Act 1992** that there can be no entitlement to benefit without the making of a claim) to govern only the situation where there are two concurrent claims, actual or deemed, to retirement pension that have to be determined in relation to the same claimant at the same time. In those circumstances, section 43 "simply provides a mechanism for choosing between different pensions to which there is entitlement": per Scott Baker LJ, giving the judgment of the court, paragraphs 21 to 24.

24. Although I do myself have some difficulty with this when read against the express wording of section 43(5), which as it stands does appear to envisage an entitlement which may change from time to time to the more favourable of two benefits whether any claim has been made for that benefit or not, I am of course bound to give effect to it; and when taken in conjunction with the rule of finality of determinations on

entitlement in section 60 Social Security Administration Act 1992 and section 17 Social Security Act 1998 already referred to, it must in my judgment mean that once the entitlement of each of these ladies was determined to be a Category A retirement pension topped-up under section 51A/53, and that determination was implemented without being appealed (as it was in each case), that was an end of the matter so far as any possibility of alternative entitlement under section 43 was concerned; unless or until there was a *fresh* claim for Category B retirement pension instead, which there never was. I have therefore to reject the alternative line of argument as well.

25. Nor in my judgment are the answers to these questions altered by application of the **Human Rights Act 1998**. The conditions at issue here are all in the provisions of the primary legislation, so there is no question of my having jurisdiction to disregard or override it even if incompatible with any Convention right of the claimants. Mr A'Zami did not of course dispute that but pointed out (entirely correctly) that under section 3 I do have the jurisdiction, and for that matter the duty, to construe even primary legislation so far as it is possible to do so in a way that is compatible and not incompatible with the Convention provisions, even if that means departing from the more familiar canons of statutory construction that otherwise govern the meaning of a British statute.

26. Therefore, he said, I could and should use section 3 to reinterpret both section 36(1)(a), and if necessary section 43(5), so as to remove the anomaly between bereavement payment claimants whose spouses had or had not happened to opt for a Category B rather than a Category A retirement pension in such circumstances as these. That he said was otherwise a piece of discrimination between people in relevantly similar circumstances, contrary to Article 14 of the Convention taken in conjunction with Article 1 of the First Protocol (possessions) and/or Article 8 (respect for family life).

27. I am not for my part persuaded that it is possible within the confines of section 3 of the **Human Rights Act 1998** to impose the construction Mr A'Zami seeks on section 36(1) and/or section 43(5) that would save these claims to bereavement payment being blocked by the condition, even though as Mr A'Zami was right to point out I would only need to apply that construction to the extent necessary to remove the alleged discrimination and no further. (Thus it would only apply in the case of a Category A pension of 25% or more but less than 60%, topped-up to the latter (Category B) level, where the resultant pensions were identical and either might have been chosen.)

28. But however that may be, I was not persuaded that the existence of such an apparent anomaly amounted to an unlawful breach of the claimant's Convention rights under Article14 (in conjunction with either of the other two substantive Articles relied on) in any event. In a system as complicated and interlocking as the insured benefits scheme under the United Kingdom social security system it is inevitable that differences of treatment, even anomalies and incongruities, may arise at the boundaries between one set of facts and another. Such things are inherent in the system but it is clear on the authority of the House of Lords in *R (Carson) v. Secretary of State* [2005] UKHL 37, [2006] 1 AC 173 that the mere existence of such dividing lines, not raising questions of differential treatment between categories of human beings on the "suspect" grounds, such as sex, race, and so forth or otherwise offensive to accepted notions of the respect due to the individual, does not constitute unlawful discrimination in the human rights context.

29. The dividing lines drawn in a contributory insurance system between the benefits for those who are themselves just under or over pensionable age, those whose deceased partners happen to have just under or over the 25% level of contributions to qualify them for a Category A retirement pension (or for that matter those whose deceased partners had a 100% contribution record, or 99% or something less, on the alternative construction put forward), or those whose partners had or had not happened to elect under section 43 to forgo their own contributory pension benefit on their own contributions and receive a Category B pension on their spouse's contributions instead, are all in my judgment squarely within the area that is left to be determined by the national legislation; and the same applies to deciding whether or in what way what may now be viewed largely as an historical anomaly in section 36(1)(a) should be eliminated. If the effect of the condition is now "incongruous" as suggested in the tribunal chairman's statement of reasons at pages 42 to 43 of file CG 1614/05, that is a matter those concerned for claimants in this position must take up in some other forum than this.

30. For those reasons, I reject the arguments advanced on behalf of the claimants and hold that there is no entitlement to a bereavement payment on the contributions of the deceased spouse in such circumstances as these. Accordingly in each of the two cases CG 2054/04 and CG 1614/05 I dismiss the claimants' appeals, and in CG 1823/05 I allow the appeal by the Secretary of State and substitute the decision the tribunal ought to have given, namely to confirm the original departmental rejection of the claim.

(Signed)

P L Howell
Commissioner
18 May 2006