

Buller, I. J.
J.H.C.

PLH

Rhif ffeil/ Commissioner's File No: CG 3322/02

DEDDFAU NAWDD CYMDEITHASOL 1992-1998
SOCIAL SECURITY ACTS 1992-1998

APÈL YN ERBYN DYFARNIAD TRIBIWNLYS APÈL
YNGHYLCH CWESTIWN CYFREITHIOL
APPEAL FROM DECISION OF APPEAL TRIBUNAL
ON A QUESTION OF LAW

DYFARNIAD Y COMISIYNYDD NAWDD CYMDEITHASOL
DECISION OF THE SOCIAL SECURITY COMMISSIONER

<i>Cais am/ Claim for:</i>	Widow's Benefit
<i>Tribiwnlys/Appeal Tribunal:</i>	Llanelli
<i>Rhif achos/Tribunal Case Ref:</i>	U/03/196/2000/00328
<i>Dyddiad/Tribunal date:</i>	28 March 2002
<i>Rhesymau/Reasons issued:</i>	12 April 2002

[GWRANDAWIAD/ ORAL HEARING]

1. This claimant's appeal brought with the leave of the tribunal chairman is dismissed, as in my judgment there was no error of law in the decision of the Llanelli appeal tribunal, consisting of a chairman sitting alone on 28 March 2002, to confirm the rejection of a claim for widow's benefit in respect of a man to whom the claimant had never been married. The tribunal chairman was right to hold the claimant had no possibility of such an entitlement under the domestic law of the United Kingdom, nor did the **Human Rights Act 1998** assist her to establish one; and his concluding observation that to extend the meaning of "widow" to a person in the claimant's position is a leap too far for a judicial, as opposed to a legislative, authority seems to me entirely apposite.

2. I held an oral hearing of this appeal which had been directed by another Commissioner. Catherine Richards of Counsel, instructed by Morgans, solicitors, appeared for the claimant and Vaughan Lewis of the solicitor's office, Department for Work and Pensions, appeared for the Secretary of State.

3. The claimant, a lady now aged 57, claimed widow's benefit in respect of her long-term partner and father of her children who died on 4 February 2000. The date of her claim was 5 September 2000 and the decision rejecting it, on the ground that she was not his widow and could not therefore qualify for the benefit, was given on 7 September 2000. It was against that rejection that she appealed to the tribunal, by her

solicitor's letters dated 11 September and 14 October 2000 at pages 1D to 1F which were accepted as her notice of appeal for this purpose effective on the latter date.

4. There was no dispute about the relevant facts which were that the claimant and her partner had lived together as a couple for over 30 years until the time of his death, and had four children. The claimant's partner had been married to someone else at the start of the relationship but had been divorced about 25 years before his death. The claimant and he had discussed marriage but decided not to go through with any ceremony whether religious or civil, regarding themselves as committed to one another without it.

5. The claimant applied for widow's benefit under sections 36 to 38 **Social Security Contributions and Benefits Act 1992** on her late partner's contributions, the condition for entitlement to any such benefit under those provisions at the material time being that the claimant must be "a woman who has been widowed". The rejection of her claim was on the ground that she could not meet this condition as it had not been established and could not be presumed that she and her partner had ever been married, so that she could not be his widow. Her appeal to the tribunal was brought on the grounds that she could still qualify by a presumption of marriage through long cohabitation, or alternatively that by virtue of the European Convention on Human Rights entitlement to a widow's pension should be extended to longstanding unmarried partners.

6. In his succinct but extremely lucid statement of reasons for his decision issued to the parties on 12 April 2002, the tribunal chairman rejected both of these arguments. He held that the presumption of lawful marriage from long cohabitation, as analysed by the decision of the majority of the Court of Appeal in case **R(G) 1/00 Chief Adjudication Officer v Bath**, was rebutted by the compelling evidence in the present case that no marriage had ever been entered into and the parties had decided against it. He said

"The authorities show that the presumption is a strong one which can only be rebutted by clear, positive evidence. They do not indicate, however, that the presumption cannot be rebutted. Here [the claimant] frankly stated that no form of marriage ceremony ever took place. Indeed, her evidence went further and showed that the parties did consider getting formally married but decided not to do so. It seems to me that if such evidence cannot rebut the presumption, the presumption must be virtually irrebuttable. With regret, I am driven to conclude that it has been rebutted."

7. In my judgment, that was an entirely accurate assessment of the facts and the law as applicable to this case, and that aspect was not pursued by Ms Richards at the appeal hearing before me. Her challenge to the tribunal chairman's decision was based solely on his rejection of the alternative argument based on the **Human Rights Act 1998**

and Articles 8 and 14 of, and Article 1 of the first Protocol to the Convention. She submitted he had erred in holding that even accepting (as he did) her contention that the Human Rights Act required the widow's benefit provisions to be construed if at all possible in a way that included the claimant in the term "widow", it was simply impossible as a matter of statutory interpretation by a judicial body to do so.

8. Before me, Ms Richards accepted she could not argue at this level that a claim by an unmarried person for a widow's pension raised an issue about her "possessions" for the purposes of Article 1 Protocol 1, though reserving that point to argue at a higher level if the case should go further. Her submission therefore focused on the combined effect of Articles 8 and 14 of the Convention, on the basis that the right to respect for a person's family life was engaged by the provision for State widow's benefits, and that the difference in treatment for this purpose between persons having the status of a survivor of a legally recognised marriage, and those who were survivors of a long-term relationship comparable in all respects other than the marriage ceremony, amounted to discrimination contrary to Article 14. Consequently the claimant, the rejection of whose claim had been expressly confirmed and ratified by a departmental decision given on 23 October 2000 when it had been reconsidered (page 21), was entitled to have the references to a "widow" in sections 36-38 above construed in accordance with section 3 of the Human Rights Act so as to avoid such discrimination by giving her the benefit. The tribunal chairman had been wrong in holding that this could not be done by including her in the expression "widow": the concepts of a "common-law marriage" and a "common-law widow" were well understood and a perfectly valid use of ordinary language.

9. For the Secretary of State Mr Lewis disputed that the claimant was entitled to rely on the provisions of the Human Rights Act at all, since the only appeal before the tribunal was against the original decision rejecting her claim. That had been given on 7 September 2000, before the relevant provisions of that Act were brought into force and thus before the Convention became directly applicable under United Kingdom law. He relied on section 12(8) **Social Security Act 1998** under which an appeal tribunal in deciding an appeal against a departmental decision is precluded from taking into account any circumstances not obtaining at the time when that decision was made, and on a decision of my own in case **CDLA 1338/02** confirming that the combined effect of this and section 6 **Human Rights Act 1998** is that a person cannot rely on the Human Rights Act to found a claim for entitlement in an appeal against a department decision given before that Act came into force. In addition, it had now been held by the House of Lords in *Wilson v First County Trust (No. 2)* [2003] UKHL 40, [2003] 3 WLR 568, that the

requirement in section 3 to construe legislation in accordance with the Convention did not extend to altering people's pre-Act rights and obligations retrospectively.

10. Further and in any event, Mr Lewis submitted that even accepting the benefits sought by the claimant were within the ambit of Article 8 and arguably also Article 1 of the first Protocol, nevertheless the difference in treatment for pension purposes between persons in her position and widows who were the survivors of legally recognised marriages was not contrary to Article 14 of the Convention, as this was an objective difference which lay within the "margin of appreciation" for a State to maintain without amounting to discrimination. Finally even if that were not so, section 3 of the Human Rights Act did not permit the extended construction of "widow" sought by the claimant, since in United Kingdom law that expression can only be construed as meaning the survivor of a lawful marriage and sections 36-38 are primary legislation, so I could grant her no remedy: a declaration of incompatibility under section 4 is, of course, not available before me any more than it was before the tribunal.

11. In my judgment the submissions of Mr Lewis were right and this appeal cannot succeed, for at any rate three reasons. In the first place it is correct that the appeal, and the only appeal, before the tribunal was the claimant's appeal under section 12 of the **Social Security Act 1998** against the decision given on behalf of the Secretary of State rejecting her claim for widow's benefit, which decision was made on 7 September 2000, just under a month before the Human Rights Act came into force. That was the only decision against which the Social Security Act provided her with a right of appeal to a tribunal and it was, quite correctly, that decision against which the claimant through her solicitors had brought her appeal on 14 October 2000 by the letters referred to above.

12. The suggestion made by Ms Richards that the decision to refuse widow's benefit should be treated as effectively made after 2 October 2000 and so fully within the Human Rights Act by reason of the further departmental decision on 23 October 2000 to leave it unaltered was not in my judgment well founded. The department does in practice carry out an administrative process of "reconsideration" after an appeal is brought against a decision, in case there is something that can be put right at once without the need for the appeal to run its full course. However that is not required by the legislation and where, as here, it does not result in any alteration of the effective decision already given it has no effect on the right of appeal against it, except as Mr Lewis pointed out, to extend the time limit for pursuing the appeal in some circumstances under regulation 31 **Social Security (Decisions and Appeals) Regulations 1999** SI No. 991. It is only if the original decision is revised and replaced by something different under the

Secretary of State's powers in section 9 that the subject matter of the appeal under section 12(1) switches to the decision as revised: otherwise, the section provides no separate right of appeal against the reconsideration, and the appeal is against the decision as originally given.

13. It therefore follows that although it eventually came before the tribunal for effective hearing only on 28 March 2002, the appeal in this case remained solely an appeal against the decision of 7 September 2000 given before the Human Rights Act became directly applicable in United Kingdom law. For the reasons explained in case **CDLA 1338/02** the tribunal was therefore restricted by section 12(8)(b) cited above to the state of the facts and United Kingdom law in force when that decision was given, and in accordance with the decision of the House of Lords in *Wilson*, supra, was not required or empowered by section 3 to alter the interpretation of sections 36-38 so as to create an entitlement that did not then exist. The appeal against the tribunal decision, based as it now is entirely on a claimed infringement of the Human Rights Act in not awarding the claimant a widow's pension on her claim, thus fails at the first hurdle.

14. Even if that were not so, the arguments on the effect of the Human Rights Act itself in this context have already been given full consideration, and held to be incorrect, in the decision of the Commissioner on substantially similar facts in case **CG 1259/02**, on 12 June 2003. In that case, unlike the present one, there was no dispute that the claimant was entitled to avail herself of any possible argument under the Human Rights Act, since to her claim for widow's benefit in respect of her long-term partner, to whom she had never been married, was made and rejected after the Act had come into force. On her behalf, reliance was placed at a contested oral hearing before the Commissioner on all the human rights arguments that have been deployed before me, as well as points on European Union law which do not arise here and a cohabitation argument which has not been pursued before me.

15. As regards the human rights point, the Commissioner held first that as a matter of statutory construction the references in sections 36, 37 and 38 of the **Social Security Contributions and Benefits Act 1992** to "a woman who has been widowed" and to that woman's "late husband" required that there must have been a marriage, actual or presumed, between the woman claimant and her late partner, and that no other reading of those sections was possible. There had been no marriage, actual or presumed, between the claimant and her partner in that case, so there was no argument on Convention law which could succeed before the Commissioner: this was primary legislation which could not be construed in any other way and there is no power to make a declaration of incompatibility at this level under section 4. Secondly however the

Commissioner went on to consider the substance of the arguments under the Convention, and concluded that even accepting or assuming Article 1 of Protocol 1 and Article 8 of the Convention to be “engaged” by a widow’s pension claim, nevertheless this difference in treatment between married and unmarried couples could not be accepted as amounting to unlawful discrimination contrary to Article 14. There was direct authority against such a proposition in the relatively recent admissibility decision in *Shackell v. UK*, ECHR 27 April 2000, where the European Court of Human Rights had held inadmissible and “manifestly ill-founded” a claim by an unmarried woman to be entitled to widow’s benefit by virtue of the Article. Rejecting an argument that he should disregard or distinguish that decision the Commissioner said:

“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 marriage, 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.”

16. There is no material distinction so far as those two points are concerned between that case and the present one, and in my judgment the claimant’s arguments based on the Human Rights Act and the Convention must be rejected for the same reasons as there given by the Commissioner, with which I entirely agree. I would for my part desire to reserve for a future occasion the question of whether a claim for widow’s benefit in these circumstances gives rise to a question on a “possession” for the purposes of Article 1 Protocol 1, and also whether this claim for financial benefits gives rise to a question affecting the right to “respect for family life” under Article 8, in particular in view of the observations of Newman J in the recent decision in *Hopkins v. Secretary of State for Defence*, [2004] EWHC 299 (Admin), neither of which need I decide here.

17. For those reasons, despite Ms Richards’ well presented arguments on behalf of the claimant I must dismiss this appeal.

(Signed)

P L Howell
Commissioner
10 March 2004