Social rights, child rights, discrimination and devolution: untangling the web
Mark Simpson
School of Law, Ulster University
Journal of Social Welfare and Family Law

Abstract
This article examines judicial reviews of two areas of social security policy and practice in the UK – the household benefit cap and the restriction of bereavement benefits to bereaved spouses and civil partners. While each case ostensibly concerned discrimination against claimants, in practice much of the legal argument centred on the impact on claimants’ children. The judiciary is revealed to be deeply divided on the lawfulness of the acknowledged discrimination. The article considers what lessons can be drawn about the relative weight that ought to be afforded to claimants’ property rights, the best interests of affected children, anti-discrimination provisions and the state’s stated policy imperatives of cost control and administrative convenience. Insights are also sought into whether devolutionary differences can be identified between the approaches of courts in London and Belfast.

Introduction
Judicial deference to the legislature in its provision for citizens’ economic welfare is an internationally recognised phenomenon. Whereas civil and political rights are frequently – if questionably\(^1\) – portrayed as negative rights mainly requiring mere non-interference on the part of the state, it is suggested that only an elected assembly has the democratic legitimacy to raise and spend large sums of money in support of positive social rights.\(^2\) Despite its primary focus on civil and political rights, the European Convention on Human Rights is not wholly unconcerned with social rights. Importantly, from the point of view of this article, an individual’s existing social security rights are protected from arbitrary inference. However, contracting states enjoy a wide margin of appreciation in questions of social and economic policy,\(^3\) with national governments deemed to be “better placed than the international judge to decide what is ‘in the public interest’.” Consequently, the ECHR “imposes no restriction on the Contracting States’ freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme.”\(^4\)

The UK’s willingness to incorporate the ECHR into domestic law without extending the same treatment to its sister instrument the European Social Charter and its reluctance to include social rights in any national or regional Bill of Rights\(^5\) is reflective of the related view that, at the level of the nation state too, politicians rather than judges should have the final say on citizens’ social entitlements. Nonetheless, the ECHR – particularly the non-discrimination provision in article 14 – has provided a vehicle for bringing grievances about social policy before the courts. The ‘welfare reform’ policies of recent governments have prompted a number of judicial reviews, challenging

---

\(^{1}\) AM Rees, ‘The promise of social citizenship’ (1995) 23(4) Policy and Politics 313

\(^{2}\) J King, Judging social rights (Cambridge: Cambridge University Press, 2012)

\(^{3}\) Stec v United Kingdom (app 65731/01) [2006] 43 EHRR 1017 para 52

\(^{4}\) Nagy v Hungary (app 53080/13) judgment of 13 December 2016 para 80, 113

\(^{5}\) For discussion, see M Simpson, ‘The Agreement as missed opportunity for socio-economic rights in Northern Ireland: implications of full implementation for social security reform’ (2015) 66(2) Northern Ireland Legal Quarterly 105
mandatory unpaid work placements, the household benefit cap and the social sector size criteria in housing benefit. Longer-established aspects of the social security system have also been subject to judicial review. Ultimately, the ECtHR decision in Stec has proved to something of a double edged sword, bringing all social security and social assistance benefits within the scope of protocol 1, article 1 (P1-1) of the Convention, and hence under the scrutiny of both Strasbourg and the UK courts, yet confirming the wide margin of appreciation afforded to contracting states and the significant discretion afforded to the legislature. This approach comes into direct conflict with a second fundamental principle of the ECHR jurisprudence recognised in Stec, that “very weighty reasons” are required to justify discrimination against certain categories of individual in their enjoyment of the Convention rights.

This paper examines two recent judicial reviews of UK social security policy and practice on the basis of article 14 ECHR in conjunction with article 8 (the right to respect for private and family life) and/or P1-1. In SG, it was argued that the household benefit cap in Great Britain unlawfully discriminated on the basis of gender, while in McLaughlin the exclusion of unmarried cohabitants from the scope of bereavement benefits in Northern Ireland was claimed to represent unlawful discrimination on the basis of marital status. Although each case ostensibly concerned discrimination against the adults in receipt of, or wishing to claim, the relevant benefits, in practice much of the legal argument centred on the impact on their children. In SG the benefit cap was held to breach the UK’s obligations under article 3(1) of the Convention on the Rights of the Child, and although the Convention is not cited in McLaughlin, the spirit of article 3(1) – that the best interests of the child should be a primary consideration in decisions concerning his or her welfare – pervades the High Court judgment. Ultimately, neither the judgment in respect of article 3(1) in SG nor the finding at first instance in McLaughlin that the eligibility rules for widowed parent’s allowance are “inimical to the interests” of the children allowed the applicant to prevail (although an appeal to the Supreme Court is pending in the latter case). Other human rights provisions that at face value appear to be relevant to the cases – article 16 ESC (the right to family protection) or article 27 UNCRC (the child’s right to benefit from social security) – go unmentioned.

Judicial decisions in other fields of social policy show that deference has its limits. Delivering the leading judgment on whether the right to jointly adopt a child might legitimately be restricted to heterosexual married couples, Lord Hoffmann has stated: “Social policy is in principle a matter for the legislature... but that does not mean that Parliament is entitled to discriminate in any case which can be described as social policy.” However, it is apparent that where the limits to deference fall remains contested both judicially and academically – even in the two cases highlighted, the various judgments reveal deep judicial division as to whether the acknowledged discrimination could be justified. Notably, the state’s duty to treat the best interests of children as a primary consideration

7 R (on the application of SG and others) (previously JS and others) v Secretary of State for Work and Pensions [2015] UKSC 16 [2015] 1 WLR 1449
8 R (on the application of Daly) (previously MA) v Secretary of State for Work and Pensions; R (on the application of Rutherford) v Secretary of State for Work and Pensions [2016] UKSC 58
9 McLaughlin’s application for judicial review, Re [2016] NICA 53
10 Stec (app 65731/01) [2006] at [52]
11 It has been suggested in the Supreme Court that the legal considerations are identical regardless of whether article 8 or P1-1 is used in conjunction with article 14 – SG [2015] UKSC 16 at [99] (Lord Carnwath)
12 McLaughlin’s application for judicial review, Re [2016] NIQB 11 at [72] (Treacy J)
has been less readily accepted as an argument against discrimination in social security than in respect of adoption rights. The paper begins with an analysis of the diversity of judicial views on the justifiability of discrimination with an impact on children’s social rights in the cases highlighted. These are then contrasted with the harder line taken against discrimination and in favour of the best interests of the child in the area of adoption. Finally, the devolutionary angle is considered.

SG was decided in Great Britain, McLaughlin in Northern Ireland; although the social security systems for the two parts of the UK are in most respects similar, they are not identical, the human rights and equality frameworks differ slightly and there are separate legal systems. Given that McLaughlin’s application was successful at first instance, and that the Court of Appeal’s reversal of this decision will not be the last word on the matter, it is necessary to explore whether, and to what extent, recent, tentative political steps towards regionalisation of social security might be mirrored in the courts.

Child rights and discrimination in social security: McLaughlin and SG

Two notable cases in recent years have seen criteria for the award or calculation of social security benefits challenged on the basis of a discriminatory impact on particular groups of parents. In practice, judgments focused to a great extent on whether the discrimination inherent in policy should be held unlawful because of the impact on the affected children. Although SG was concerned with social security in Great Britain, McLaughlin with Northern Ireland’s parallel system, the similarities between the legislation in the two jurisdictions mean lessons can be drawn from each judgment for the UK as a whole.

SG challenged the lawfulness of regulations establishing the household benefit cap, which limited total income from working age income replacement benefits to £500 per week, (£350 for single claimants without dependents). It was argued that the impact of the cap fell disproportionately on lone parents and domestic violence victims, and that the policy consequently represented indirect discrimination contrary to article 14 ECHR in conjunction with article 8 and/or P1-1. The High Court, Court of Appeal and Supreme Court all held that the acknowledged disproportionate impact on women (specifically, lone parents) did not constitute unlawful discrimination. Nonetheless, the Supreme Court judgments reveal deep divisions between the UK’s most senior judges on the question of what constitute reasonable grounds for gender-based discrimination in social rights and on the relevance of children’s rights to the assessment. These divisions are at least in part based on conflicting views of the applicability of human rights instruments outside the ECHR – specifically the Convention on the Rights of the Child.

McLaughlin, following the death of her partner of 23 years, argued that restriction of bereavement benefits to surviving spouses and civil partners – and the exclusion of unmarried cohabitees – violated article 14 in conjunction with article 8 and/or P1-1. At first instance, it was held that discrimination against unmarried cohabitees could be justified in respect of bereavement payment, a one-off payment on the death of a spouse or civil partner with the requisite national insurance contributions record. However, such discrimination could not be justified in respect of widowed parent’s allowance, an ongoing payment to the spouse or civil partner for as long as he or she

---

14 Benefit Cap (Housing Benefit) Regulations 2012 no 2994; the level of the cap has since been further reduced by the Welfare Reform and Work Act 2016 c7 s8
15 SG [2015] UKSC 16
16 Social Security Contributions and Benefits (Northern Ireland) Act 1992 c7 ss36 and 39A
receives child benefit in respect of the couple’s children and does cohabit with another person.\textsuperscript{17} The latter part of the decision was subsequently overturned on appeal.\textsuperscript{18} Like the Supreme Court, the Northern Ireland judiciary is revealed to be divided as to the extent to which the best interests of the child should be determinative of the parent’s social rights.

The judgments of Lord Reed and Lady Hale in \textit{SG} are described as “almost textbook examples of different approaches to linking established human rights jurisprudence to social security provision.”\textsuperscript{19} In his first-instance judgment in \textit{McLaughlin}, Treacy J aligns himself with the dissenting Supreme Court justices in \textit{SG}.\textsuperscript{20} Lord Kerr finds the economic interests of a child to be “indissociable” from those of his or her lone parent to the extent that the discrimination against lone parents inherent in the benefit cap could not be justified.\textsuperscript{21} Lady Hale likewise finds the discrimination unlawful in part because the further reduction of lone parent claimants’ already-low income “cannot possibly be in the best interests of the children affected.”\textsuperscript{22} In similar terms, Treacy J finds for McLaughlin on the basis that the limitation of widowed parent’s allowance to surviving spouses or civil partners is “inimical to the interests” of the children of surviving cohabiters.\textsuperscript{23}

Hence it is the link between widowed parent’s allowance and the shared responsibility of the couple for their children that results in the different decisions in respect of the two benefits with which the case was concerned. A bereavement payment is made in recognition of the relationship between the two members of the couple. It is within the state’s margin of appreciation to discriminate between married couples and civil partners on one hand and unmarried cohabiters on the other in pursuit of the legitimate objective of promoting the institutions of marriage and civil partnership.\textsuperscript{24} Indeed, Treacy J suggests that article 8 requires the state to be cautious about extending the rights and responsibilities of marriage to couples who have elected not to ‘opt in’. On the other hand, the primary basis for widowed parent’s allowance is held not to be the nature of the couple’s relationship, but “parentage and co-raising of... children.”\textsuperscript{25} Since parental responsibilities are the same regardless of marital status, for the purposes of this benefit surviving cohabiters are analogous to surviving spouses or civil partners. Consequently, denial of the allowance on the basis of marital status, although in pursuit of the same legitimate objective (promotion of marriage and civil partnership), could not represent a proportionate means of pursuing that objective.

The single Court of Appeal judgment falls in line with the majority in \textit{SG}, notably the view of Lords Reed and Hughes that the wide margin of appreciation afforded to contracting states in matters of social and economic policy means that, although the benefit cap does discriminate against women, such discrimination would only contravene article 14 ECHR if “manifestly without reasonable foundation.”\textsuperscript{26}

\begin{thebibliography}{9}
\bibitem{McLaughlin} McLaughlin [2016] NIQB 11
\bibitem{McLaughlin's} McLaughlin’s [2016] NICA 53
\bibitem{Larkin} PM Larkin, ‘Delimiting the gulf between human rights jurisprudence and legislative austerity: the judicial entrenchment of “less eligibility”’ (2016) 23(1) Journal of Social Security Law 42, 61
\bibitem{SG} SG [2015] UKSC 16 at [266] (Lord Kerr)
\bibitem{SG2} SG [2015] UKSC 16 at [226] (Lady Hale)
\bibitem{McLaughlin} McLaughlin [2016] NIQB 11 at [72] (Treacy J)
\bibitem{Reference} Reference is made to UK and ECHR case law including \textit{ES v Secretary of State for Work and Pensions} [2010] UKUT 200; \textit{Yigit v Turkey} (app 3976/05) [2011] 53 EHRR 25
\bibitem{McLaughlin} McLaughlin [2016] NIQB 11 at [68] (Treacy J)
\bibitem{SG} SG [2015] UKSC 16 at [93] (Lord Reed)
\end{thebibliography}
ensuring fairness (as defined by Parliament) in the social security system are found to provide a reasonable foundation for the policy. Correspondingly, in McLaughlin it was found that “the promotion of marriage by way of limited benefits for surviving spouses could not be said to exceed the margin of appreciation afforded to the state”27 – a principle established by the ECtHR and extended to civil partnerships from 2004.28 Although the right to respect for family life under article 8 encompasses other family forms, this does not prohibit the conferment of particular economic advantages upon marriage and civil partnership that are not available to other family forms, including unmarried cohabitants.29 This approach was adopted by the High Court and Court of Appeal in upholding an occupational pension scheme’s requirement that whereas employees’ spouses and civil partners were automatically be entitled to a survivor’s pension, unmarried cohabitants had to be specifically nominated, although it is noteworthy that the Supreme Court found this discrimination was not justified.30

The legitimacy of special treatment for marriage was recognised at first instance in McLaughlin and underpinned the decision to uphold refusal of a bereavement payment. The crucial question where widowed parent’s allowance is concerned is for whose benefit it is paid. The Court of Appeal recognises that, unlike marital status, birth status is not a matter of choice and therefore falls within the ‘suspect’ grounds for discrimination to which the “very weighty reasons” test applies.31 For the High Court, the logic of this position leads inexorably to the conclusion that, as a child-related benefit, the allowance should be paid to the surviving parent whether she had been married or not. The Court of Appeal took a different position, finding – in common with Lord Carnwrath’s reluctant judgment in favour of DWP in SG – that although the benefit might be child related (in common with various of the capped benefits in SG), it is not paid to the child. The child therefore has no relevant possession to be protected by P1-1, consequently article 14 cannot be engaged on behalf of the child and there can be no question of unlawful discrimination against any child. The argument then returns to the question of whether it is permissible to discriminate against adult claimants for the purpose of promoting marriage or civil partnership, already answered in the affirmative.

In its eagerness to defer to the legislature, the Court of Appeal in McLaughlin performs some questionable semantic gymnastics. The judgment highlights:

“In relation to the... argument that the children were discriminated against by reason of their illegitimate status... the reason the surviving cohabitee was not eligible for the benefit was that she and her late partner were not married. The reason was not related to the status of the children.”32

As Lord Kerr highlights that the “indissociability” of a lone parent’s economic interests from those of her children means it is a nonsense to argue that the children are not victims of any reduction of the parent’s benefit payments, it surely an affront to common sense to suggest that the “illegitimate status” of a child is somehow unrelated to his or her parents’ marital status. A child whose parents

27 McLaughlin [2016] NICA 53 at [23] (Lord Weatherup)
28 Shackell v UK (app 45851/99) [2000] 27 April 2000; Burden v UK (app 13378/05) [2008] 47 EHRR 38
29 Yigit v Turkey (app 3976/05) [2011]; Van der Heijden v Netherlands (app 42857/05) [2013] 57 EHRR 13
31 Ingze v Austria (app 8695/79) [1988] 10 EHRR 394; Johnson v Secretary of State for the Home Department [2016] UKSC 56
were married will profit from growing up in a household with greater financial resources than a child whose circumstances are identical except for the fact that his or her parents were not married. Questions might also be asked about the distinction drawn by Lord Hughes between the “paramountcy” of the best interests of the child in “decisions about the upbringing of a child, or legislation designed for the protection/advancement of children” and the wider requirement that the best interests of the child be a, but not necessarily the, primary consideration in decisions relating to his or her welfare.\textsuperscript{33} Logically, it is implausible to argue that decisions having the effect of further reducing the already-low income of the household in which a child grows up do not impact on the upbringing of that child or that social security is not intimately connected to the advancement of children in low income households.

It is true that in the UK social security system, benefits are only paid to adult claimants. Nonetheless, some of these benefits are clearly designated as being paid for children. Child benefit is a compensatory benefit paid, until recently universally, in partial recognition of the extra costs a household incurs when caring for children. Child tax credits and the child element of universal credit are income replacement benefits that reflect the fact that a household with more members requires a greater income (again the link between family size, income needs and the calculation of the benefit is being eroded).\textsuperscript{34} This position is reinforced when the wider human rights landscape is taken into account. The preamble to UNCRC identifies “the family” as “the natural environment for the growth and well-being of... children” and calls for it to “be afforded the necessary protection and assistance so that it can fully assume its responsibilities” in this regard. Building on this, articles 26 and 27 respectively confer upon the child a “right to benefit from social security” and to have the state “take appropriate measures,” including “material assistance and support programmes,” to “assist parents” with the discharge of their primary responsibility for providing a “standard of living adequate for the child's physical, mental, spiritual, moral and social development.” Article 16 ESC similarly requires states to “promote the economic, legal and social protection of family life by such means as social and family benefits,” while article 17 confers a right to social and economic protection upon mothers and children specifically. The latter provision was argued in \textit{Defence for Children International}’s successful challenge of asylum policy in Belgium to require that children do not suffer “unfit living conditions” because of the choices of their parents;\textsuperscript{35} in a similar vein of logic it might be argued that material disadvantage to children should not flow from their parents’ choice not to get married.

While neither UNCRC nor ESC has been incorporated into UK law, they and other human rights instruments can be used as aids to interpretation of the ECHR rights.\textsuperscript{36} Article 3(1) UNCRC is recognised as “an integral part” of the proportionality test for interference with the right to respect for family life under article 8 ECHR;\textsuperscript{37} given the finding in SG that when considering whether discrimination in the enjoyment of a right to social security is justified, it makes no difference whether article 8 or P1-1 is relied upon,\textsuperscript{38} it seems safe to assume that any right acting as a relevant

\textsuperscript{33} SG [2015] UKSC 16 at 142, 149
\textsuperscript{34} From April 2017, eligibility for the child element of child tax credits or universal credit is largely restricted to two children per household – Welfare Reform and Work Act 2016 s13, 14; Welfare Reform and Work (Northern Ireland) Order 2016 no 999 (NI 1) art 10
\textsuperscript{35} \textit{Defence for Children International v Belgium} [16/2011] [2013] 56 EHRR SE20 at [26]
\textsuperscript{36} See, for example, \textit{Moohan v Lord Advocate} [2014] UKSC 67 [2015] AC 901
\textsuperscript{37} \textit{Zoumbas v Secretary of State for the Home Department} [2013] UKSC 74 [2013] 1 WLR 3690 at [10] (Lord Hodge)
\textsuperscript{38} SG [2015] UKSC 16 at [99] (Lord Carnw wrath)
This is an Accepted Manuscript of an article published by Taylor & Francis in the Journal of Social Welfare and Family Law. The version of record is: M Simpson, ‘Social rights, child rights, discrimination and devolution: untangling the web’ (2018) 40(1) JSWFL 3-20
<http://dx.doi.org/10.1080/09649069.2018.1414201>

Aid to interpretation to article 8 must play the same role in respect of P1-1. It does not seem far-fetched to suggest that article 27 UNCRC and article 16 ESC might play a similar role; indeed Lady Hale appears to argue that a decision on whether the best interests of the child are treated as a primary consideration should be in part informed by article 27.39 The Supreme Court finds in SG that the benefit cap is incompatible with article 3(1) UNCRC, but does not mention the ESC; neither judgment in McLaughlin mentions any human rights instrument other than the ECHR, but the statement in the High Court judgment that the current eligibility criteria for widowed parent’s allowance are “inimical to the interests of children” must be a strong indication that, had the question been asked of Treacy J, he would have found the criteria incompatible with article 3(1) UNCRC.

Previously, the courts have most readily resorted to instruments other than the ECHR as aids to interpretation when they confer a similar right, for example article 11 ECHR and article 22 of the International Covenant on Civil and Political Rights, both of which concern the right to join a trade union.40 Lord Kerr’s dissenting view in SG that article 3(1) UNCRC has direct effect goes much further; if his approach is adopted by colleagues on the bench, the legal position regarding retrogressive or discriminatory measures in relation to child related benefits may change dramatically.41 Even Lady Hale’s more conventional approach of affording article 3(1) a central role in the interpretation of rather different ECHR rights implies an enhanced role for the best interests of the child in UK law and erosion of deference to the legislature. The Supreme Court’s deliberations on McLaughlin represent an opportunity to test whether either of these perspectives has potential to capture the judicial imagination. For now, the view of the majority in SG and of the Court of Appeal in McLaughlin indicates that the human rights ‘revolution’ of 1998 still leaves social and economic rights relatively unprotected.42

Child rights, discrimination and adoption: evolving social norms

The conclusion of the court in McLaughlin that cohabitation is not analogous to marriage or civil partnership is justified in part by reference to previous observations of the European Commission on Human Rights on social attitudes to marriage and cohabitation. Weatherup LJ highlights:

“While the ECHR (sic) noted43 the increased social acceptance of stable personal relationships outside the traditional notion of marriage, it stated that marriage remained an institution which was widely accepted as conferring a particular status on those who entered into it and thus a surviving cohabitee and a widow were not comparable.”44

Parallels may be drawn with the legal challenges to the exclusion of homosexuals from the UK armed forces in the 1990s. Then, in an unusually emotion-laden judgment, Brown LJ stated that while the

---

39 SG [2015] UKSC 16 at [227] (Lady Hale)
43 In Lindsay v United Kingdom (app 11089/84) [1987] 9 EHRR CD555 at 559
44 McLaughlin [2016] NICA 53 at [22] (Weatherup LJ)
bar could not in 1996 be regarded as Wednesbury unreasonable, public opinion was moving rapidly towards greater social acceptance of same-sex relationships and against discrimination on the grounds of sexual orientation. Consequently, “the tide of history is against the ministry... It seems to me improbable... that the existing policy can survive for much longer.”45 As public attitudes in the UK and the policies of democratic countries around the world continued to evolve in favour of equality for homosexuals, their exclusion from the services would, probably quite soon, become irrational. The bar was lifted in 2000, and in 2016 statutory provisions making participation in homosexual acts grounds for discharge from the armed forces were repealed.46

Of course, there are differences. Marital status is a matter of choice in a way that sexual orientation is generally recognised not to be, and consequently is not usually treated as a ‘suspect’ ground for discrimination47 requiring “particularly convincing and weighty reasons” for its justification.48 Nonetheless, it is not unthinkable that in the future public opinion should evolve to the point at which the exclusion of unmarried survivors from widowed parents’ benefits is regarded as manifestly without reasonable foundation in the same way that Brown LJ envisaged the policy challenged in Smith would become indefensible. It is worth noting that in 2013 the Department for Health, Social Services and Public Safety changed its guidance on adoption in Northern Ireland to instruct relevant agencies to accept applications from unmarried couples;49 an Adoption and Children Bill intended to put this change on a statutory footing has been in development since at least 2014 but has yet to be laid before the Assembly.50 This development follows successful legal challenges to the previous bar on joint adoptions by unmarried or same-sex couples.51 The fact that these cases were successful is undoubtedly to some extent reflective of changing social attitudes to the suitability to child raising of family types not based on heterosexual marriage, itself influenced by the fact that 44% of all live births in Northern Ireland were to unmarried mothers in 2015, compared to two per cent in 1962.52 These cases bring the argument full circle in that, in contrast to Lord Carnwath’s judgment in SG, discrimination against adults on the basis of their marital status or sexual orientation was prohibited on the basis that it was contrary to the best interests of the child for whom adoptive parents were sought. The crucial difference is that in the case of adoption it is the Northern Ireland legislation that establishes “the welfare of the child as the most important consideration,”53 so that reliance is not only placed on the UNCRC.

Lord Hoffman felt that:

46 Armed Forces Act 2016 c21 s14
47 This perspective is not universally held – Kilkelly’s view that “discrimination on the grounds of marital status is particularly difficult to justify” is cited approvingly in P (a child), Re [2008] UKHL 38 [2008] HRLR 37 at [28] (Lord Hoffman)
48 EB v France (app 43546/02) [2008] 47 EHRR 21 at [91]; for discussion, see OM Arnor, ‘The differences that make a difference: recent developments on the discrimination grounds and the margin of appreciation under article 14 of the European Convention on Human Rights’ (2014) 14(4) Human Rights Law Review 647
49 E McDaniel in NIA Committee for Health, Social Services and Public Safety, Adoption and Children Bill deb 28 May 2014 p4
50 M O’Neill in NIA deb 18 Oct 2016 vol 116 no 6 p35
53 Adoption (Northern Ireland) Order 1987 no 2203 (NI 22) art 9
However, in the case of adoption, this did not extend to an entitlement to put in place a blanket exclusion of unmarried couples.

“The question therefore is whether... there is a rational basis for having any bright line rule. In my opinion, such a rule is quite irrational. In fact, it contradicts one of the fundamental principles stated in [the legislation], that the court is obliged to consider whether adoption ‘by particular ... persons’ will be in the best interest of the child.”

In particular, the adoption legislation requires a highly individualised examination of what is in the best interests of each child for whom adoptive parents are sought. It could not, therefore, be possible to justify a “bright line rule... on the basis of the needs of administrative convenience or legal certainty.” Conversely, administrative convenience is one of the chief arguments advanced by policymakers in favour of the restrictions on bereavement benefits challenged in McLaughlin and maintained by the new bereavement support payment. It was argued in the High Court that establishing which cohabiting relationships are sufficiently close and long term to merit the same treatment as marriage in the social security system would represent an excessive administrative burden. Although the argument is not addressed in the judgment, that the decision (at that stage) went against the Department indicates that it did not justify the discrimination, although the administrative impact is treated as a relevant consideration by the Court of Appeal. Similar evidence was also given to the Northern Ireland Assembly committee responsible for scrutiny of the Pensions Bill. Meanwhile, in its response to consultees’ calls for the extension of eligibility for bereavement benefits to unmarried cohabitees, DWP simply reiterates that this is not envisaged, noting that “the law and tax and benefit systems currently only recognise the inheritance rights and needs of bereaved people if they have a recognised marriage or civil partnership.” In response to criticism of this position from the Social Security Advisory Committee, it also points out that to do so would cost (in Great Britain) £300 million over the first four years following the change (although a parliamentary committee found it would cost only £22 million per year to extend eligibility to cohabitees with dependent children only). The implicit argument mirrors that in SG that safeguarding the public finances represents a legitimate objective capable of justifying the resulting discrimination. The Court of Appeal judgment states that the true reason for persistence with the restriction to spouses and civil partners is the “character of contributions to the national insurance

54 P [2008] UKHL 38 at [13] (Lord Hoffman)
55 P [2008] UKHL 38 at [16] (Lord Hoffman)
56 P [2008] UKHL 38 at [16] (Lord Hoffman)
57 Pensions Act 2014 c Pensions Act (Northern Ireland) 2015 c5 part 5
58 McLaughlin [2016] NIQB 11 at [31] (Treacy J)
59 McLaughlin [2016] NICA 53 at [65] (Weatherup LJ)
system and the practical issues of processing a multitude of individual cohabitees,” although the basis on which Weatherup LJ finds this to be the true explanation is not stated.

The benefit cap is just one example of the widening gulf between individualised decision making on adoption applications and increasingly depersonalised calculation of social security entitlements. The “problem of rent” was one of three “special problems” identified by Beveridge as challenges for his proposed system of social insurance. His vision for flat-rate subsistence benefits was ill-equipped to accommodate the variability of housing costs across the UK. Consequently, housing benefit was designed to adjust claimants’ incomes in accordance with their actual rent, with costs controlled by a variable cap based on typical rents in the area in which the claimant actually lives. With the current freezing of the local housing allowance steadily decreasing the range of properties whose rent will be covered in full by housing benefit and the household benefit cap (further reduced since the SG judgment) primarily affecting larger families in high rent areas, the link between eligibility and housing costs is being eroded. The link between child related benefits and need is also weakened, not only by the benefit cap but by the limitation of the child element of child tax credits and universal credit to two children per household. So whereas adoption guidelines strongly emphasise the best interests of the individual child, social security benefits (other than disability benefits, which are outside the scope of the cap) are moving in the direction of a maximum allowance per household regardless of living costs.

The effect of evolving social attitudes to sexual morality and the acceptance of particular forms of relationship has been felt to some degree in decisions on adoption. Social change has been slower to influence unmarried cohabitees’ social security entitlements on bereavement – although the recent judgment that an occupational pension scheme could not exclude “financially dependent” or “interdependent” cohabitees from survivors’ rights when these were automatically conferred upon spouses and civil partners may represent a step in this direction. Ironically, there is less hesitation about reducing entitlements, including withdrawal of widowed parent’s allowance, on grounds of cohabitation. The determination of the judicial majority across SG and McLaughlin to deny that the best interests of the child are relevant to discrimination in access to social security, when a different approach is taken in respect of adoption, can in part be explained by the difference between reliance on UNCRC alone in one case and the inclusion of the ‘best interests’ requirement in domestic law in the other. However, the state might also be expected to welcome the expansion of the pool of prospective adoptive parents given the £2.5 billion spent annually on children’s residential care and fostering services in England alone, whereas the prospect of increased expenditure acts as an obstacle to liberalisation of bereavement benefit eligibility.

Children’s social rights and devolution: parity, mitigation and one-upmanship

The all but unspoken undercurrent to the McLaughlin judicial review is the question of whether the UK should be served by essentially a common social security system, or whether in the era of devolution a diversity of approaches at regional level is desirable, perhaps even (in some

---

64 McLaughlin [2016] NICA 53 at [64] (Weatherup LJ)
65 W Beveridge, Social insurance and allied services (Cmd 6404, London: HMSO, 1942) para 197
66 Welfare Reform and Work Act 2016 c7 s11
67 Welfare Reform and Work Act 2016 c7 s8
68 Welfare Reform and Work Act 2016 c7 s14
69 Brewster [2017] UKSC 8
circumstances) a legal requirement. Prior to 2012, social security was one of the few areas of social policy in which a single, UK-wide approach had scarcely been eroded by devolution, but the tortuous process by which these reforms have been extended to Northern Ireland and Scotland’s new devolved powers indicate that this can no longer been taken for granted.\textsuperscript{70} Potential legal drivers of divergence exist within the devolution settlement, not least the deeper entrenchment of the ECHR in the devolved constitutions. Scotland’s proposed revival of statutory targets for child poverty reduction and its vision of a social security system underpinned by values of dignity and respect stand on the fine line between political and legal drivers of a distinctive approach.\textsuperscript{71} A final consideration must be the likely impact of the proposed repeal of the Human Rights Act 1998 in favour of one or more domestic Bills of Rights.

The Court of Appeal observes that policy on bereavement benefits in Northern Ireland – as in most areas of social security – has developed in tandem with that in Great Britain, in keeping with the parity principle.\textsuperscript{72} Yet the parity arrangement is absent from the legal argument. This seems a strange omission: the UK government’s assessment of the likely cost of extending benefits to cohabitees does form part of the argument for not doing so. Social security provision in Northern Ireland is heavily subsidised by the UK Exchequer, to the extent necessary to provide the same rates of benefit subject to the same conditions as prevail in Great Britain.\textsuperscript{73} Under normal circumstances, if Northern Ireland opts for a more expensive approach to social security than the UK government, it is obliged to make up the difference from devolved resources. The affordability of doing so was at the heart of the debate as to the desirable and feasible extent of divergence from the Welfare Reform Act 2012,\textsuperscript{74} about which the regional political parties were relatively united in their concerns. If the impact on public finances is recognised to be a legitimate consideration when determining the legality of discrimination in social rights, then the likely effect of such a change in Northern Ireland on the Northern Ireland budget is arguably more relevant than that on UK expenditure. The status of the ECHR in the devolved regions might conceivably become central to this discussion.

The nature of the devolution settlement means the Supreme Court decision in \textit{McLaughlin} will be of crucial importance for the future of bereavement benefits in Northern Ireland. When dealing with UK legislation, a court must interpret a statute so as to be compatible with the ECHR if at all possible; if a compatible interpretation is \textit{impossible}, then a declaration of incompatibility is made. Parliament may act to remedy the incompatibility – a special, fast-track procedure is provided – but is within its rights not to do so.\textsuperscript{75} Although widowed parent’s allowance in Northern Ireland is based on separate legislation to the equivalent, identical benefit in Great Britain,\textsuperscript{76} this legislation was passed at Westminster during the long suspension of legislative devolution between 1974 and 1999. However, this benefit is now being phased out and replaced with bereavement support payment, which

\textsuperscript{70} M Simpson, ‘The social union after the coalition: devolution, divergence and convergence’ (2017) 46(2) Journal of Social Policy 251
\textsuperscript{71} M Simpson, G McKeever and AM Gray, \textit{Social security systems based on dignity and respect} (Glasgow: Equality and Human Rights Commission, 2017 – forthcoming)
\textsuperscript{74} B Hale, ‘What’s the point of human rights?’ (Warwick law lecture, Warwick, 2013) <https://www.supremecourt.uk/docs/speech-131128.pdf>
\textsuperscript{75} Social Security Contributions and Benefits Act 1992 c4 ss36 and 39A
maintains the restriction of eligibility to surviving spouses and civil partners. Again, legislative provision for the benefit takes the same form on either side of the North Channel.\textsuperscript{77} Crucially, this time the legislation for Northern Ireland has been passed by the Assembly, which lacks competence to legislate contrary to the ECHR.\textsuperscript{78} A finding of incompatibility in respect of the relevant provisions in the 2015 Act, then, would not result in a mere declaration, but in the invalidation of the offending measures.\textsuperscript{79} While McLaughlin’s judicial review is concerned with the 1992 Act, a finding of incompatibility in respect of the marriage restriction here would make a similar challenge to the application of the same rule to the new benefit both inevitable and extremely likely to succeed. This would leave the Northern Ireland Assembly with no choice but to amend the 2015 Act so that surviving cohabitees with charge of the couple’s children would be eligible for benefit, and parity would be eroded regardless of the wishes of the two Executives.

Arguably, such a development would be in keeping with political efforts in Northern Ireland that, without explicit reference to article 27 UNCRC, are aimed at securing children’s right to benefit from social security. At the committee stage of the Pensions Bill, concern was expressed at the likely “impact on the children” of cohabiting couples if the marriage restriction were retained. The Department was asked to investigate how “verification of [cohabiting] relationships could be established with a view to including unmarried cohabiting partners through the Bereavement Support Payment.”\textsuperscript{80} More recently, following the belated extension of social security reforms legislated for in Great Britain in 2012,\textsuperscript{81} provision has been made to protect children from loss of income as a result of the household benefit cap – the very measure at the centre of SG’s complaint. Although the cap is now technically in force in Northern Ireland, regulations provide for its disapplication in respect of claimants with dependent children until March 2020.\textsuperscript{82} Due to Northern Ireland’s relatively low housing costs, this effectively means that introduction of the cap is deferred in the region: at its original level of £26,000 per year it was projected to affect only around 400 very large families (average 5.2 children) and even at £20,000 per year affected claimants are projected to have an average of 3.8 children.\textsuperscript{83} Mitigation of the impact of welfare reform on children sits alongside measures to compensate (again temporarily) people with disabilities for financial loss as an example of the ability of Northern Ireland’s politically disunited Executive to agree protections for the “unambiguously deserving poor.”\textsuperscript{84}

There would be a difference between the welfare reform mitigations, which are political choices, and any extension of eligibility for bereavement benefits as the result of a judicial decision. It is undisputed that the cost of political decisions to increase social security expenditure is borne by the Northern Ireland Executive; £585 million from the regional budget has been earmarked for the four years of the mitigation programme. If the Supreme Court were to reinstate the first-instance

\begin{itemize}
\item \textsuperscript{77} Pensions Act (Northern Ireland) 2015 c5 part 5; Pensions Act 2014 c19 part 5
\item \textsuperscript{78} Northern Ireland Act 1998 c47 s6
\item \textsuperscript{79} For an example of a similar outcome in respect of Scottish devolved legislation, see Salvesen v Riddell [2013] UKSC 22 [2013] HRLR 23
\item \textsuperscript{80} Committee for Social Development, \textit{Report on the Pensions Bill (NIA Bill 42/11-16)} (NIA 229/11-16, Belfast: NI Assembly, 2014) 2
\item \textsuperscript{81} Welfare Reform (Northern Ireland) Order 2015 no 2006 (NI 1)
\item \textsuperscript{82} Welfare Supplementary Payments Regulations (Northern Ireland) 2016 no 178 reg 4
\item \textsuperscript{83} Department for Social Development, \textit{Northern Ireland benefit cap information booklet} (Belfast: DSD, 2016)
\end{itemize}
decision in McLaughlin that the eligibility criteria for widowed parent’s allowance are incompatible with the ECHR, this would be a strong indication that the Assembly must amend the criteria for bereavement support payment. The impetus from this amendment would not come from a political decision at devolved level, but from Parliament’s decision to restrict the Assembly’s legislative competence to ECHR-compatible measures. It might be argued that such a breach of parity, outside the control of the Assembly and Executive, ought to be funded by the UK Exchequer.

Scotland has recently acquired some devolved social security competences. These powers are more limited than Northern Ireland’s, including neither pension-related benefits nor the main income replacement benefits. However, the devolution legislation includes a similar provision on legislative competence that prevents the Scottish Parliament acting contrary to the ECHR, compliance with which will therefore become a key consideration when developing proposals in areas that do come under devolved control (chiefly disability-related benefits). Politically, the Scottish government has indicated that it intends to use its new competences to develop a devolved social security system underpinned by the principles of dignity and respect. Dignity is a fundamental concept in human rights law, which McCrudden argues requires compliance with articles 3 and 8 ECHR, but which can be argued to encompass additional rights – notably the right to social security in article 9 ICESCR. Although it is not yet clear how the Scottish government will ensure its emerging social security system aligns with these principles, beyond a general statement that they will be enshrined in legislation and/or a ‘claimant’s charter’, the consultation raises the possibility that non-ECHR rights will be afforded higher priority than in UK government policy decisions on social security. If article 9 ICESCR does become part of the process of assessing the compliance of social security legislation with the right to dignity, then non-discrimination in access and the adequacy of benefits for child development will be among factors to be taken into account – the latter point reinforced by current proposals to reinstate the former statutory targets for child poverty reduction in Scotland.

As Northern Ireland has made provision for the mitigation of the impact of welfare reform on children, these may be factors that influence Scotland’s use of its power to top up reserved benefits. The limitation of the child element of universal credit to two children per household cannot but be interpreted as directly discriminatory on the basis of family size (arguably contrary to the non-exhaustive prohibition of discrimination in article 2(2) ICESCR), will undermine the ability of larger low-income families to meet their children’s needs and will drive an increase in child

---

85 Scotland Act 2016 c11 part 3
86 Scotland Act 1998 c46 s29
89 M Simpson, ‘“Designed to reduce people... to complete destitution”: human dignity in the active welfare state’ (2005) 1 European Human Rights Law Review 66
93 Child Poverty (Scotland) SP Bill (2016–17) [6] – the Bill reinstates the targets contained in the Child Poverty Act 2010 c9 ss2-6, but defers the deadline for their achievement by a decade
94 Scotland Act 2016 c11 s24
Meeting the self-imposed objectives of ensuring dignity in the social security system and reducing child poverty to a very low level may well require that consideration be given to topping up large families’ universal credit payments.

A final consideration here must be the future means of human rights protection in the UK. At first glance, the proposed repeal of the Human Rights Act 1998 gives little cause to predict any enhancement of the status of social rights. Although the Conservative party endorses “the commitments made when we signed the Convention,”96 its rejection of the Strasbourg court’s subsequent “mission creep”97 could well imply retreat from the relatively recent inclusion of non-contributory benefits within the scope of P1.98 If the rights protected by a UK Bill did come to differ qualitatively from those protected by the ECHR, this would mean the devolved legislatures, which are bound to the Convention by their constitutional legislation rather than the Human Rights Act, would be required to meet different human rights standards to the UK government. Some authors suggest repeal of the 1998 Act could have unintended consequences that actually serve to enhance the protection of human rights, including non-ECHR rights. Gearty argues that removal of the express preservation of parliamentary supremacy in the Act99 “might well produce that judicial supremacism about which the [former] Prime Minister complains,” with judges no longer “beholden to Parliament” by statute suddenly emboldened to treat protection of human rights as a fundamental element of the rule of law.100 Laverack believes replacement of the 1998 Act with a UK Bill of Rights containing substantially similar provisions to the ECHR would, in fact, have little effect on the standing of Strasbourg jurisprudence in the UK. British courts would continue to interpret rights – albeit now conferred by domestic rather than international law – in light of similar rights conferred by the ECHR and other instruments. The judiciary would remain free, if it wished, to further develop Lord Kerr’s attack on dualism on the basis that even the provisions of non-incorporated treaties, once ratified by the state, are capable of forming the basis of a “‘legitimate expectation’... that the state complies with its international human rights obligations” that can be enforced by the courts.101 This outcome, of course, is by no means certain: the majority in SG are clear that, for the time being, “international treaties do not give rise to enforceable rights unless they are incorporated by primary legislation.”102

98 Stec (app 65731/01) [2006]; for discussion, see N Harris, ‘European Court of Human Rights confirms that both contributory and non-contributory benefits are covered by Article 1 of Protocol 1’ (2006) 13(1) Journal of Social Security Law 3; I Leijten, ‘From Stec to Valkov: possessions and margins in the social security case law of the European Court of Human Rights’ (2013) 13 European Human Rights Law Review 309
99 Human Rights Act 1998 c42 s4(6)
Conclusion

The human rights landscape is in a state of flux. The political debate on the future of the Human Rights Act 1998 is the headline-grabber, but the continuing political and judicial debate regarding the relative roles of the judiciary and the legislature in determining the social rights of citizenship should not be ignored. The judgments in SG and McLaughlin serve more to muddy the waters than to bring clarity, and the place of social security in a changing devolution settlement is a further complicating factor. The majority of the Supreme Court in SG and the High Court in McLaughlin find discrimination against the applicants in their social security rights to be contrary to the best interests of their children. Yet the Supreme Court majority in SG and the Court of Appeal in McLaughlin find that it does not follow that the discrimination is contrary to article 14 ECHR or, by extension, to UK law. The best interests of the child, while in principle a primary consideration in any decision with an impact on child welfare, are revealed to be of lesser importance in social security than in adoption. Lord Kerr’s vision of direct applicability for the UNCRC points to one means of increasing the priority afforded to the best interests of the child in social security, Lady Hale’s approach of interpreting the ECHR rights with reference to article 3(1) UNCRC another, with the latter model a less radical departure from dualist principles. If the best interests of the child were to become a more important consideration, then changing social attitudes towards the suitability of family forms other than heterosexual marriage to childrearing could begin have an impact on social security law and practice in the way that they have on adoption practice. Saving money, promoting employment, a highly ideological view of ‘fairness’ or administrative convenience might be less readily accepted as providing reasonable foundation for discrimination against lone parents or surviving cohabitants when it has a direct impact on the living conditions of their children.

Moves toward increased regional autonomy in social security, the enhanced constitutional status of the ECHR in the devolved legislatures and the possible retreat from the Human Rights Act at UK level add a further dimension to the debate. If the Supreme Court reinstates the High Court judgment in McLaughlin, its options will be to read the legislation establishing widowed parent’s allowance in Northern Ireland so as to be compatible with the ECHR or, if this is impossible, issue a declaration of incompatibility. If the latter course of action is taken, then the Assembly’s competence to legislate for bereavement support payment in the form that it did in 2015 will be, to say the least, in doubt. The constitutional status of the ECHR would, in all probability, require amendment of the legislation so as to protect the interests of the children of unmarried couples, a legal outcome in keeping with the previous political decision to (temporarily) protect children from the household benefit cap. Lack of competence to legislate contrary to the ECHR will also have to be taken into account by the Scottish Parliament in the exercise of its new social security competences. In both regions, exactly what the ECHR requires will be determined in part by the extent to which other human rights instruments can be used as aids to interpretation. Any rollback of the extent to which social rights are protected in a future transition from the Human Rights Act 1998 to a UK Bill of Rights would further increase the possibility of judicially-driven divergence in social security, and rhetoric from the Scottish government suggests it aims to afford higher political priority to social rights, without yet specifying a legal vehicle for doing so. However, some authors argue that, whatever the political intention, the legal outcome of repeal need not be to reduce human rights protection.

The threads, then, remain tangled. Lord Kerr and Lady Hale offer alternative routes to enhancing protection of children’s social rights in the UK that may or may not win the endorsement of colleagues. Other social rights instruments remain secondary to the ECHR, but the Strasbourg’s approach to interpretation means the door to their protection is always ajar. The implications of
possible repeal of the Human Rights Act 1998 remain unknown; it is by no means certain that doing so will shut the door to social rights protection at UK level, but if this is the effect then the potential for judicially- as well as politically-driven divergence can only grow.