[See DMG Memo Vol 10/91]

BEREAVEMENT SUPPORT PAYMENT – SATISFACTION OF THE CONTRIBUTION CONDITIONS – SUPREME COURT DECISION R (ON THE APPLICATION OF JWANCZUK) V SECRETARY OF STATE FOR WORK AND PENSIONS

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INTRODUCTION

1. The purpose of this memo is to inform decision makers of the judgment of the Supreme Court[1], delivered on 20th November 2025, in which the Court considered

   1. how the appellate courts in each of the United Kingdom jurisdictions should treat one another's previous decisions on the effect of similar or materially identical legislation and

   2. whether the contribution condition provisions in sections 30 and 31 of the Pensions Act 2014 constituted unlawful discrimination in breach of Article

14 read with Article 1 of the First Protocol to the European Convention on Human Rights.

1 https://supremecourt.uk/uploads/uksc_2023_0152_judgment_6ae4ed1945.pdf

BACKGROUND

2. The respondent, Mr Jwanczuk, applied for Bereavement Support Payment following the death of his wife, Suzanne who had a progressive degenerative condition that meant she was severely disabled. During her working life, Mrs Jwanczuk was never in employment and never paid any relevant national insurance contributions. Mr Jwanczuk's claim for Bereavement Support Payment was refused because the contribution condition was not met.

3. The refusal was maintained in a reconsideration decision which Mr Jwanczuk challenged by judicial review. He claimed that his wife was unable to work due to her disability, and that applying the contribution condition in these circumstances constituted unlawful discrimination in breach of Article 14 read with Article 1 of the First Protocol to the European Convention on Human Rights.

4. Mr Jwanczuk relied on the decision in O'Donnell v Department for Communities [2020] NICA 36[1] where the Northern Ireland Court of Appeal held that the contribution condition in the Northern Ireland pensions legislation unlawfully discriminated against the surviving spouse or partner of a deceased person who had been unable to work due to their disability. The relevant Northern Ireland legislative provisions were materially identical to those in sections 30 and 31 of the Pensions Act 2014[2].

1 https://www.judiciaryni.uk/judicial-decisions/2020-nica-36

2 https://www.legislation.gov.uk/ukpga/2014/19/contents

5. Mr Jwanczuk's claim succeeded before the High Court and Court of Appeal of England and Wales. Both courts considered that they should follow the decision in O'Donnell unless it was clearly wrong or there was a sufficiently compelling reason to depart from it.

SUPREME COURT DECISION

Issue 1:

6. The Supreme Court held that decisions of any of the appellate courts of England & Wales, Scotland and Northern Ireland should be treated as persuasive authority when a similar legal point arises in one of the other United Kingdom jurisdictions. The appellate courts should treat one another's decisions with great respect, since it is undesirable that there should be conflicting decisions on the construction of provisions which are intended to apply in the same way in more than one United Kingdom jurisdiction. However, the appellate courts are not obliged to follow decisions they consider to be wrong.

7. The appellate courts are not required to identify a compelling reason or exceptional circumstances to justify a departure from the previous decision of another United Kingdom appellate court. Rather, they should explain clearly why they consider the previous decision to be incorrect, give what they consider to be the correct decision, and grant permission to appeal to the Supreme Court so that the difference of views can be resolved without undue delay.

8. In Mr Jwanczuk's case, the Court of Appeal of England & Wales should have departed from the decision in O'Donnell if it considered it to be wrong. Indeed, there were good reasons for the Court of Appeal to do this. Firstly, the Secretary of State chose not to amend the Bereavement Support Policy for England & Wales in light of the decision in O'Donnell, indicating that consistency was not regarded as a matter of overriding practical importance. Secondly, the Supreme Court's decision in R (on the application of SC) v Secretary of State for Work and Pensions [2021] UKSC 26[1] was available to the Court of Appeal of England & Wales, whereas it had not yet been handed down at the time O'Donnell was decided. Thirdly, declining to follow O'Donnell would not have caused any serious difficulties; in fact, it would have maintained the status quo.

1 https://www.supremecourt.uk/cases/uksc-2019-0135

Issue 2:

9. Article 14 requires the Convention rights to be secured without unlawful discrimination on any ground "such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

10. The Supreme Court concluded that Mr Jwanczuk had "other status" for the following reasons:

- disability is recognised as a relevant "other status"

- disability was a factor in the reason Mr Jwanczuk, who was associated with Mrs Jwanczuk through his marriage to her, was refused Bereavement Support Payment and

- the Supreme Court rejected the Secretary of State's argument that Mr Jwanczuk's status is too susceptible to change to qualify under article 14. The Court was confident that the claimed status would be recognised by the European court and that there was no principled or constitutional objection to it.

11. In being refused Bereavement Support Payment, Mr Jwanczuk was treated in the same way as any other widower with a deceased spouse who made no national insurance contributions. He alleges discrimination because of the failure to treat his situation differently on account of his deceased wife's disability. A breach of Article 14 can arise where, without sufficient justification, there is a failure to treat differently those persons whose situations are materially different.

12. The Supreme Court concluded that the failure to make an exception to the contribution condition can be justified. It held that the contribution condition has three aims, namely

(i) to encourage people to work to make the contributions needed to obtain contributory benefits such as Bereavement Support Payment, reducing the stigma of claiming benefits;

(ii) to simplify the benefit system to reduce administrative cost and complexity; and

(iii) to ensure greater certainty so that individuals understand what they are entitled to and are able to plan for their financial future.

All three of these aims are legitimate and rationally connected to the imposition of the contribution condition, which is justified and strikes a fair balance between the rights of individuals affected by the measure and the interests of the community as a whole.

13. The Court stated that Parliament should be given a wide margin of appreciation in cases, like this one, which concern policy choices about the allocation of "scarce public resources". Parliament can be taken to have chosen not to enact an exception for those whose incapacity to work means that they will be unable to meet the contribution condition. This decision was an exercise of political judgement, and the courts should be very slow to substitute their own view for that of Parliament.

14. The Court held that the interpretive obligation in section 3 of the Human Rights Act 1998 does not permit the courts to read an exception to the contribution condition into the Pensions Act 2014 and accordingly, the Court allowed the Secretary of State's appeal finding that Mr Jwanczuk was not entitled to Bereavement Support Payment because the contribution condition was not met. The Supreme Court stated that appellate courts must respect the boundaries between legality and the political process.

IMPACT ON DECISION MAKING

15. As a court of higher authority whose rulings apply throughout the United Kingdom, the Supreme Court's judgment takes precedence over the Northern Ireland Court of Appeal decision in O'Donnell.

16. Therefore, the guidance in DMG Memo Vol 10/77 ceases to apply from 20th November 2025. From this date the exception to the contribution condition where the deceased was unable to work throughout their life due to disability should no longer be considered. All claims to Bereavement Support Payment from this cohort of claimants will be subject to the conditions of entitlement as set out in the legislation[1]. Decision makers should determine such claims as they would have done prior to the O'Donnell judgment.

1 Pensions Act (NI) 15, sec 29(1)(d)

17. Any mandatory reconsiderations and appeals falling to be decided on or after 20th November 2025 will also be subject to the Supreme Court judgment. These should be considered without applying the exception to the contribution condition where the deceased was unable to work throughout their life due to disability. This is because the Supreme Court found that the conclusion reached by the Northern Ireland Court of Appeal in O'Donnell was incorrect.

EXISTING AWARDS

18. Any cases currently in payment can remain so until the natural expiry of the awards. Although the Supreme Court ruling has effectively overturned the O'Donnell judgment it was not in existence at the time the decisions were given on those cases. Therefore, it cannot be said that these decisions were erroneous in law at the time they were made.

ANNOTATIONS

Please annotate the number of this memo (DMG Memo Vol 10/90) against the following DMG paragraph: 59012.

CONTACTS

If you have any queries about this memo, please contact:

Decision Making Services
Section 3
Causeway Exchange
Level 3
1-7 Bedford Street
Belfast
BT2 7EG

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