



Neutral Citation Number: [2022] EWHC 2298 (Admin)

Case No: CO/000034/2022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil and Family Justice Centre,
33, Bull Street, Birmingham B4 6DS
Date: 07/09/2022

Before :

MR JUSTICE KERR

Between :

THE QUEEN
on the application of
DANIEL RICHARD JWANCZUK

Claimant

- and -

**SECRETARY OF STATE FOR WORK AND
PENSIONS**

Defendant

Catherine Callaghan QC and Tom Royston (instructed by **Public Law Project**) for the
Claimant
Clive Sheldon QC and Zoe Gannon (instructed by **Government Legal Department**) for the
Defendant

Hearing dates: 13 and 14 July 2022

Approved Judgment
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MR JUSTICE KERR

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is 10am on 7 September 2022. I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Kerr :

Introduction and Summary

1. This case is mainly about whether it is lawful to deny a bereavement support payment (**BSP**) to the claimant husband of a deceased wife on the ground that the wife did not in her lifetime pay any national insurance contributions (**NICs**) because she was severely disabled and therefore did not work. The Northern Ireland Court of Appeal (**NICA**) has decided that to deny BSP to the surviving spouse violates article 14, read with article 8 of and article 1 of the first protocol (**A1P1**) to the European Convention on Human Rights (**ECHR**). Mr Jwanczuk asks the court simply to follow the decision of the NICA.
2. The defendant (**the SoS**) argues that the late Mrs Jwanczuk was not necessarily unable to work; that the NICA's decision, *O'Donnell v. Department for Communities* [2020] NICA 36, is not binding, the reasoning is flawed and the decision wrong; that it is distinguishable anyway because it was decided under delegated not primary legislation, and because the O'Donnells had children; and that the qualifying condition of paying sufficient NICs is justified, for it is a proportionate way of rewarding work, keeping the benefits system simple, easy to understand and certain, and making it quick, easy and cheap to administer.

Facts

3. Suzanne Jwanczuk, known as Suzzi, was born on 16 December 1974. She and Daniel Jwanczuk (born in January 1977) first met at nursery. They attended the same primary and secondary schools, were very close friends, fell in love and started living together in early adulthood. Unfortunately, Suzzi had serious multiple disabilities. Mr Jwanczuk's account is not disputed by the SoS and is consistent with the medical evidence:

“Suzzi suffered from Ullrich Congenital Muscular Dystrophy (UCMD) from birth. UCMD is a rare hereditary muscle condition that starts soon after birth and is a lifelong health condition. Suzzi had various physical health problems resulting from her condition. She was born with dislocated hips and needed an operation on her legs as one was growing quicker than the other. She suffered from scoliosis and double curvature of the spine. She also had type II respiratory failure and was ventilated for about 17 years of her life. She also suffered from various other conditions such as diabetes, skin conditions, and clinical depression.”

4. Mr Jwanczuk's evidence includes considerable detail about the effects of Suzzi's disabilities. She used a walking stick at home and an electric wheelchair outdoors. He devoted himself to looking after her. She wanted to work and hoped to become a probation officer. Her disabilities made it very difficult for her to go out. She had to stay home because she needed to spend many hours on the toilet. She attended college, with difficulty.
5. In 1996, Suzzi fell down in the shower and broke her leg, making her condition worse. She could no longer move around at home without help. Mr Jwanczuk would carry

her. She needed help with basic tasks such as washing and making food and drinks. Despite these difficulties, she and Mr Jwanczuk became community volunteers, with Suzzi mostly contributing from home, working on the administration side.

6. In 2004, Suzzi became ill and had to be ventilated in hospital. It was feared she would not survive, but she did. On 4 October 2005, she and Mr Jwanczuk got married. They continued living together, in very difficult conditions. I will not dwell on the details as the evidence about Suzzi's condition up to her death in 2020 may be a live issue in other proceedings.
7. In 2011 and 2012, the government undertook a public consultation on reform of bereavement benefits. An excellent account of their earlier history going back to 1925 can be found in Baroness Hale PSC's judgment in *In re McLaughlin* [2018] 1 WLR 4250, at [4]-[12]. She explains chronologically in detail how (as she put it at [12]):

“what began as a long term replacement of a wife's and children's loss of a breadwinning husband's income, moved to a long term replacement of a breadwinner's income while children were growing up, and is now a transitional compensation for the immediate financial loss suffered by the survivor and children on bereavement. The contribution conditions are now less onerous... .”
8. The last part of the history deals, at [11], with the times I am concerned with in this case:

“... the scheme has been radically changed yet again, by the Pensions Act 2014 and the Pensions Act (Northern Ireland) 2015, in respect of deaths taking place after their implementation in March 2017. Bereavement payment and widowed parent's allowance have been abolished and replaced with a single bereavement support payment available to all bereaved spouses and civil partners irrespective of age. This is paid as an initial lump sum followed by monthly instalments for up to 18 months. The rates are higher if the bereaved person is pregnant or entitled to child benefit. The object is 'to focus support on the period immediately after bereavement', it being very common for bereavement to have a large short term impact on the finances of the surviving partner (*Government Response to the Public Consultation: Bereavement Benefit for the 21st Century* (2012) (Cm 8371), p 16. As before, entitlement depends on the (simplified) contribution record of the deceased and is not means-tested. Longer term impacts are left to means-tested benefits with some transitional cushioning.”
9. The public consultation exercise that led to those reforms is explained in the witness statement of Ms Helen Walker, a deputy director at the Department for Work and Pensions. She has produced the documents generated in the course of that consultation, including the *Government Response* document, Cm 8371 referred to by Baroness Hale PSC and a record of a parliamentary debate on the legislation dealing with BSP.
10. The Pensions Act 2014 (**PA 2014**) received royal assent on 14 May 2014. Sections 30 and 31 provided for payment of BSP and conditions for entitlement to it. BSP is payable to the surviving spouse (or civil partner) where the other spouse dies on or after 6 April 2017, provided the surviving spouse is under pensionable age on the date of death, is ordinarily resident in Great Britain and the “contribution condition” is met.
11. That condition is found in section 31: the deceased spouse has to have “actually paid” class 1 or class 2 NICs giving rise to “an earnings factor (or total earnings factors) equal

to or greater than 25 times the lower earnings limit for the tax year”. There are two exceptions to the requirement that the required amount of NICs must have been “actually paid” by the deceased spouse. The contribution condition is “treated as met” where (see section 31(3)):

“the deceased was an employed earner and died as a result of—

(a) a personal injury of the kind mentioned in section 94(1) of the Social Security Contributions and Benefits Act 1992, or

(b) a disease or personal injury of the kind mentioned in section 108(1) of that Act.”

12. The effect of the contribution condition requirement (apart from where one of the two exceptions applies) is described thus by Ms Walker in her witness statement:

“The condition set out in s.31(1)(b) requires two things:

a. First, that in any one year, the deceased must have accrued NI Contributions which attract an ‘earnings factor’ of 25 times the lower earnings limit (“LEL”). The LEL (£123 [*the FY 2022-3 figure*]) is the point at which employees start to build up entitlement to contributory benefits. It should be noted that National Insurance is not *actually paid* until the Primary Threshold (£190) is reached. An ‘earnings factor’ is derived from gross earnings between the LEL (£123) and the Upper Earnings Limit (£967).

b. Second, in the same financial year the deceased must have actually paid at least one week of Class 1 or 2 NI Contribution. To do this one must have earned over the Primary Threshold in any one week: or the equivalent if their pay period is monthly (and therefore *actually paid* National Insurance).”

13. Suzzi’s condition became progressively worse during the years relevant to her case, when she would have been paying NICs if she had been working. Mr Jwanczuk became her full time carer and received a carer’s allowance for looking after her. Suzzi was in and out of hospital at various times in the last part of her life. They did not have children. They would have liked to, but they were unable to due to medical conditions.
14. During the last year of Suzzi’s life, it happened that a case was being litigated in Northern Ireland, which culminated in the decision of the NICA in *O’Donnell*. That decision was handed down on 10 August 2020, a few months before Suzzi died. The legislation that applied was the Northern Ireland equivalent of the PA 2014, namely the Pensions Act (Northern Ireland) 2015 (**PANI 2015**). The case was decided in favour of Mr O’Donnell, whose late wife, because of her disability, had died without having paid the NICs required to satisfy the contribution condition.
15. Sadly, Suzzi Jwanczuk died in a hospice on 20 November 2020. Mr Jwanczuk continues to mourn her loss. He then experienced significant financial difficulties. He lost his income as her carer. The income from the benefits she had been receiving also ceased to come in. Since Suzzi’s death, Mr Jwanczuk has received universal credit, employment and support allowance and personal independence payment.
16. Like Mrs O’Donnell, Suzzi had not worked and therefore had not paid even the modest amount of NICs required to meet the contribution condition that would have entitled Mr Jwanczuk to BSP. She did not fall within either of the two exceptions. She did receive what are known as National Insurance credits which, broadly, are deemed NICs

credited to those unable to pay actual NICs for various reasons including disability. She received various benefits during her life, some associated with her disabilities.

17. On 3 December 2020, Mr Jwanczuk applied for BSP. The SoS refused the application by letter of 8 December 2020. The reason given was “because your ... wife ... did not pay enough National Insurance contributions”. The letter added: “[i]f you disagree with this decision, you can ask for a written explanation, ask for it to be reconsidered or appeal...”. After that, Mr Jwanczuk obtained advice from various sources and considered the position.
18. In Northern Ireland, meanwhile, the Department for Communities issued new guidance on BSP in March 2021 (**the NI BSP guidance**), to deal with cases covered by the *O’Donnell* ruling, against which the minister did not appeal. The NI BSP guidance is still in use and is called *Bereavement support payment – satisfaction of Contribution Condition where the deceased was unable to work due to disability*. Decision makers are required “to consider if the late spouse was unable to work throughout their entire working life due to disability”.
19. The NI BSP guidance went on to consider what kinds of evidence decision makers would need to consider. Where a system check shows continuous entitlement to benefits payable due to disability, the claim for BSP can be allowed. If that is not shown, other evidence can be considered and a decision made on the balance of probabilities. That could include the claimant’s uncorroborated word as well as more authoritative sources of evidence such as medical records.
20. On 17 September 2021, assisted by a local community law service, Mr Jwanczuk made a request for mandatory reconsideration of the decision to refuse his application for BSP. The SoS responded on 6 October 2021. The decision remained the same. The reasoning was also the same, though expressed in greater detail. There was no mention of *O’Donnell* or acknowledgment that it had any impact on the case. The deceased, said the decision maker, Ms Linda Perry, must have “paid” the required NICs; credits would not do. She expressed sympathy but “the Department are bound by the current legislation”.
21. That is the decision challenged in this judicial review. The pre-action protocol procedure was followed. On 3 December 2021, Mr Jwanczuk’s solicitors wrote a first pre-action protocol letter. He also appealed against the reconsideration decision on 15 December 2021, to the First-tier Tribunal (Social Entitlement Chamber) (**the FTT**) which has statutory jurisdiction to uphold or reverse the decision made by the SoS to maintain the refusal to pay BSP.
22. The FTT appeal proceedings were stayed by consent on 27 January 2022. The SoS then filed her acknowledgment of service and summary grounds of defence on 1 February 2022. The judicial review came before Dove J on the papers, as a permission application. He granted permission on 28 February 2022. Detailed grounds of resistance and various further witness statements were then filed. The case was prepared for hearing and argued before me in Birmingham on 13 and 14 July 2022. The FTT proceedings remain stayed.
23. It is common ground that the amount of BSP that would be payable to Mr Jwanczuk, if he were entitled to receive it, is in total £4,300 which is payable in the form of an initial

lump sum, followed by monthly instalments for up to 18 months. That is, therefore, the monetary amount in issue between the parties in this claim.

Issues, Reasoning and Conclusions

The decision of the Northern Ireland Court of Appeal in O'Donnell

24. The judgment of the court was given by Stephens LJ, now Lord Stephens JSC, sitting with Morgan LCJ and O'Hara J. After Mr O'Donnell's request for BSP was refused by the Department for Communities, he appealed to the Social Security Tribunal, arguing that the contribution condition was unlawful indirect associative disability discrimination against him and their children, on the ground of the late Mrs O'Donnell's disability.
25. The tribunal adjourned the appeal and referred to the NICA the question whether sections 29 and 30 of the PANI 2015 (in the same terms as sections 30 and 31 of the PA 2014) were compatible with articles 14, 8 and A1P1. The evidence relied on by the Department travelled much of the same ground as the evidence before me, a point to which I will have to return.
26. At [9], Stephens LJ (as he then was) described the contribution condition as "extremely modest". The deceased spouse or civil partner only had to have paid Class 1 or Class 2 NICs for six months during their lifetime, which meant that about 75 per cent of potential claimants would meet the contribution condition. The judge reviewed the evidence of the decision making process and noted at [13] that if, as some had suggested during the public consultation process, the contribution condition also covered National Insurance credits, then 99 per cent of potential claimants would meet the condition.
27. The evidence showed, he said at [13], that by declining this suggestion, the government had recognised that it would be excluding about 24 per cent of potential claimants from entitlement to BSP and that the 24 per cent would include both those able to work but who had chosen not to, and those unable to work throughout their working life because of disability. This, he explained, was said to be treating differently those whose situations were significantly different, i.e. the kind of discrimination known as *Thlimmenos* discrimination (*Thlimmenos v. Greece* [2000] ECHR 162, (2001) 31 EHRR 15 (GC) at [44]).
28. The judge set out the factual background. It was agreed, he explained at [20]-[23], that Mrs Pauline O'Donnell had been unable to work throughout the period of her "working life" due to a substantial neurological disability. She had received employment and support allowance and National Insurance credits but had not actually paid the NICs necessary for the contribution condition to be met. She died aged 41 leaving her husband (the claimant) and their four children.
29. Stephens LJ then explained the legislative history, by reference to Lady Hale's account in *In re McLaughlin* from which I have quoted, and the relevant provisions of the PANI 2015. At [42]-[48], he explained that article 14 discrimination covered two kinds of case: failure to treat like cases alike; and *Thlimmenos* discrimination, failing to treat unlike cases differently. Both kinds of discrimination were relevant, Lord Stephens noted, though the second kind had been relied on in the tribunal, while the first kind was relied on in the NICA.

30. The court considered both ways of formulating the discrimination. Thus, the judge noted, Mr O'Donnell was treated in the same way as a person whose deceased spouse or civil partner had not been disabled but had chosen not to work. In that formulation, the article 14 "status" of Mr O'Donnell and the children was that they were the spouse and children of a deceased who was "severely disabled so that she was unable to work and therefore unable to satisfy the contribution condition" ([47]).
31. In the other formulation, it was said that Mr O'Donnell was treated differently from a person whose deceased spouse or partner had been able to meet the contribution condition because she had not been disabled. In that formulation, the "status" was "spouses of people with severe disabilities", of whom Mr O'Donnell was one ([48]).
32. The court preferred the latter formulation, based on the second category identified in *Thlimmenos* – treating alike materially different cases – because it "brings focus to the comparator group, to status and to the lack of difference in treatment which is to be justified" ([49]).
33. Stephens LJ determined at [51] that the appropriate questions were those identified by Lady Hale PSC in *R (DA) v. Secretary of State for Work and Pensions* [2019] 1 WLR 3289, at [136]:

“(i) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights? (ii) Does the ground upon which the complainants have been treated differently from others constitute a “status”? (iii) Have they been treated differently from other people not sharing that status who are similarly situated or, alternatively, have they been treated in the same way as other people not sharing that status whose situation is relevantly different from theirs? (iv) Does that difference or similarity in treatment have an objective and reasonable justification, in other words, does it pursue a legitimate aim and do the means employed bear ‘a reasonable relationship of proportionality’ to the aims sought to be realised ...”.
34. The court went on to discuss further case law relevant to finding the answer to these four questions, most of which I do not repeat here. In relation to the fourth question, that of justification, Stephens LJ referred at [62] to Lord Bingham's observation in *A. v. Secretary of State for the Home Department* [2005] 2 AC 68, at [68], that “[w]hat has to be justified is not the measure in issue but the difference in treatment between one person or group and another”; and at [63] to the “manifestly without reasonable foundation” test for respecting the government's determination of where the public interest lay.
35. There was some further discussion (by reference to a simile expressed by Lord Walker, equating personal characteristics to concentric circles) about the influence on the standard of review of the kind of “status” enjoyed by the claimant. On justification, the court regarded Lord Reed's four *Bank Mellat* questions (*Bank Mellat v HM Treasury* [2014] AC 700 at [74]), as a useful “heuristic tool” to help answer the question whether the difference of treatment was manifestly without reasonable foundation.
36. As is well known, the four questions are, in Lord Reed's words (quoted by Stephens LJ at [70]):

“(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3)

whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter ... In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

37. Among other topics discussed in passages I do not reproduce from the judgment were: the flexible principle of "parity" in the social security laws of, respectively, Great Britain and Northern Ireland; whether government had specifically considered the difference of treatment; international obligations of the United Kingdom, namely the United Nations Convention on the Rights of the Child (**UNCRC**) and the United Nations Convention on the Rights of Persons with Disabilities (**UNCRPD**); the interpretative obligation under section 3 of the Human Rights Act 1998; and the non-availability of a declaration of incompatibility as the PANI 2015 is subordinate legislation.
38. Answering the four questions posed in the *DA* case, the court held that the subject matter of the complaint fell (as was conceded by the Department for Communities) within the ambit of article 8 and A1P1 ([84]-[86]); that the ground on which the complaints had been treated differently was a "status" for the purpose of article 14 ([87]-[89]); that the complainants had been treated in the same way as others not sharing their status whose situation was relevantly different from theirs ([90]-[91]); and that the adverse treatment, i.e. exclusion from BSP, was not objectively justified ([92]-[100]).
39. In reaching the latter conclusion the court used as its tool the four *Bank Mellat* questions, which it considered in some detail. The government's aims (incentivising work, protecting the contributory principle and simplifying the benefits system), were legitimate. The contribution condition was rationally connected to those objectives.
40. But, considering the third and fourth *Bank Mellat* questions together, the NICA found that applying the measure to those unable to work through disability throughout their working lives was not justified. I will set out in full the reasoning at [98]-[100]:

"[98] In answer to those questions, we consider that the policy in its application to those who through disability are unable to work throughout their working life is manifestly without reasonable foundation. It is just not reasonable to suggest that one can incentivise a severely disabled person to work if through their disability they cannot work. Alternatively, to put it another way, that is manifestly without reasonable foundation. Furthermore, one cannot make work pay if through disability the individual cannot work. There is no stigma attached to credits of national insurance if a person is disabled. No one is going to think worse of a disabled person who can never work if they do not do so and receive credits rather than making payments. The contributory principle for BSP is extremely modest and that extremely modest application of the principle is not undermined by an exception being made in relation to those who through disability cannot contribute throughout their working life. An exception would simply amount to recognition that those who cannot contribute should not be excluded. That does undermine the close relationship between the contribution condition and employment merely recognising that the severely disabled are at a substantial disadvantage if they cannot work throughout their working life. It is entirely possible to make an exception without undermining the contributory principle as is shown by s 30(3) of the 2015 Act. The policy of parity may explain why in Northern Ireland the relevant provisions have been adopted given that they were adopted in England and Wales but that policy does not serve to justify the impugned difference in

treatment. Unjustifiable discrimination is not justified by parity. In answer to question three, we consider that a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. That less intrusive measure was to create an exception for those never able to work through disability and therefore never able to pay Class 1 or Class 2 National Insurance Contributions. In answer to the fourth question, the severity of the measure's effect on the associated rights of the persons whose deceased spouse or civil partner was never able to work through disability was clearly disproportionate to the likely benefits of the impugned measure.

[99] We also consider that the respondent has failed to comply with the positive obligation to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different. This failure is confirmed by the respondent's breach of its obligation to comply with UNCRC and the UNCRPD, which informs interpretation of the ECHR.

[100] As Lord Reed stated, in 'essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure'. We consider that the adverse impact is disproportionate. The answer to the fourth *DA and DS question* is that the respondent has failed to justify the similarity in treatment of those with and those without severe disabilities so that the contributory principle in so far as it effects those individuals who through disability cannot work throughout their working life is manifestly without reasonable foundation."

41. The remedy was ([103]) that the contribution condition in section 29(1)(d) of the PANI 2015 "is to be treated as met if the deceased was unable to comply with s 30(1) throughout her working life due to disability".

Introduction to the issues

42. Such, in outline, are the bare bones of the NICA's decision and the reasoning supporting it. The parties came to this case with very different ideas about how I should approach *O'Donnell* when deciding the present case. For the claimant Mr Jwanczuk, *O'Donnell* was the simple solution to this case, its beginning and its end. For the SoS, *O'Donnell* was a wrong, flawed and distinguishable decision that did not help this court, which must address the issues afresh and should draw the contrary conclusion to that reached by the NICA.
43. The parties were unable to agree on a list of issues. Mr Jwanczuk asked me to focus first on the status of *O'Donnell*, whether it was materially distinguishable and whether it should be followed. The article 14 issues (ambit, status, differential treatment, justification and relief) should be viewed through the *O'Donnell* prism. The SoS asked me to address those same article 14 issues, in so far as necessary, independently of *O'Donnell* and then to ask whether this court is bound by that decision and to what extent I am required to follow it.
44. Neither side contended that I am formally bound by authority to follow *O'Donnell*, as I would be (other than in the extremely rare case of a *per incuriam* decision) if it were a decision of the Court of Appeal of England and Wales. Nor, on the other hand, did either party dispute that decisions of the NICA are entitled to the utmost respect. The differences between the parties about the correct approach to *O'Donnell* were, on examination, more forensic than substantial.

45. But the forensic differences were trenchantly expressed. Mr Jwanczuk submitted, or came close to submitting, that I should treat a decision of the NICA as, in practice, only to be departed from in the same narrow circumstances as a decision of the Court of Appeal. The SoS submitted that I should treat the NICA's decision like any other merely persuasive authority, i.e. follow it if it is right and if it is wrong, say why and not follow it.
46. I have been shown the various authorities on the status of decisions of Northern Ireland (and Scottish) courts and the desirability of observing comity between jurisdictions within the overall United Kingdom; particularly in areas of the law such as social security, where the principle of "parity" (discussed in *O'Donnell* and in the skeleton arguments) applies. I am guided in particular by the remarks of Ward LJ at [26]-[27] in *Secretary of State for Work and Pensions v. Deane* [2011] 1 WLR 743.
47. I do not undertake an analysis of those authorities, in the absence of any submission that *O'Donnell* is formally binding on this court. It is a decision on the content of human rights, rather than on a point of statutory interpretation. Human rights should if possible have the same content throughout the UK. If *O'Donnell* is not distinguishable, I would not depart from it unless persuaded that is clearly wrong, which I would find only with great diffidence.

Summary of Mr Jwanczuk's principal submissions

48. The submissions of Ms Catherine Callaghan QC need little elaboration, for they closely follow the reasoning of the NICA, understandably culminating in the conclusion that this case is "on all fours with the facts of *O'Donnell*". She submitted, further, that the court should grant the same remedy as in *O'Donnell*, not just a declaration of incompatibility.
49. I need not repeat Mr Jwanczuk's submissions in so far as they adopt the *O'Donnell* reasoning, but I record that Ms Callaghan engaged fully and in detail with the SoS's evidence on justification, over and above submitting that those same or similar arguments had failed in *O'Donnell* on the basis of evidence that was, she submitted, materially the same as in this case and included the relevant parliamentary and departmental history.
50. Addressing the grounds of distinction relied on by the SoS, Ms Callaghan submitted as follows. First, Suzzi's lifelong inability to work was established by her receipt of various benefits such as employment and support allowance, which are a sufficient proxy for inability to work. I record that the diligence of counsel's researches led to the court being referred to copious statutory benefits, past (or "legacy") and present (under the universal credit regime in place since 2013). I will not lengthen this judgment unnecessarily by a full account of them.
51. Although some of these benefits, as the SoS has shown, could be available even where limited "exempt" work is done, that did not matter, as is recognised in the NI BSP guidance. That guidance, rightly, treats receipt of relevant benefits as the starting point for the enquiry into the deceased's lifelong inability to work. It is fanciful to suggest, Ms Callaghan submitted, that Suzzi was ever "able" to work, other than in the extreme sense that a severely disabled person may be "able" in desperation to claw their way out of a burning building.

52. Furthermore, any dispute about whether Suzzi falls within the class of those unable to work throughout the period of their working life cannot be resolved against Mr Jwanczuk in the current judicial review proceedings, which are not the appropriate forum – the FTT is. As he has standing to bring the present challenge, the right course is for the court to rule on the legality of the exclusion from BSP and to leave the FTT to determine any subsequent factual dispute.
53. Ms Callaghan accorded no merit to the SoS’s contention that the determination of lifelong inability to work would be unduly complex, extensive, intrusive and difficult, as attested to in Ms Walker’s witness statement. The same contention had failed in *O’Donnell*. The post-*O’Donnell* experience of using the NI BSP guidance showed that the exercise was not difficult. In cases where gaps in official records required resort to factual evidence from the surviving spouse or civil partner, he or she bore the burden of proof that may or may not be met.
54. Nor did it matter that the PANI 2015 is classified (Human Rights Act 1998, section 21(1)) as subordinate legislation, while the PA 2014 is primary legislation. The PANI 2015 was an Act of the Northern Ireland Assembly, the elected legislature for Northern Ireland. There was no deficit in democratic accountability, as there is in some subordinate legislation. Further, the NICA accorded it the same degree of deference as it would to primary legislation, applying the most stringent level of scrutiny, namely the “manifestly without reasonable foundation” test; the very test advocated by the SoS for this case.
55. It is also irrelevant that the Jwanczuks had no children, Ms Callaghan submitted. The UK’s obligations under the UNCRC did not ground the decision in *O’Donnell*; breach of them merely “confirmed” (at [99]) the lack of justification. The article 14 status of Mr O’Donnell did not include any need for them to have children. The case engages article 8 (not only A1P1) just as *O’Donnell* did, because family life, with or without children, is present during the deceased’s lifetime and BSP is only payable where that is so.
56. As to remedy, the court should grant the same relief as the NICA did, reading down the contribution condition, applying section 3 of the Human Rights Act. That does not involve forbidden rewriting of the law and would not go against the grain of the legislation. Actual payment of contributions is not fundamental. The contribution requirement is modest and already subject to an exception for in cases of personal injury or disease at work. The additional words are needed to give effect to Mr Jwanczuk’s article 14 rights and avoid a violation of them.

Summary of the SoS’s principal submissions

57. For the SoS, Mr Clive Sheldon QC contended that *O’Donnell* is not binding, is wrong and is distinguishable. The margin of appreciation is at its widest, the measure being one of social and economic policy expressed in primary, not secondary, legislation. The issue of those “unable to work due to illness or disability” (to quote from the government’s response to the consultation) was expressly considered before the PA 2014 was enacted. Actual payment of NICs rather than credits is a historic thread running through the legislation.

58. Mr Sheldon further argued that the article 14 status relied on is too amorphous to count: you cannot tell who is within the group (in shorthand, spouses and partners of deceased with lifelong inability to work) and who is not. Receipt of certain benefits is not a reliable proxy for inability to work. The NICA misapplied the justification test, ought to have deferred to government on the policy issue and recognised that bright line rules are permissible, even though they may lead to hard cases. The NICA's conclusion was wrong.
59. As to the facts, the SoS does not accept that Suzzi was necessarily unable to work throughout the period of her working life. She undertook some tasks such as caring for Mr Jwanczuk when he was unwell and doing volunteer community work from home. The investigations done for this case had been time consuming and detailed. They show that such investigations would be so in cases generally, if the NICA's reasoning were upheld.
60. The records in the present case are, Mr Sheldon argued, detailed but nonetheless incomplete and inconclusive. He did not ask the court to determine the factual issue of Suzzi's ability to work, accepting that this court is not the right forum; but he submitted that the detail and complexity of the factual issues that arise, of which the present case is an example, demonstrated the merit of the government's policy of requiring actual payment, which was easy to ascertain.
61. The SoS accepts that the payment of BSP falls within the ambit of A1P1, but not article 8 because, she submits, the payment of BSP does not affect the basic necessities of life (*R (SG) v. Secretary of State for Work and Pensions* [2015] 1 WLR 1449, per Lord Reed JSC at [79]-[80]). The point had not been properly argued in *O'Donnell* and was effectively conceded. It was unnecessary for the court to determine the article 8 issue here, Mr Sheldon submitted, because the SoS accepts that payment of BSP is within the ambit of A1P1.
62. The contention that the surviving spouse or partner has sufficient article 14 status was, Mr Sheldon said, wrong; the status was too vague. The reasoning on the point in *O'Donnell* was confined to one virtually unreasoned paragraph, ([87]); albeit that at [88] the NICA rejected the Department's argument that the difference of treatment arose because the deceased "did not work" and therefore paid no NICs, commenting that the argument "ignores the reason why she did not work", namely her severe congenital disability.
63. The SoS asserts that the term "unable to work" is too imprecise to determine who falls within the group said to constitute the required article 14 status. The status should refer to inability to work throughout the period of the deceased's working life. Further, a severely disabled person may be able to work; indeed, Suzzi was paid carer's allowance representing at least 35 hours per week of caring work. I was referred to the limits of "other status" for article 14 purposes, drawn from the analysis of Ouseley J and his review of the cases in *C v. Secretary of State for Work and Pensions* [2018] 1 WLR 5425, at [111]-[131].
64. On the issue of differential treatment, Mr Sheldon submitted that reliance on *O'Donnell* must necessarily be confined to the analysis founded on *Thlimmenos* discrimination, i.e. depriving of BSP alike those whose deceased partner did not pay NICs by choice, and those whose deceased partner could not pay NICs because of a lifelong disability.

Mr Jwanczuk cannot, said Mr Sheldon, rely on *O'Donnell* to support a claim based on standard indirect discrimination, because that formulation was not the foundation of the NICA's decision.

65. As to *Thlimmenos* discrimination, I should reject the suggestion that Mr Jwanczuk is in a relevantly different situation to the spouse of a deceased who "chose" not to work. Many disabled people, Mr Sheldon pointed out, work at some stage in their lives. Many who are not disabled do not work for reasons unrelated to disability; for example, because of caring responsibilities. It is unclear, Mr Sheldon said, why Mr Jwanczuk's position is "relevantly different" to those in the latter category, who may not refrain from work out of choice.
66. On the issue of justification, the SoS complained that the NICA, while stating that it was applying the most deferential standard, asking whether the measure was "manifestly without reasonable foundation", had in fact treated the status claimed as if it were a "suspect" ground; while the status, if acceptable as such at all, must be regarded as "disability plus" and no more suspect than was that of the claimant in *R (MOC) v. Secretary of State for Work and Pensions* [2022] EWCA Civ 1, [2022] PTSR 576 (cf. Singh LJ at [64] and [70(3)]).
67. The degree of deference should, Mr Sheldon argued, be higher in this case than in *O'Donnell* because the latter concerned subordinate legislation. It is not clear what standard the NICA would have applied if the PANI 2015 had been primary legislation, endorsed by Parliament after debate and unopposed by the political opposition. The SoS's aims here are clearly legitimate, as were the similarly articulated aims in *O'Donnell*. Mr Jwanczuk does not suggest otherwise.
68. The contribution condition is a proportionate way of achieving those aims, contrary to the NICA's decision. The advantages of a bright line rule are manifold and such rules are recognised as legitimate in designing social welfare legislation, though they may produce hard cases: see e.g. *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311, per Lord Neuberger at [54]-[57] and *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 per Lord Wilson JSC at [27].
69. The advantages of an "actual payment" rule in the present context are explained in Ms Walker's witness statement, not necessarily in the same terms as in the evidence she gave to the NICA in *O'Donnell*. I summarise them as avoidance of an intrusive, time consuming, expensive, fact-sensitive and subjective investigation going back over many years; the inadequacy of a person's benefits record as a proxy for lifelong inability to work; the need for speed and certainty at a difficult time for the bereaved; and discouragement of unmeritorious claims.
70. Mr Sheldon addressed also the principle of parity and that of comity between different courts within the United Kingdom jurisdictions. While he accepted the proposition that the content of human rights should ideally be the same throughout the kingdom, the SoS was sanguine about a difference in content being established through this case, should the court be persuaded to depart from the reasoning and conclusion in *O'Donnell*.
71. That is not unfair to Mr Jwanczuk, the argument runs. The logic of the SoS's position is that it was Mr O'Donnell who received a windfall. The NI BSP guidance, far from

providing a satisfactory solution, invites officers to take short cuts which do not do justice to the complexity of the factual position leading, no doubt, to payments of BSP in cases where they ought not to be made. It does not follow that because the system devised in the wake of *O'Donnell* is relatively simple, it correctly reflects the legal position.

72. The NICA also wrongly took account of international law obligations, asserting at [99] that the Department had acted in breach of the UNCRC and the UNCRPD and that this “informs interpretation of the ECHR”. That, said Mr Sheldon, was contrary to Lord Reed PSC’s dictum in *R (SC) v. Secretary of State for Work and Pensions* [2022] AC 223, (in which Lord Stephens JSC, as he had by then become, also sat) that “our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties” (see [74]-[96], at [84]) and that domestic courts should not consider justification with reference to international treaty obligations.
73. On the question of remedy, should the court not accept the SoS’s other submissions, Mr Sheldon submitted that I should confine the remedy to a declaration of incompatibility. The court should not read an exception into the PA 2014 contribution condition, as the NICA did into the PANI 2015. The requirement of actual payment of NICs was fundamental; any departure from it would go against the grain of the legislation (*R (Ghaidan) v. Godin-Mendoza* [2004] 2 AC 557, per Lord Nicholls at [33]; per Lord Rodger at [121]).
74. The exception to the requirement of actual payment where disease or personal injury is suffered at work, submitted Mr Sheldon, does not undermine that conclusion, contrary to the reasoning in *O'Donnell*. That exception applies in a case where a person has actually been in employment and has either paid some NICs but not enough, or would but for their misfortune have paid NICs. An exception for the spouse of a deceased who had never worked would be inconsistent with the essential principles behind the legislation.

Reasoning and conclusions

75. I accept Mr Sheldon’s submission that I have to consider the arguments afresh. The NICA’s decision, persuasive as it is, does not formally bind this court. If *O'Donnell* is wrongly decided, Mr O'Donnell got a windfall and the NI BSP guidance is too generous. Even if this case is on all fours with *O'Donnell*, it would not be right to decide this case only on the basis that *O'Donnell* stands as authority against the SoS. That said, to the extent that I agree with the NICA’s reasoning, I need not say much more than that I do.
76. The first part of the enquiry in an article 14 case is the question of ambit. It is common ground that payment of BSP falls within the ambit of A1P1, but not within that of article 8. The NICA held that it does fall within the ambit of article 8, but the SoS disagrees for reasons submitted by Mr Sheldon and in part summarised above. He relied on the observations of Lord Reed JSC in *SG*, rather than those of Lord Wilson JSC and Lady Hale PSC in *DA* and complained that the NICA appeared to have been referred to the latter rather than the former.

77. However, Mr Sheldon also invited me not to decide the point: the issue does not need to be resolved in this case, he said, it could have repercussions in other contexts and it has been addressed by courts of higher authority. I agree that I need not resolve the article 8 issue and I accept the invitation to refrain from doing so. I do not think that in this case, the defence of justification would play out any differently depending on which Convention right is engaged.
78. I recognise that some Convention rights are more fundamental than others and that the issue of ambit can influence what situations are regarded as analogous, and the standard of review in relation to justification, as the NICA observed at [53]. But I do not think which right is in play makes any difference here. The effect on the individual is the same whether the differential access is to a right to respect for family life, or to a right not to be wrongly deprived of a possession. Either way, the effect is that the applicant does not receive a payment of BSP.
79. So, I do not base my decision on article 14 read with any potential article 8 right. That said, the argument that payment of BSP falls within the ambit of article 8 does seem to me pretty strong. BSP is only payable at all where family life has existed before being sadly disrupted by the death of a family member. Whether or not the family includes children, it is a harsh proposition to say that family life is extinguished at the moment when only one family member remains alive. I would have thought it endures at least during the aftermath of the deceased's death, including a reasonable period for funeral rites and mourning.
80. The next question is that of "other status" within article 14. Mr Jwanczuk's formulation of his status, based on *O'Donnell*, is (in Ms Callaghan's skeleton argument): "being the spouse of a deceased person who was severely disabled so that she was unable to work and therefore unable to pay Class 1 or Class 2 national insurance contributions". That formulation, Mr Sheldon says, is too vague to qualify because it is not possible to determine who is within the class, in particular because the formulation does not refer to lifelong inability to work.
81. I have no difficulty in accepting that Mr Jwanczuk enjoys the status contended for. It is the same in substance as Mr O'Donnell's, as determined by the NICA at [47]: the spouse of a deceased who was "severely disabled so that she was unable to work and therefore unable to satisfy the contribution condition". It is clear from the word "therefore" that the reason for not being able to satisfy the contribution condition is inability to work through disability. If disability is not the reason, the surviving spouse is not within the class; if it is, he is.
82. The NICA considered the case law, domestic and from the Strasbourg court, on "other status" in the judgment at [54]-[57]. The conclusion was that indirect associative disability discrimination, i.e. based on the disability of another, was capable of being a status for article 14 purposes. I find no flaw in the reasoning, analysis or conclusion. I respectfully agree with the conclusion and I find no difference between Mr O'Donnell's status and that of Mr Jwanczuk in this case.
83. The next issue is what is often called differential treatment or, to put it the other way round in the present context, like treatment of unlike cases. I agree with the NICA that the latter analysis is a better fit: Mr Jwanczuk has the relevant status and is denied BSP,

as is the surviving spouse of a person not sharing his status, i.e. whose deceased spouse was not prevented by disability from meeting the contribution condition.

84. I reject the submission that Mr Jwanczuk is in, relevantly, the same situation as a person in the latter category. A deceased spouse who is not disabled may, I accept, be unable to work throughout her working life for other reasons than disability; for example, caring responsibilities. It would be possible to argue for a wider exception than contended for in this case; for example, by defining the status more widely as being the spouse of a deceased person who was unable *other than through choice* to meet the contribution condition.
85. However, that is not this case. To deny BSP to that wider class would be easier to justify, but the issue does not arise because the status of Mr Jwanczuk is more narrowly defined: the absence of choice must be through disability. Accordingly I accept, as the NICA did, that like Mr O'Donnell and his children, Mr Jwanczuk has been "treated in the same way as other people not sharing their status whose situation is relevantly different from theirs" ([91]).
86. That leaves the issue of justification. Mr Sheldon raised the question whether "disability plus" of the deceased is a "suspect" ground and suggested that it should not be and that the standard of review should be relatively low and the margin of appreciation generous. I need not enter into that debate because, as Ms Callaghan pointed out, the NICA adopted the lowest standard of review available, namely the "manifestly without reasonable foundation" test. I do not accept that a higher standard of review was adopted under the guise of that test.
87. The objectives of the SoS are, I accept legitimate, i.e. sufficiently important to justify limiting a protected right. To recap, they are (i) to reward work through the benefit system; (ii) to simplify the benefit system and reduce administrative cost and complexity so that BSP is paid quickly when most needed; and (iii) to promote certainty and transparency for individuals in understanding entitlement to benefits. They are, in substance, the same as the objectives relied on in *O'Donnell* and found legitimate by the NICA. The contribution condition is rationally connected to those objectives.
88. The third and fourth *Bank Mellat* questions arise next. I have already set out above the NICA's answers to them, in the court's judgment at [98]-[100]. The questions were framed just before that, at [97], thus:

"The third and fourth questions can be considered together. The third question is whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. The fourth question is whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."
89. The NICA effectively answered yes to both questions. I respectfully agree with those answers, for the reasons given at [98]-[100], quoted above, which do not need elaboration and on which I cannot improve. I need add only a few further comments.
90. First, there was some discussion in the SoS's skeleton argument about whether what must be justified is the measure itself, or the differential treatment of the complainant. The complaint was that the NICA had wrongly focussed on the latter, not the former.

In the *SG* case [2015] 1 WLR 1449 at [189], Baroness Hale DPSC explained that in cases of disparate impact indirect discrimination where the measure is neutral on its face and also impacts on those not in the class discriminated against, it is “the measure itself which has to be justified, rather than the fact that women are disproportionately affected by it”.

91. This debate has been taken up in subsequent case law; see e.g. (among other cases) Andrews LJ’s judgment in *R (Salvato) v. Secretary of State for Work and Pensions* [2021] EWCA Civ 1482, [2022] PTSR 366, at [79] and [94]. In my opinion, there is a danger of over-thinking this distinction and the debate can become arid. Normally at least, it is the measure that makes the treatment differential. If there are cases where examining the measure and examining its disparate impact lead to different outcomes, this is not one of them.
92. Next, I gain only limited assistance from the NI BSP guidance, not considered in *O’Donnell*. Had I upheld the SoS’s arguments in favour of a simple bright line rule requiring actual payment of NICs, it would follow that the NI BSP guidance is inappropriate here in England. But if, as I consider, the NICA’s decision is correct, the NI BSP guidance still does not itself prove that the SoS’s concerns about complexity, delay and expense are wholly unfounded; only that they are not of enough weight to sustain the justification defence.
93. The next and related point is that I am not deciding whether and to what extent receipt of relevant state benefits is a valid proxy for inability to work. No doubt in many cases it will be, but each case ultimately turns on its own facts. I have not found it necessary or practicable to conduct an exhaustive analysis of all the relevant benefits in place at various times since 2014 and their historic predecessors.
94. The benefits legislation and case law does show that a person may be in receipt of what is now called employment and support allowance, founded broadly on an inability to work, yet may perform “exempt” work to a limited extent without losing entitlement. The materials do not, however, enable me to determine when, in individual cases, the deceased’s benefit records will themselves be enough to determine a surviving spouse’s BSP claim, and when they will not be. That is a matter for decision makers on the ground.
95. My decision means comity between courts of the UK jurisdictions is preserved and that the human rights at issue in this case have the same content in England and Wales as in Northern Ireland. I do not accept that the two cases have proceeded on different evidence. I am confident from a reading of *O’Donnell* and comparing it to the evidence of departmental and parliamentary procedure before me in this case (aided by Ms Callaghan’s submissions in reply) that *O’Donnell* and this case are being decided on, materially, the same evidence.
96. The SoS was in a position to demonstrate, if she could, that the evidence was different, but all indications are that it was not. It can be said with confidence that the facts are, essentially, on all fours in the two cases. The absence of children in the present case does not affect the outcome; I have not determined the article 8 issue and it does not affect the failure of the justification defence, as I have explained above.

97. I agree with the submission that the NICA ought not to have placed any weight on the breaches of the two relevant international conventions, the UNCRC and the UNCRPD. But I am far from convinced that the NICA's conclusion was strongly influenced by its finding that the contribution condition in the PANI 2015 breached the Department's obligations under those two conventions (of which one, the UNCRPD, is relevant in the present case). I accept Ms Callaghan's submission that the observations on breach were *obiter*.
98. The fact that the PANI 2015 is subordinate legislation does not make any difference, in my judgment. The interpretative exercise required under section 3 of the Human Rights Act is available in the case of both primary and secondary legislation. The primary and secondary legislation are in materially the same terms. Any difference in the degree of deference to the legislature that is appropriate, is in my view theoretical rather than real because the PANI 2015 is an Act of the elected legislature, the Northern Ireland Assembly.
99. I do not accept that the section 3 interpretative remedy is off limits on the basis that to read in the suggested words would go against the grain of the legislation. There is already an exception in the case of disabling personal injury or disease during employment. Injury and disease are not dissimilar from congenital or other forms of disability. All involve impairment of bodily functions, which may make work impossible. The exception carved out by the NICA under section 3 does not go against the essentials of the legislation.
100. The NICA's decision was not appealed. If it is departed from, that is likely to be by a higher court than mine. I find that the claim succeeds and I will make a declaration in the same words as the declaration made in *O'Donnell*. If the SoS wishes to contend that Mrs Jwanczuk was able to work and could have paid the necessary NICs, the SoS will have to apply to the FTT to lift the stay and ask the FTT to determine Mr Jwanczuk's appeal against the refusal to pay him BSP.