THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 202
[Record No. 2020/398 JR]

IN THE MATTER OF THE CONSTITUTION OF IRELAND
AND IN THE MATTER OF
THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

BETWEEN

PATRICK MCGOVERN

APPLICANT

AND

CHIEF APPEALS OFFICER, MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION, IRELAND, AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 19th day of March, 2021.

1. Issues

1.1 The issue arising herein is as to whether the applicant is entitled to Widower's (Contributory) Pension and the Widowed or Surviving Civil Partners Grant paid in accordance with Chapter 18 and Chapter 21 of Part 2, respectively, of the Social Welfare Consolidation Act 2005 (the 2005 Act), under Irish legislation, or under the Constitution, or under European Union Law, in the circumstances which pertain in the within matter.

1.2 The decision of the Appeals Officer of 31 March 2020 refusing the applicant such a pension and grant is the subject matter of an application for *certiorari*.

1.3 By order of 22 June 2020 the applicant was afforded leave to maintain the within judicial review proceedings based on the matters set forth in the statement required to ground the application for judicial review (the statement). In addition to the order for *certiorari* the statement seeks a declaration that:

(a) the first or second named respondents exceeded their jurisdiction in making a determination that the applicant was not the legal spouse of *inter alia*, Pauline Carbery McGovern (Ms. Carbery) who died on 5 October 2016;

(b) the applicant ought to be entitled to a presumption that his marriage was valid;

(c) the decision on 31 March 2020 is contrary to EU law, the principle of proportionality, or assimilation of facts and events under Regulation 883/2004, and/or by analogy based on that regulation;

(d) the provisions of the 2005 Act unlawfully interfere with the applicant's property rights and are contrary to Articles 40 and 43 of the Constitution by treating him unequally before the law;

(e) or in the alternative, a declaration that there is an unconstitutional lacuna in the law as a consequence whereof the applicant should be treated as a widower for the purposes of the 2005 Act;

(f) the asserted discrimination in the 2005 Act is incompatible with the European Convention on Human Rights Act 2003; and,

(g) the first named respondent failed to exercise her discretion properly and/or fettered her discretion by failing and/or refusing to refer the matter to the High Court pursuant to s.306 of the 2005 Act.

2. Background

2.1 The applicant is an Irish citizen and retired school teacher and resides in Co. Kildare.

2.2 The applicant married Elizabeth Casey on 2 August 1982 in Johnstownbridge, Co. Kildare.

2.3 "… a Decree of Divorce was granted by the High Court of Justice, Principal Registry of the Family Division, London, on or about 13 July 1994" (See para. 5 of the grounding affidavit of the applicant).

2.4 On 2 August 1994 the applicant married Pauline Carbery at the Registry Office in Belfast and the paperwork in respect thereof suggest that both the applicant and Ms. Carbery had a residential address at 42 Sandhurst Drive, Belfast at that time.

2.5 On 6 July 1999 the applicant and Ms. Casey were granted a divorce pursuant to s.5(1) of the Family Law (Divorce) Act 1996 in the Circuit Court, Naas, Co. Kildare.

2.6 The parties secured a church annulment of the marriage of 2 August 1982 on 19 May 2000.

2.7 Ms. Carbery died on 5 October 2016, and on 24 November 2016 the applicant made an application for the Widowed or Surviving Civil Partner Grant, with an application made on 12 January 2017 in respect of the Widowers Contributory Pension.

2.8 The claim of the applicant in respect of both the pension and the grant was disallowed on the basis that the divorce from the applicant's first wife, Ms. Casey was not recognised as valid in Ireland. Notwithstanding a review and an appeal of such status, ultimately a decision was made by the Chief Appeals Officer on 31 March 2020 to the effect that the applicant was not entitled to either the grant or the pension on the basis that his divorce from Ms. Casey was not recognised in this jurisdiction.

2.9 The applicant points to the fact that between August 1994 and October 2016, the applicant and Ms. Carbery were treated by the Revenue Commissioners as a married couple.

2.10 It had been suggested to the applicant on a number of occasions during the course of the appeal and review above, that he might process an application pursuant to s.29 of the Family Law Act 1995 in the Circuit Court, seeking to have the divorce he secured in London declared valid in this jurisdiction. However, the grounding affidavit of the applicant merely indicates that he was advised that this would be a futile exercise.

2.11 During the course of the oral hearing the applicant requested the first named respondent to refer the matter for determination by the High Court pursuant to s.306 of the 2005 Act, however, such a referral was refused. It is common case that a referral under s.306 is within the privilege of the Appeals Officer rather than the applicant.

3. Exhausting statutory remedies

3.1 Under s.318 of the 2005 Act it is provided that the Chief Appeals Officer may at any time revise any decision of an Appeals Officer where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts. In this regard the respondent argues that this was a portion of the statutory process available to the applicant to pursue as opposed to proceeding with an application for judicial review.

3.2 Furthermore, under s.327 it is provided that any person who is dissatisfied with the decision of the Appeals Officer or the revised decision of the Chief Appeals Officer may appeal that decision or revised decision as the case may be to the High Court on any question of law. The respondent argues that such an application would involve the primary argument made before this Court to the effect that a reference to the Court of Justice of the European Union (CJEU) is required under Article 267 of the Treaty on the Functioning of the European Union (TFEU). The question suggested by the applicant is as to whether or not the "event" in the United Kingdom was to be recognised under the principle of assimilation of facts and events as provided for by Regulation 883/2004, whether directly or by analogy.

3.3 Ultimately the decision to apply by way of judicial review as opposed to the statutory appeal process would have had significant time implications in that the statutory appeal process must be made within a period of 21 days whereas judicial review applications must be processed within three months.

3.4 Both parties rely on the Supreme Court decision in *Petecel v. The Minister for Social Protection* [2020] IESC 25. In the judgment of O'Malley J. at para. 99 it was recorded that the existence of a right of appeal is not an automatic bar to seeking judicial review although is a matter to be taken into account in the exercise of the discretion of the court. In the case before the Supreme Court the first question that arose was as to whether or not the statutory appeal process could deal only with the legal merits of a claim for benefit, or whether it could deal with the validity of the legislation. There the Court was satisfied that the Appeals Officer did not have competence to determine the invalidity of an instrument although such officer could interpret national law by reference to EU law. Furthermore, it was recognised that an appeal to the High Court in such a case could result in a question being referred to the CJEU.

3.5 *Petecel v. The Minister for Social Protection* held that the statutory process could not involve a determination of the constitutionality of the legislation. However, in this regard the respondent argues that the applicant's argument on constitutionality is superficial, brief and essentially unsustainable.

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3.6 Notwithstanding that I accept the respondent's argument as to the minimal engagement by the applicant with the Constitution, and the argument that parties should be encouraged to follow the statutory scheme laid down by the Oireachtas, nevertheless, it does appear from the foregoing that consequences of choosing judicial review as opposed to proceeding with the statutory process should be taken into account in the exercise of judicial discretion as opposed to resulting in any outright refusal to deal with the issues raised.

4. Fettering of discretion

4.1 The applicant argues that the Appeals Officer fettered her discretion in failing to refer the issues raised to the High Court pursuant to s.306 of the 2005 Act aforesaid. The basis of such argument is the refusal of the respondent to accede to the request of the applicant to refer the matter to the High Court together with the content of para. 51 of *Petecel v. The Minister for Social Protection* aforesaid, which states:

> "Counsel for the appellant asserts, without contradiction, that s.306 (like its predecessors in social welfare legislation dating back some 30 years) has never been utilised."

4.2 The request is dealt with in the replying affidavit of Joan Gordon on behalf of the respondents of 1 December 2020. In para. 24 the request to refer the matter under s.306 is mentioned and it is stated that the Appeals Officer raised this issue with the deponent (the Chief Appeals Officer). It is stated:

> "Having considered the issues, I did not consider that it was necessary or appropriate to refer any question to the High Court for determination. I considered that the question before the Appeals Officer could be determined in accordance with the statutory provisions…I was also of the view that, if the Applicant was dissatisfied with the decision of the Appeals Officer, the 2005 Act provided remedies for him and other mechanisms to challenge that decision."

* * * *

4.3 I accept the respondent's argument that based on para. 24 aforesaid the respondent dealt with the application under s.306 on the basis of the facts of the case and accordingly, whatever about the possibility of a fettering of discretion in past cases, there is no sufficient evidence before this Court to suggest that the respondent's discretion was fettered.

5. Eligibility

5.1 Eligibility for the pension and the grant is set out in s.123 of the 2005 Act where "spouse" is defined as:

> "in relation to a widow or widower who has been married more than once, refers only to the widow's or widower's last spouse and for this purpose that last spouse

shall be read as including a party to a marriage that has been dissolved, being a dissolution that is recognised as valid in the State."

5.2 In *LD v. The Chief Appeals Officer & Ors*. [2014] IEHC 641, Peart J. stated at para. 38 that *inter alia*, "The [2005] Act should in my view be interpreted (sic) as widely as the words reasonably permit in order to reflect the permissive nature of the legislation….". At para. 40 Peart J. considered that the provisions under scrutiny should be given a purposive interpretation, yet one that is fully consistent with the clear words used by the Oireachtas.

5.3 In *NAMA v. Commissioner for Environmental Information* [2015] IEHC 51 it was considered that the term "include" may enlarge or extend the meaning of a class, or be exhaustive.

5.4 The applicant argues that having regard to the decision of Peart J. in *LD v. The Chief Appeals Officer* aforesaid, and the potential for the word "including" as it appears in s.123 of the 2005 Act in the definition of a spouse, as enlarging or extending eligibility, the said s.123 definition should be read as including a party such as the applicant to "a marriage that has been dissolved".

* * * *

5.5 I cannot agree that such an understanding of the definition would be fully consistent with the clear words used by the Oireachtas in the instant circumstances, notwithstanding that obviously in some circumstances "including" may well enlarge or extend a class of persons that might benefit. In the instant circumstance it appears to me that the word "including" is exhaustive by reason of the condition attached thereto in the wording of the provision, namely "…being a dissolution that is recognised as valid in the State".

5.6 I am satisfied that "being a dissolution that is recognised as valid in the State", refers to the preceding words "including a party to a marriage that has been dissolved", and therefore it is only a party to a marriage that has been dissolved where that dissolution is recognised as valid in the State, who is included in the definition of spouse in s.123 of the 2005 Act.

6. Need for a reference under Article 267

6.1 Counsel on behalf of the applicant suggests that it is inevitable that a reference to Europe will have to be made. The fact that he cannot rely on any particular case to identify that under European law Ireland is obliged to recognise the applicant's divorce in another Member State (the UK), he says demonstrates the need for a reference. It is argued that the applicant has a substantial chance of successfully securing a finding that his divorce is entitled to recognition within this jurisdiction, notwithstanding that he accepts that under domestic law (in particular having regard to s.5(3) of the Domicile and Recognition of Foreign Divorces Act 1986 and the judgment of the Supreme Court in *H v. H* [2015] IESC 7) it is not possible to secure recognition of his divorce without calling in aid European law.

6.2 It is argued that the European courts will uphold the applicant's divorce as being recognised under European law on the basis of one or both of the following arguments:

(a) Ireland should have accepted as valid the UK divorce by analogy having regard to the terms of Regulation 2201/2003 (Brussels II) just as in the case of *Coman* Case C-673/16, a judgment of the CJEU on 5 June 2018, Regulation 883/2004 was applied by analogy; and/or,

(b) at the time the applicant secured his divorce in the UK he was exercising his free movement to another Member State, accordingly under Regulation 883/2004 the facts and events that occurred in the UK (the applicant's divorce) should be accepted in this jurisdiction under Article 5 of Regulation 883/2004.

6.3 Both parties rely on the regulations and jurisprudence aforesaid to support their respective diametrically opposed arguments. As aforesaid the applicant suggests Regulation 2201/2003 should apply by analogy and in addition suggests that in any event Regulation 883/2004, Article 5 thereof applies insofar as facts and events in the UK are concerned. The applicant argues that when he went to the UK to secure the divorce he was exercising his right to freedom of movement. He further suggests that by virtue of Regulation 2 of the State Pension Credit Regulations 2002, considered in the UK Supreme Court decision of *Patmalniece v. Secretary of State for Work and Pensions* [2011] UKSC 11, once an Irish citizen enters the UK such citizen immediately has an entitlement to a state pension.

6.4 Ultimately, it is argued that notwithstanding the brevity of time that the applicant might have spent in the UK, facts and events that occurred therein, being the applicant's divorce, are entitled to recognition in this State without looking behind the decree of divorce.

6.5 On the other hand, the respondent argues that:

(a) under the terms of Regulation 2201/2003 same is a prospective rather than retrospective piece of legislation;

(b) Article 5 of Regulation 883/2004 manifestly does not apply to the applicant's divorce;

(c) the respondent inquires as to what evidence there is that the applicant was exercising his free movement right; and,

(d) the case of *Coman* and indeed Regulation 883/2004 apply to genuine EU citizens exercising their right to move and reside in another

6.6 It appears to me significant that when the Court inquired of the applicant as to what evidence was before the Court to the effect that the applicant travelled at all to the UK to secure his divorce, the response was to the effect that the applicant was clearly present in Belfast at the date of his marriage to Ms. Carbery. Clearly such a response is most

unsatisfactory. Being present in Belfast for his marriage on 2 August 1994 does not advance at all the applicant's argument *vis-à-vis* being in the UK either at the date of application for, or securing of, the decree of divorce of 15 July 1994.

6.7 Regulation 2201/2003 – Brussels II

6.7.1 Regulation 2201 of 2003, known as Brussels II, came into force on 1 August 2004 and was introduced for the purposes of dealing with the jurisdiction on recognition and enforcement of judgments in matrimonial matters within the EU. Under Recital 10 it is provided that the regulation is not intended to apply to matters relating to social security nor to other questions linked to the status of a person. Furthermore, maintenance obligations are excluded under Recital 11. Under Recital 23 reference is made to judgments in the field of family litigation being automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal or enforcement.

6.7.2 Under Article 3 thereof, in matters relating to divorce, jurisdiction shall lie with the courts of the Member State where the spouses are habitually resident *inter alia*, for at least a year or in certain circumstances for at least six months. Under Article 3(1)(b) jurisdiction shall lie in the case of the United Kingdom and Ireland in the Member State of the domicile of both spouses.

6.7.3 Article 21 provides that a judgment given in a Member State shall be recognised in the other Member State without any special procedures being required.

6.7.4 Article 22 provides that a judgment relating to divorce shall not be recognised if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought.

6.7.5 Under Article 64 it is provided that the provisions of the regulations shall apply only to legal proceedings instituted and documents formally drawn up after its date of application in accordance with Article 72.

6.7.6 In the grounding affidavit of the applicant of 17 June 2020 the only reference to the details of the divorce in the UK is set out at para. 5 and consists of the following statement:

> "I say that a Decree of Divorce was granted by the High Court of Justice, Principal Registry of the Family Division, London, on or about 13 July 1994."

6.7.7 It is apparent from the replying affidavit of Joan Gordon, Chief Appeals Officer, of 1 December 2020, that initially, in the applicant's application for the pension and grant, the applicant denied having been divorced previously. Subsequently he was required to lodge the certificate of his marriage to Ms. Carbery and when same was lodged it was apparent therefrom that he was recorded as being a divorcee and was subsequently required to fill out the details in respect of same. The applicant at that time believed that the divorce he obtained was secured in Belfast and there was a delay as Belfast authorities could not locate the divorce. It subsequently became apparent that he was divorced in London. In

his revised application a query was raised as to the country in which he was living when the divorce or dissolution proceedings started and his answer was Ireland.

6.7.8 Given the totality of the foregoing it appears to me that there is no evidence before the Court to suggest that the applicant travelled to any portion of the UK either at the date of making the application for divorce, which is not disclosed, or at the date of securing the decree of divorce.

6.8 Regulation 883/2004

6.8.1 Regulation 883/2004 was introduced as per Recital 1 thereof for the purpose of coordination of national social security systems and under Recital 4 it is stated that it is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.

6.8.2 Under Recital 8 it is provided that the general principle of equal treatment is of particular importance for workers who do not reside in a Member State of their employment, including frontier workers.

6.8.3 Recital 9 records that the Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts, and that this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings.

6.8.4 Under Recital 14 it is provided that the objectives must be attained by aggregating all the periods taken into account under the various national legislation for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefits, and by providing benefits for the various categories of persons covered by the regulation.

6.8.5 Under Recital 17a it is provided that once the legislation of a Member State becomes applicable, conditions for affiliation and entitlement to benefits should be defined by the legislation of the competent Member State while respecting community law.

6.8.6 Under Recital 32 the purpose of the regulation is for fostering mobility of workers in the various Member States, and therefore it is stated that it is necessary to ensure closer and more effective coordination between the unemployment insurance schemes and the employment services of all Member States.

6.8.7 Under Article 2 the regulation will apply to nationals of a Member State residing in a Member State who are or have been subject to the legislation of one or more Member States.

6.8.8 In this regard the applicant laid emphasis on Article 2 as being applicable to the applicant as he is residing in Ireland but subject to legislation in the UK vis-à-vis the divorce.

6.8.9 Under Article 5 it is provided that where under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent

benefits acquired under the legislation of another Member State or to income acquired in another Member State. Under Article 5(b) it is provided that where under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.

6.8.10 The respondent argues that it is clear that under the 2005 Act all nationals of Ireland and other Member States are treated the same. If such individual's marriage is not recognised no benefits will be given in Ireland whether of another Member State or a national of Ireland. It is said this is consistent with Article 5 of Regulation 883/2004.

6.9 *Coman*, Case C-673/16

6.9.1 In *Coman*, Case C-673/16, the applicant held Romanian and American citizenship and his partner was an American citizen. The applicant took up residence in Brussels in May 2009. The parties married in Brussels on 5 November 2010. Following the applicant's cessation of work in Brussels in March 2012 the parties sought information as to how the applicant and his family could reside lawfully in Romania for more than three months. The Romanian government indicated that they could not so reside as Romania did not recognise same sex marriages.

6.9.2 In its judgment the Court referred to established case law that Directive 2004/38 is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of Member States, which is a right conferred directly on citizens of the Union by Article 21(1) of the TFEU. At para. 19 of the judgment it was noted that Article 3(1) of Directive 2004/38 applies to all Union citizens who move to or reside in a Member State. The Court acknowledged that the Directive did not confer a derived right of residence on Mr. Coman's partner although it was also noted that the Court had previously acknowledged that in certain cases an otherwise non-eligible party would be accorded such a right on the basis of Article 21(1) aforesaid.

6.9.3 In para. 24 of the judgment the Court noted that in particular the Court has held that where during the genuine residence of a Union citizen, the citizen's family may acquire the grant of a derived right of residence. The Court was satisfied that Directive 2004/38 should be applied by analogy to the situation at hand, and the answer to the first question therefore was that in the situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence in a Member State other than that of which he is a national, and whilst there has created or strengthened family life, Article 21(1) of the TFEU must be interpreted as precluding the Member State of which the citizen is a national from refusing to grant third country nationals a right of residence.

6.9.4 At para. 36 the Court was satisfied that a Member State could not rely on its national law as justification for refusing to recognise in its territory for the sole purpose of granting a derived right of residence, the marriage concluded in another Member State in accordance with the law of that State. At para. 37 it is stated:

> "Admittedly, a person's status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States and EU law does not detract from that competence."

6.9.5 At para. 45 it was recorded that the Court finds that the obligation of a Member State to recognise a marriage for the sole purpose of granting a derived right of residence to a third country national does not undermine the institution of marriage in the first Member State which is defined by national law and falls within the competence of the Member States. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that State, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law.

6.9.6 Paragraph 46 provides therefore:

> "Accordingly, an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned."

6.9.7 The applicant relies on the above decision to support his contention that the divorce obtained in the UK and the subsequent marriage to Ms. Carbery are entitled to recognition in this jurisdiction. The respondent counters that the case clearly relates to the genuine exercise of a right to move and reside in another Member State and a marriage conducted in accordance with the laws of that Member State will be recognised in another Member State solely for the purposes of granting a right of residence.

6.10 Decision on reference under Article 267

6.10.1 I am satisfied that there is no basis for the applicant's argument that Regulation 2201/2003 would be applicable to the applicant for the year in or about 1994, having regards to the terms of the regulation cited above.

6.10.2 I am satisfied that having regard to the totality of the case, as opposed to the portions thereof identified by the applicant, *Coman* supports the respondent's argument that an assessment under the 2005 Act is within the competence of Ireland to determine, so that the relevant pension and grant will only be payable to a party who has been divorced where that divorce is entitled to recognition within the jurisdiction of Ireland.

6.10.3 No evidence has been adduced by the applicant to establish that the divorce obtained in the UK was in fact in compliance with UK law and indeed the answer given in his application form for the pension and grant as identifying that he was residing in Ireland at the date of application for the grant is not consistent with any compliance with UK legislation. Furthermore, no other evidence has been adduced by the applicant, assuming he did travel to the UK in connection with securing the divorce in 1994, that the applicant actually moved to and resided in the UK or was otherwise genuinely availing of his rights under Article 21 of the TFEU. The protocol to the common travel area is also of no

assistance to the applicant given the lack of information disclosed to the Court as to any movement of the applicant to the UK prior to the issuing of the 1994 divorce.

6.10.4 Accordingly, the applicant's argument to the effect that he has a strong case that if there was a reference to the European Courts he would secure an order obliging Ireland to recognise his divorce obtained in the UK in this jurisdiction, for the purpose of securing the grant and pension, is effectively unsustainable.

7. Constitutionality of the 2005 Act

7.1 This heading of claim is based on two issues namely:

(1) there is an unlawful lacuna in Irish legislation insofar as his divorce and remarriage in another Member State cannot presently be recognised under national law; and,

(2) he is being discriminated against because a national of a third country who might have obtained a divorce, will have his or her divorce recognised in this jurisdiction without question for the purpose of the pension and grant herein, whereas because the applicant is a citizen of Ireland his divorce and remarriage is not recognised for the purpose of the 2005 Act.

* * * *

7.2 I am satisfied that the applicant has not demonstrated any unlawful lacuna relative to his circumstances. The applicant secured a recognised divorce in Ireland in 1999, however, notwithstanding he was free to do so, the applicant did not marry Ms. Carbery thereafter prior to her death. The applicant therefore had some seventeen years to arrange his family circumstance following his divorce from his first wife when he could lawfully marry Ms. Carbery, but choose not to do so.

7.3 The applicant has not demonstrated any discrimination against him. It is clear from the provisions of s.123 of the 2005 Act that in relying on a marriage following a divorce for the purposes of securing the pension and grant, that divorce must be recognised in this State, and therefore the provisions apply as equally to the applicant as any third party from another Member State.

8. De facto family

8.1 The applicant argues that his de facto family should be recognised in this jurisdiction as indeed it was by the Revenue Commissioners, and he should not be discriminated against by reason only of the fact that he was not lawfully married as recognised in this jurisdiction to Ms. Carbery.

8.2 The applicant relies on the judgment of the UK Supreme Court in *McLaughlin*, a judgment of Lady Hale of 30 August 2018 involving the payment, after the death of one parent for the benefit of children. In that decision the UK Supreme Court held that there should be no disparity as between children of a marriage and children of cohabitees.

8.3 Reference was made in *McLaughlin* to the European Court of Human Rights (ECtHR) judgment of *Shackell v. United Kingdom* (Application no. 45851/99, 27 April 2000), where

the Court denied the claim of Widow's Benefit to an unmarried surviving partner and held that discrimination as between the survivor of an unmarried partner and a married partner was justified as marriage conferred a special status, and the lack of public contract between cohabitees meant that the situation was not comparable to a widow. *McLaughlin* also noted that a Strasburg court allows a wide margin of appreciation to Member States, in or about justification of a different treatment in law. In *McLaughlin* the allowance was payable as it was held to be payment in respect of children and therefore the marital status of the parents was irrelevant.

* * * *

8.4 The payments being considered in this judgment are clearly for the benefit of a surviving spouse or civil partner, with additional sums payable if there is a dependant child. Such payment is readily distinguishable from the payments referred to in *McLaughlin*.

8.5 In *Shackell v. United Kingdom*, the Court, consistent with a like status in Ireland (as per paras. 6-8 of the affidavit of Joan Gordon of 1 December 2020) recognised the validity of a difference in treatment of parties to a marriage (or other civil contract), to the treatment of parties without such public contract.

8.6 I am satisfied that neither McLaughlin nor *Shackell v. United Kingdom* are of any support at all to the applicant in suggesting that his de facto family status must be recognised by the Irish State for the purpose of determining that the applicant is eligible to the claimed pension and grant.

9. Conclusion

9.1 In all of the circumstances the applicant has not demonstrated his entitlement to any of the reliefs claimed, and I am further satisfied that there would be no benefit in making a reference to the CJEU. All of the reliefs claimed by the applicant are therefore refused.