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Widowers' Bereavement Benefits and Tax Relief: A Survey of Some Recent Case Law of the European Court of Human Rights

This article examines the issue of discrimination in respect of entitlement to UK widower bereavement benefits and tax relief in the context of recent UK and European Court of Human Rights (ECtHR) decisions.

Introduction

Anyone who regularly examines the website of the ECtHR for cases concerning taxation might have been astonished by the number of cases involving the United Kingdom in recent years. There have been literally dozens of cases involving the United Kingdom, with case names such as *Application No. 58372/00 – 50 applications against the United Kingdom*, and *Application No. 27948/02 – 90 applications against the United Kingdom*. Readers might have thought that multiple and gross abuses of human rights of taxpayers were being perpetrated in the United Kingdom!

These cases all concern the failure of the UK government to grant certain social security benefits and a tax relief to widowers, i.e. to men whose wives had died, but which were granted to widows, i.e. to women whose husbands had died. This article seeks to explain the background to these cases.[1] It will then be for the reader to judge whether there have been gross abuses of human rights in the United Kingdom and, if so, whether the ECtHR has shown itself capable of providing an adequate remedy.

Background

Until April 2001, the UK's social security system and tax system, as they applied to bereavement, discriminated against men. Certain social security payments and a tax allowance were granted only to women whose husbands had died, and not to men whose wives had died. Partly as a result of the litigation discussed in this article, and partly as a result of pressure from the European Community, a non-discriminatory system of social security payments on bereavements was introduced with effect from April 2001.[2]

Until April 2001, there were three social security benefits which were available only to women, and a tax relief which, although abolished in 2000, was until then available only to women. The details of these benefits and the tax relief are explained more fully in the relevant case law of the ECtHR. Here it is only necessary to explain in outline these benefits and the relief.

The Widow's Payment was a lump sum payment (GBP 1,000 at the relevant time) paid to a woman who had been widowed.[3]

The Widowed Mother's Allowance was a weekly payment made to a woman who had been widowed and who had the responsibility for the care of a son or daughter.[4] The payment of the allowance continued until all children ceased full-time education.

The Widow's Pension was paid to a woman who had been widowed and who was over the age of 45 but under the age of 65 (and who had ceased to be entitled to a Widowed Mother's Allowance if she had previously been entitled to that Allowance). Accordingly, this pension typically applied to older women who had no children or who had ceased to be responsible for the care of children.[5]

The Widow's Bereavement Allowance (WBA) was a tax allowance originally introduced by the Finance Act 1980 (and for the relevant years when the litigation was brought before the ECtHR was governed by Sec. 262(1) of the Income and Corporation Taxes Act 1988). The WBA was introduced at a time when married couples were taxed as a single taxable entity in the name of the husband, the husband receiving an additional allowance (the Married Man's Allowance) in respect of his wife's earnings. When a married man was widowed, he could

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1. The author should explain that he had a personal involvement in these matters, having been involved as Counsel in the *Wilkinson* case discussed subsequently, and having worked with SAGA, a company specialising in holidays, insurance and other products for the elderly, to prepare standardized documentation to bring a claim before the ECtHR. To a certain extent, this article draws on the author's personal knowledge of the background. This may also imply that the author is not entirely impartial.
2. By virtue of the Welfare Reform and Pensions Act 1999, which introduced a bereavement payment, bereavement allowance, and widowed parents' allowance that, for the first time, were available equally to men and women.
3. The relevant legislation was Sec. 36 of the Social Security and Benefits Act 1992 (SSBA 1992).
4. The legislation providing for the allowance was Sec. 37 of the SSBA 1992.
5. The legislation providing for the Widow's Pension was Sec. 38 of the SSBA 1992. All these three benefits were social security benefits and were dependent on a claim made within a time limit prescribed by the legislation. Although it is not discussed further below, several of the cases brought against the UK government were decided on the basis that applicants had failed to make a claim or failed to claim within the statutory time limit, so that they were not entitled to any of the benefits, or only entitled from the time that the claim was made.

continue to claim the Married Man's Allowance for the year of his wife's death and the subsequent year. The original objective of the WBA was to grant the equivalent of the Married Man's Allowance to a widowed woman in the year that her husband died and the subsequent year.

The WBA had become an anachronism by the mid-1990s. Independent taxation of men and women was introduced with effect from the year of assessment 1990-91. The husband was granted an additional allowance (the Married Couples Allowance), which became transferable between spouses from the year of assessment 1993-94 onwards. From 1994, the UK government began successively to reduce both the Married Couples Allowance and the WBA. The WBA was finally abolished with effect from 6 April 2000.[6]

Whilst the WBA was something of an anachronistic remnant of the old system of taxing a wife's income in the name of her husband, the allowance remained in force until April 2000 and was discriminatory at all times, as it was available only to a woman whose husband had died, and not to a man whose wife had died.

Early Litigation and UK Case Law

The ECtHR jurisprudence can be traced to a starting point in the case of *Christopher Crossland v. United Kingdom*.[7] Mr Crossland's wife died in 1995, and he had to give up his full-time job to care for their children. In August 1996, he applied to the Inland Revenue for a bereavement tax allowance (i.e. the equivalent of the WBA), and was told that the allowance was exclusive to widows and there was no equivalent for widowers. In April 1997, he lodged an application directly with the Strasbourg bodies alleging discrimination on grounds of his sex.[8] On 8 June 1999, the ECtHR declared the application admissible. The UK government then offered a "friendly settlement" to Mr Crossland, paying him the sum of GBP 575, which was the amount he would have received had the WBA been available to men at the date his wife died. This offer was accepted and no decision on the merits had to be made.

The offer of settlement to Mr Crossland became public knowledge and was commented on in the media. As a consequence, a number of other widowers wrote to the Inland Revenue asking for an equivalent payment to Mr Crossland. At that point, it could have been expected that the UK government would have agreed to pay other widowers an amount equivalent to what they would have received had the WBA been available to men, and the matter would have ended there.

The UK government, however, chose to distinguish Mr Crossland's case on the grounds that he had initiated a claim before the Strasbourg bodies, and incurred expense in doing so, and that it was appropriate to make a friendly settlement offer to him but not to other widowers. In effect, the UK government invited other widowers to commence an action against them before the Strasbourg bodies. This invitation was taken up by widowers in relatively large numbers, which explains, in part, the number of cases against the United Kingdom in recent years.

Meanwhile, aside from widowers who made claims directly to the Strasbourg bodies, a further widower commenced an action in the UK courts for judicial review of the Inland Revenue's refusal to grant him the equivalent of a WBA. Adrian Wilkinson lodged a claim for judicial review in March 2001 of the Inland Revenue's refusal to grant him the equivalent of the WBA. That litigation (together with a parallel case involving the social security benefits for widowers – the *Hooper* case)[9] ended up ultimately in the House of Lords (see *R v. IRC, ex parte Wilkinson*).[10] That case became ultimately the leading authority on the power of the Commissioners of Revenue & Customs to issue extrastatutory concessions. By the time the *Wilkinson* case reached the House of Lords, the Inland Revenue had admitted that the failure of the legislation to grant the WBA to men as well as to women was discriminatory and could not be justified. The Inland Revenue, however, argued that there was nothing they could do about it. The grant of the WBA to women only and not to men was part of primary legislation and they had no power to disregard that primary legislation. Mr Wilkinson, on the other hand, argued that the general discretion of the Commissioner in their care and management of the tax system allowed them to make a concessionary grant of the allowance in order to remedy the now admitted discrimination between the sexes inherent in the primary legislation. Mr Wilkinson referred to a number of examples of "extra-statutory concessions" where the Commissioners had departed from the strict letter of the legislation in order to remedy anomalies or to deal with short-term problems with the tax system.

The House of Lords ultimately held that the power of the Commissioners to grant concessions was limited and did not go so far as to disregard primary legislation, except in cases of transitory anomalies and other similar situations. This put in train a process which has led ultimately to the enactment into legislation of a number of previously concessionary practices.[11]

6. By virtue of Sec. 34 of the Finance Act 1999.
7. Application No. 36120/97; admissibility decision issued 8 June 1999; judgment of 9 November 1999; resolution by the Committee of Ministers, Resolution DH (2000) 81 of 29 May 2000.
8. At that time, the European Convention on Human Rights had not yet been incorporated into the UK domestic law. As a consequence, it would have been impossible for Mr Crossland to make a claim based on his rights under the Convention in UK domestic courts. The Convention was incorporated into domestic law by the Human Rights Act 1998. That Act provided, inter alia, for a remedy of a "declaration of incompatibility". The Grand Chamber of the ECtHR has recently held, in another tax case from the United Kingdom, that a declaration of incompatibility is not yet an effective remedy (see *Burden v. United Kingdom* [2008] STC 1305; application No. 13378/05). It would be an interesting issued to establish whether a taxpayer in the position of Mr Crossland would now be able to bring his case directly to the ECtHR or would have first to exhaust domestic remedies.
9. *R v. Secretary of State for Works and Pensions, ex parte Hooper* [2005] UK HL 29.
10. [2005] UK HL 30.
11. On this, see the provisions for the enactment of former extrastatutory concessions in the Finance Act 2008.

The House of Lords also concluded that it was inappropriate to "level up" the legislation by granting the equivalent of the value of the WBA to men. The WBA was an anomalous remnant of the previous system of taxation, and it would exacerbate the anomaly, at the cost of the general tax-paying population, to extend the allowance to widowers too.

ECtHR Jurisprudence: The Leading Cases

While Adrian Wilkinson brought his case before the UK courts, the vast majority of widowers brought their claims directly to the ECtHR on the basis that (as Wilkinson had proved) there was no effective remedy before the UK courts.

The ECtHR dealt with the various claims by issuing three lead judgments, the first dealing with Widow's Payment and Widowed Mother's Allowance, the second dealing with the WBA, and the last dealing with the Widow's Pension. It is interesting to examine those lead judgments in the order in which they were delivered, and to contrast those judgments since they reached rather different conclusions.

The lead judgment on the Widow's Payment and the Widowed Mother's Allowance was *Willis v. United Kingdom*,[12] delivered on 11 June 2002. At that stage, the domestic litigation brought by Wilkinson and Hooper had only reached the stage of the High Court, and not yet the House of Lords. Before the High Court, the UK government had conceded that there had been discrimination against men in the failure to pay them the Widowed Mother's Allowance.

The ECtHR concluded that the refusal to grant a man the Widow's Payment and the Widowed Mother's Allowance was unjustified discrimination and that there had been a violation of Art. 14 of the European Convention taken in conjunction with Art. 1 of the First Protocol. The Court awarded pecuniary damage based on the amount of GBP 1,000 as the Widow's Payment and slightly over GBP 20,000 for the Widowed Mother's Allowance, plus interest from the date on which the pecuniary damage accrued, making an award on an equitable basis of GBP 25,000. Subsequent cases involving the Widow's Payment and the Widowed Mother's Allowance (where the applicant had made a claim within the time limits and met the conditions for a claim) have been resolved on a similar basis. Many of the recent judgments issued by the ECtHR on the claims against the United Kingdom have adopted the approach in this case.

The second of the lead judgments, relating to the WBA, was the case of *Hobbs, Richard, Walsh and Geen v. United Kingdom*,[13] which was delivered on 14 November 2006. It is significant that, by the time that this judgment was issued, the *Wilkinson* and *Hooper* cases had been decided by the House of Lords and, in particular, the House of Lords had refused to extend the WBA to men. Before the ECtHR, the UK government accepted that the WBA fell within Art. 1 of the First Protocol and did not seek to argue that the discrimination between men and women for the period from 1994 to 2000 (when the WBA was abolished) could be justified. The ECtHR confirmed this position and found, therefore, that there had been a violation of Art. 14 of the Convention taken in conjunction with Art. 1 of the First Protocol.

The case turned only on the question of the amount of just satisfaction to be awarded to the injured party in accordance with Art. 41 of the European Convention. The UK government argued that, in line with the House of Lords' judgment in the *Wilkinson* case, it was inappropriate to "level up" by granting to widowed men the allowance that had been given to widowed women. The argument was that the retention of the WBA after 1994 was anomalous and that it would be inappropriate to extend that anomalous treatment to men at the overall cost to the taxpayer. The only previous case in which the ECtHR had taken this approach and refused to level up was the case of *Van Raalte v. the Netherlands*.[14] In contrast, in at least four other cases the ECtHR had awarded compensation for the wrongful levying of taxes or the refusal of a tax allowance.

The ECtHR decided that the question of whether or not an award of financial compensation should be made to remedy discriminatory treatment depended on all the circumstances of the case, including the size of the class of persons affected by the discrimination, the nature of the legislative provision, and whether the discrimination had subsequently been eliminated. In these circumstances, the ECtHR (following the decision of the House of Lords in *Wilkinson*) decided not to remedy the discrimination by "levelling up" and refused financial compensation. They also refused any financial compensation for anguish, loss of sleep, distress and frustration. Finally, to add insult to injury, in the case of *Hobbs*, the Court made no award for legal costs. The result was that, despite a finding by the ECtHR of discrimination and a breach of Art. 14 (taken in conjunction with Art. 1 of the First Protocol), Mr Hobbs received no financial compensation and no costs.

The third and final, lead judgment, which dealt with the issue of the Widow's Pension, was the case of *Runkee & White v. United Kingdom*,[15] which was decided on 10 May 2007 (and, therefore, after the House of Lords' judgments in both *Wilkinson* and *Hooper*).

As explained previously, the Widow's Pension was granted to widows over the age of 45 but under the age of 65 and (if there were children) only after those children ceased to be in full-time education when the Widowed Mother's Allowance ceased to be paid. In *Hooper*, the House of Lords had unanimously found that, with regard to the Widow's Pension, the difference in treatment between men and women was objectively justified

12. Application No. 36042/97.
13. Application Nos. 63684/00, 63475/00, 63484/00 and 63468/00.
14. Application No. 20060/92, (1997) 24 EHRR 503, judgment of 21 February 1997.
15. Application Nos. 42949/98 and 53134/99.

and involved no breach of Convention rights. The House of Lords had accepted that the Widow's Pension was paid to older women who were likely to have given up work when they married. This did not apply to widowers, who were not, therefore, in an objectively comparable position. The main question, as the House of Lords saw it, was whether or not there was justification in not moving faster in abolishing the pension for widows, not the question of extending it to men.

The ECtHR accepted the House of Lords' description of the Widow's Payment and its application to older women in circumstances where they might have given up work on becoming married. The ECtHR, therefore, concluded, in line with the House of Lords, that the difference in treatment was reasonably and objectively justified because it was intended to correct "factual inequalities" between older widows as a group and the rest of the population. Consequently, the ECtHR concluded that there had been no violation of Art. 14.

To summarize the three lead judgments, the ECtHR found that failure to extend the Widow's Payment and the Widowed Mother's Allowance to men was discriminatory and awarded financial compensation. The ECtHR concluded that the failure to extend the WBA was discriminatory, but refused to award financial compensation and decided that the failure to extend the Widow's Pension to men was not discriminatory. Subsequent cases have been settled or decided on the basis of these lead judgments, with reference to the particular circumstances of the widower concerned.

Conclusions

There is much to criticize about this saga. So far as the UK government is concerned, it comes out of this with very little credit. The government ultimately admitted discrimination in respect of most of the social security benefits and the tax allowance, but nevertheless fought tooth and nail to prevent a group of widowers from receiving relatively small payments which would have assisted them in their financial circumstances following their bereavement. The question must be asked what sort of principles or morality is evidenced by the government leadership that allowed this battle to be fought against widowed men. The failure to treat widowers and widows in a non-discriminatory fashion dates back to the period before 2001, but the decision to maintain a stance of denying equivalent benefits to widowers continued from 1997 onwards.

Equally, the ECtHR comes out of the saga with little credit. In principle, it is possible to understand the different conclusions reached in the three lead judgments, i.e. the WBA had been abolished from 2000, and it is reasonable to accept that it was an anomalous allowance even before its abolition. It was, however, an anomalous allowance that was granted on a discriminatory basis and that discrimination was accepted to be a breach of the Convention. The Widow's Pension did apply primarily to older widows and reflected earlier social conditions where women usually gave up work on marriage (and might, therefore, be unable to return to work after the death of their husband or when their children had ceased full-time education). The social security benefit had, however, been continued even after social conditions had changed in the United Kingdom and had been continued on a discriminatory basis. It seems clear that the ECtHR was heavily influenced by the judgments of the House of Lords in *Wilkinson* and *Hooper*, rather than making an independent assessment of the appropriateness of levelling up and awarding financial compensation.

Most significant is the potential impact on the willingness of applicants to bring cases to the ECtHR in the future. It is somewhat naive to assume that "just satisfaction" for most applicants is satisfactory where all that they receive is a declaration that their rights have been infringed. The failure to grant full financial compensation to an individual whose Convention rights have been infringed is likely to deter rather than encourage applicants to take their cases to Strasbourg in the future. The miserly approach to claims for compensation and to the award of legal expenses is likely to compound that reluctance.

At the end of the day, a significant number of widowers have had to bring claims in Strasbourg in order to obtain moderately sized payments of compensation for the discriminatory refusal to make to them the equivalent of the Widow's Payment and the Widowed Mother's Allowance. It would have done more credit to everyone, and been a far more sensible use of resources, had the UK government decided that, when it introduced a non-discriminatory system of bereavement payments from 2001, it would remedy the injustice of the past and make ex gratia payments to all surviving widowers who had been discriminated against with regard to social security payments and the tax allowance in previous years.