



## Advice NI Information Briefing

# Bereavement Support Payments in Northern Ireland

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## Bereavement Support Payments in Northern Ireland

### Contents

Background .....	1
Bereavement Support Payment .....	2
Basic Eligibility .....	2
Adviser Checks .....	3
Claims and Payment .....	3
Adviser Checks .....	4
Social Policy Issues & Legal Challenges .....	4
Claimant's spouse unable to work .....	4
What does this ruling mean? .....	5
Adviser Checks .....	6
Cohabiting partners .....	7
What does this ruling mean? .....	7
Adviser Checks .....	9
Payable amounts not uprated .....	9

### Background

State support for those effected by bereavement has been a feature of the welfare system in Britain since the inter-war period, when the first state-funded widow's and orphan's pensions were created.<sup>1</sup> Despite some reform in the intervening decades, it was not until 2001 that the system was modernised with the introduction of bereavement benefits, which also extended support to widowers. The Bereavement Support Payment (BSP) consolidates the three elements of the previous bereavement benefit system – Bereavement Payment (BP), Bereavement Allowance (BA) and Widowed Parent's Allowance (WPA) – into a single benefit.<sup>2</sup>

<sup>1</sup> Pat Strickland & Graham Vidler, '[Widows' Benefits \(revised edition\)](#)', *House of Commons Library Research Papers*, 98/100 (1998) [accessed 13 September 2021]

<sup>2</sup> Andrew Mackley & Steven Kennedy, '[Widowed Parent's Allowance](#)', *House of Commons Library Research Briefing* (2019) [accessed 15 September 2021]

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BSP came into operation in Northern Ireland from 6<sup>th</sup> April 2017 under the provisions of the [Pensions Act \(Northern Ireland\) 2015](#) and the [Bereavement Support Payment Regulations \(Northern Ireland\) 2017](#) (since revoked and replaced). Where a bereavement occurred on or after 6<sup>th</sup> April 2017 the surviving spouse was required to submit a claim to BSP.<sup>3</sup> The previous bereavement benefit system continues to operate on a legacy basis for bereavements that occurred before 6<sup>th</sup> April 2017.<sup>4</sup>

Soon after the introduction of BSP significant legal challenges arose in relation to the provisions both of the legacy benefits and BSP itself. This briefing seeks to address the implications of the judgements arising from those cases and the recent response of the Department of Communities in Northern Ireland. However, in order to provide some helpful context we will begin by introducing the basic features of BSP.

## **Bereavement Support Payment**

### **Basic Eligibility**

BSP is a contribution-based social security benefit administered by the Department for Communities in Northern Ireland. It offers financial support to people of working age following the death of their spouse or civil partner. The main conditions of entitlement are as follows:

- claimant's spouse or civil partner died on or after 6 April 2017;
- claimant was under [State Pension age](#) when their spouse or civil partner died;
- claimant ordinarily resident in the UK or any country with a reciprocal agreement;
- deceased paid sufficient [National Insurance contributions](#) in any single tax year during their working life.<sup>5</sup>

Given the potential complexity of contribution conditions it is worth making these as clear as possible. The contribution condition for BSP is met if both of the following apply:

- the deceased paid either Class 1 or 2 National Insurance contributions during any year of their working life;
- during that year they paid contributions on earnings of at least 25 times the Lower Earnings Limit for the year.<sup>6</sup>

An exception to the contribution condition applies where the deceased was an employed earner and they died as a result of either an industrial accident or a

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<sup>3</sup> [Decision Maker's Guide](#) (hereafter DMG) 59001; Pensions (2015 Act) (Commencement No. 5) Order (Northern Ireland) 2017, [art 2](#)

<sup>4</sup> DMG 59002, also chapters 58 (Widow's Benefit) and 63 (Bereavement Benefit)

<sup>5</sup> DMG 59011; Pensions Act (Northern Ireland) 2015, § 29(1); [Bereavement Support Payment: Eligibility](#)

<sup>6</sup> DMG 59012; Pensions Act (Northern Ireland) 2015, § 30(1); for details of the National Insurance contribution thresholds in specific years, see [Rates and allowances: National Insurance contributions](#)

prescribed disease. In that case it will be accepted automatically that the contribution condition has been met.<sup>7</sup>

As with the previous bereavement benefit system there are no income or qualifying criteria for BSP, so in principle any surviving spouse or civil partner of working age can submit an application. In addition, there is no lower age limit for BSP and payment of the benefit will continue if the claimant remarries, enters into a civil partnership or moves in with a partner.<sup>8</sup> However, entitlement to BSP will cease immediately once the claimant reaches State Pension age.<sup>9</sup>

### *Adviser Checks*

- Has the client's spouse or civil partner recently died?
- Is the client below State pension age?
- Did the client's spouse or civil partner pay National Insurance contributions at any time during their life?

### **Claims and Payment**

Claims for BSP can be made either by [phoning the Bereavement Service](#) or [downloading an application form](#). The Bereavement Service will also be able to assist with reporting the death to other benefits, where appropriate.

It is important that clients are supported to make claims as promptly as possible as this can affect the amount of benefit they will receive, both in terms of the amount of the first payment and the period over which the benefit will be paid. In the first instance, clients claiming within 12 months of the death of their spouse or civil partner will be entitled to an initial payment equivalent to the old Bereavement Payment. In addition, BSP is paid in up to 18 monthly instalments, equivalent to Bereavement Allowance and Widowed Parent's Allowance, running from the date the claimant's spouse or civil partner died, but this can only be backdated up to a maximum of 3 months from the date of claim.<sup>10</sup> Therefore, the later the claim is made the fewer payments the claimant will receive.

There are two rates of BSP: standard and higher. A person will be paid the standard rate where they meet all criteria other than the conditions of entitlement to the higher rate.<sup>11</sup> They will be entitled to the higher rate if any of the following apply:

- they were pregnant when their spouse or civil partner died;
- they were entitled to Child Benefit when their spouse or civil partner died;
- after the spouse or civil partner died, they become entitled to Child Benefit for a child or qualifying young person who was living with them or the deceased spouse or civil partner immediately before the spouse or civil partner died.<sup>12</sup>

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<sup>7</sup> DMG 59013; Pensions Act (Northern Ireland) 2015, § 30(3)

<sup>8</sup> DMG 59007

<sup>9</sup> DMG 59016; Pensions Act (Northern Ireland) 2015, § 29(5)

<sup>10</sup> DMG 59071; BSP (No. 2) Regs (NI), reg 2

<sup>11</sup> DMG 59056; Bereavement Support Payment (No. 2) Regulations (Northern Ireland) 2019 (hereafter BSP (No. 2) Regs (NI)), reg 5

<sup>12</sup> DMG 59051; BSP (No. 2) Regs (NI), reg 4

At the time of writing (2021-22 tax year), the rates of BSP are as follows:<sup>13</sup>

	Initial Payment	Monthly Instalments
Higher	£3,500 <sup>14</sup>	£350 <sup>15</sup>
Standard	£2,500 <sup>16</sup>	£100 <sup>17</sup>

BSP is not taxable.<sup>18</sup> In addition, it is not taken into account as income for the purposes of calculating entitlement to other benefits, although it can be treated as capital.<sup>19</sup>

### *Adviser Checks*

- Did the death of the client's spouse or civil partner occur in the last 3 months?
- Did the death of the client's spouse or civil partner occur in the last 12 months?
- Does the client have children (and are they entitled to Child Benefit for them)?

## **Social Policy Issues & Legal Challenges**

Any social security benefit has qualifying criteria, which will inevitably mean that not all will satisfy that criteria. Two individuals with a bereavement may not both be eligible for the BSP or the same amount of BSP.

One obvious inequality is that the claimant's spouse or civil partner needs to have paid a certain level of Class 1 or Class 2 National Insurance contributions in any single tax year during their working life. This is demonstrated by the first case below: only now, after a judicial review in 2020, can a person claim when their deceased partner was not able to work due to disability.

The second case relates to co-habiting (i.e. unmarried) partners, which was a problem with the legacy bereavement benefits that was not corrected on the introduction of BSP. Again, this stance was only addressed by the government following a legal challenge.

Finally, we briefly address the question of uprating – in contrast to most other benefits, rates of BSP are specified in legislation and are static relative to inflation.

### **Claimant's spouse unable to work**

In August 2020, a judicial decision was reached in the case of Michael O'Donnell v Department for Communities. The claimant's wife died, leaving a young family. Her husband claimed BSP and was refused on the grounds that his wife had not paid the necessary contributions. This despite the fact that the claimant's wife had been

<sup>13</sup> [Bereavement Support Payment: Payments](#)

<sup>14</sup> DMG 59033; BSP (No. 2) Regs (NI), reg 3(2)

<sup>15</sup> DMG 59032; BSP (No. 2) Regs (NI), reg 3(1)

<sup>16</sup> DMG 59037; BSP (No. 2) Regs (NI), reg 3(5)

<sup>17</sup> DMG 59036; BSP (No. 2) Regs (NI), reg 3(4)

<sup>18</sup> [Income Tax: Tax-free and taxable state benefits](#)

<sup>19</sup> [Bereavement Support Payment: Effect on other benefits](#)

severely disabled from a young age, and therefore not able to work and fulfil the contribution requirements.

The Court of Appeal ruled that current arrangements discriminate by treating the family of a deceased person who was never able to work the same as a family of a deceased person who chose not to work.<sup>20</sup> The Court concluded:

...section 29(1)(d) of the 2015 Act should be read and given effect so that the contribution condition is to be treated as met if the deceased was unable to comply with section 30(1) throughout her working life due to disability. Reading and giving effect to the 2015 Act in this manner means that it is compatible with Article 14 ECHR read in conjunction with Article 8 and A1P1.<sup>21</sup>

Central to the Court's ruling was its view that in treating disabled persons in the same way as non-disabled persons the Department had 'failed to comply with the positive obligation to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different.' The Court also noted that legislation could 'make an exception without undermining the contributory principle, as shown by section 30(3) of the 2015 Act.'<sup>22</sup>

#### *What does this ruling mean?*

Although the Court was only able to make a declaration of incompatibility, which does not have direct effect on legislation,<sup>23</sup> in principle a person whose deceased partner was unable to work throughout their working life due to disability could now apply for BSP. As the Law Centre NI's Legal Officer, Owen McCloskey, said at the time of the judgement, this outcome 'confirms that the requirement for those who can never work to have paid contributions as a condition of entitlement to this benefit is unlawful.'<sup>24</sup> Moreover, as barristers Elaine Banton and Joshua Yetman of 7BR Chambers have argued, the Court's 'broad approach to associative discrimination opens the door for claimants who have been refused BSP in Northern Ireland on the same basis as Mr O'Donnell to have those refusals reviewed. New claimants in the same situation will be able to apply without being barred due to their deceased spouse's inability to work.'<sup>25</sup>

In light of the ruling, the Department published a memo for decision makers to formalise the principle in Departmental procedure (albeit without formal legislative backing).<sup>26</sup> The memo provides guidance on the type of evidence that can be

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<sup>20</sup> [Court of Appeal Rules in Favour of Family Denied Bereavement Support Payment](#) (2020)

<sup>21</sup> [\[2020\] NICA 36](#), para 103 ('the 2015 Act' refers to the Pensions Act (Northern Ireland) 2015 and 'ECHR' refers to the [European Convention on Human Rights](#), of which Article 14 addresses 'Prohibition of discrimination', Article 8 covers 'Right to respect for private and family life' and Article 1 of the First Protocol ('A1P1') 'Protection of property')

<sup>22</sup> [Court Finds That Provisions for the Disabled in the Pensions Act \(Northern Ireland\) 2015 Are Inadequate: Summary of Judgement](#) (2020) ([alternative source](#)) (the existing exception is addressed above, under [Basic Eligibility](#))

<sup>23</sup> Human Rights Act 1998, § 4(6)

<sup>24</sup> [Court of Appeal Rules in Favour of Family Denied Bereavement Support Payment](#)

<sup>25</sup> Elaine Banton & Joshua Yetman, '[Unlawful indirect associative disability discrimination](#)', *Discrimination Law Association Briefings*, 71 (2020) p. 21

<sup>26</sup> [DMG Memo Vol 10/77](#)

considered to demonstrate that a person has been unable to work throughout their working life, such as entitlement to certain benefit or the previous payment of some NI contributions. However, even the Department recognises that the gathering of relevant evidence in these cases could be a source of distress to claimants.

The memo is also notable as it makes clear that the Department will only be applying the Court's judgement to new claims or decisions made from 10<sup>th</sup> August 2020 (the date of the Court's decision). This is to some extent in contrast to the interpretation of *Banton and Yetman* quoted above, appearing to close off the possibility of revision in cases decided before the Court of Appeal's judgement.

Advice NI also asked the Department whether the BSP application form will be updated to specifically ask if the claimant's deceased partner was unable to work due to illness or disability. Their response was as follows:

The Department does not intend putting a specific question on the BSP application form to ask if the claimant's late spouse civil partner has been unable to work throughout their entire working life due to a disability. Based on BSP claims to date we envisage there will only be a very small number of claimants who may be affected by this change to the interpretation of the legislation.

This criteria is only considered if the first two conditions are not met, i.e.

- that the late spouse or civil partner had paid a minimum of 25 class 1 or class 2 National Insurance contributions in any single tax year during their working life, i.e. an earnings factor at least 25 times the lower earnings limit (LEL) for the year;
- that the deceased was an employed earner and died as a result of an industrial accident or prescribed disease.

Where the above conditions are not met we will then consider whether the deceased was unable to work throughout their working life due to a disability. In the first instance we will use government IT systems to establish if any contributions were paid or if the deceased was in receipt of any benefits, for which they had to be available/seeking work, at any point during their working life.

It will only be if absolutely necessary that we will contact the claimant, initially by telephone, or if we are unable to reach the claimant by telephone (or if they would prefer to respond in writing) or letter to request further information to assist us in making this decision.

As such, claimants in these cases remain to some extent subject to the good offices of the decision maker, albeit with strong case law now in their favour.

#### *Adviser Checks*

- Was the client's spouse or civil partner unable to work due to disability?

- Would there be evidence that the client's spouse or civil partner was unable to work?
- Has the client made a claim and this was refused due to the contribution conditions? Was the Department's decision made after 10 August 2020?
- If the client has not made a claim, did the bereavement occur within the last 21 months?

## Cohabiting partners

Currently, the surviving partner of a cohabiting couple (where the couple live together but are neither married nor in a civil partnership) cannot claim BSP.<sup>27</sup> This was successfully challenged in February 2020, in a case that reflected a 2018 ruling by the Supreme Court in a case dealing with eligibility to Widowed Parent's Allowance.<sup>28</sup>

The Child Poverty Action Group (CPAG) represented two families where the mothers had passed away, leaving the fathers caring for their young children. Both claims for BSP were refused on the grounds that neither couple was married. Judicial review was sought 'on the grounds that the requirement for the deceased person and their partner to have been married or civil partners in order to claim the higher rate of BSP is incompatible with the Human Rights Act 1998' and 'discriminates against children of unmarried couples.' Direct comparison was drawn between eligibility to the higher rate of BSP and entitlement to Widowed Parent's Allowance.<sup>29</sup>

The High Court handed down judgment in the case of *Jackson & Others v Secretary of State for Work & Pensions*. Mr Justice Holman held that, 'pursuant to section 4 of the Human Rights Act 1998', the requirement under the Pensions Act to be married or in a civil partnership in order to claim higher rate BSP 'is incompatible with Article 14 of the European Convention on Human Rights read with Article 8'.<sup>30</sup>

### *What does this ruling mean?*

As in the *McLaughlin* case, the new ruling recognises the right of *children* (not partners) of bereaved parents to support, whether or not their parents were married or in a civil partnership. The Law Centre NI emphasise that the UK government has accepted this decision, that it is not subject to appeal and that the Minister for Communities committed to supporting the application of the judgement in Northern Ireland. Therefore, surviving partners of a cohabiting couple with children should submit a claim for BSP. Although without a legislative change the claim could still be refused, the claimant would have good grounds to challenge the decision and a template supporting statement to assist advisers has been provided by the Law Centre.<sup>31</sup>

<sup>27</sup> DMG 59011; Pensions Act (Northern Ireland) 2015, § 29(1)(a)

<sup>28</sup> On the 2018 case, see '[Bereavement and Children: Unequal No More?](#)', *Welfare Rights Bulletin*, 266 (2018) (the case itself is [\[2018\] UKSC 48](#), also known as the *McLaughlin* case)

<sup>29</sup> [Bereavement Support Payments for Unmarried Parents](#)

<sup>30</sup> [\[2020\] EWHC 183 \(Admin\)](#), para 66

<sup>31</sup> '[Bereavement Support Payment and Cohabitees](#)', *Law Centre NI Legal Information Briefing* (March 2021)



As with the O'Donnell case, Advice NI asked the Department whether in light of the ruling they had any intention to update the claim form, to which the Department responded:

The Department for Work and Pensions will be taking forward a Remedial Order to extend eligibility for Bereavement Support Payment and its predecessor Widowed Parents Allowance to cohabitees with children. This will remove incompatibilities with the European Convention on Human Rights from the legislation governing these benefits. The Order will be laid as soon as possible but until such time as it is brought forward the legislation stands as it is.

The Secretary of State referred to the presentation of the draft Remedial Order in a response to a written question tabled on 21 June 2021,<sup>32</sup> and indeed on 15 July 2021 the draft was laid before Parliament.<sup>33</sup>

As the Explanatory Memorandum makes clear,<sup>34</sup> the Order 'makes surviving cohabiting partners with dependent children, who were not in a legal union with the deceased, entitled to the same WPA or BSP payment as those who had been married or in a civil partnership with the deceased and who had dependent children.' In addition, the Order will have 'retrospective effect to 30 August 2018' (the date of the Supreme Court judgement in the earlier McLaughlin case), allowing claims from surviving cohabiting partners from that date.

The Memorandum also outlines the time limits that will apply to claims made in line with the Order:

7.12 If the death occurred after the Order comes into force, there is no change from the current position. That is, the claim has to be made within 3 months of the death to get the full amount of BSP (lump sum and all 18 monthly payments). The claim has to be made within 12 months of the death to get the lump sum, and each monthly payment has a three month claiming window.

7.13 If the death occurred before the Order comes into force, and retrospective payments are due, the time limits for claiming are as follows:

- if the claim is received within 12 months of the Order coming into force, the claimant will receive the full amount of BSP (lump sum and all 18 monthly payments), irrespective of whether the claim is received within 12 months of the death
- if the claim is received after 12 months of the Order coming into force, the claimant will receive 3 backdated monthly payments, plus any remaining monthly payments that are due within 18 months following the date the Order comes into force – no lump sum will be payable

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<sup>32</sup> Dan Jarvis (Lab), [UIN 19588](#)

<sup>33</sup> [Bereavement Benefits: Proposal for implementation of the McLaughlin \(2018\) and Jackson \(2020\) judgments](#)

<sup>34</sup> [Draft Explanatory Memorandum: Draft Bereavement Benefits \(Remedial\) Order 2021](#), § 7. Policy background

At present the Order is before Parliament for amendment and approval, but once it passes into law we will update this Briefing accordingly.

#### *Adviser Checks*

- Did the client's bereavement occur on or after 10 August 2018?
- Did the client and their partner have children (and is the client entitled to Child Benefit for them)?

#### **Payable amounts not updated**

The amount of BSP a person can claim is set out in the Bereavement Support Payment Regulations.<sup>35</sup> Despite regular amendments until 2019, these amounts have remained the same from the introduction of the benefit in 2017 and have not been annually updated.<sup>36</sup> This means that those applying in 2021 are arguably receiving less than earlier claimants due to inflation. Advice NI recommends that the payable amounts are annually updated.

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<sup>35</sup> BSP (No. 2) Regs (NI), reg 3

<sup>36</sup> Bereavement Support Payment Regulations (Northern Ireland) 2017 ([as enacted](#)), reg 3



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