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Introduction
The long litigation saga involving the compatibility of UK legislation on survivors’ benefits appears to have come to a (not particularly glorious) end with the European Court of Human Rights’ (ECtHR) decision in Runkee v United Kingdom.1 This case, which is the subject of this article, involved a challenge to the compatibility of national law on the payment of widows’ pensions solely to women, similar to that considered by the House of Lords in R. (on the application of Hooper) v Secretary of State for Work and Pensions2 and the ECtHR came to a similar conclusion holding that UK law was not incompatible with the European Convention on Human Rights.

UK law on survivors’ benefits
UK law has long provided for a series of contributory widows’ benefits. After reforms in 1992 these consisted, in particular, of a widow’s payment, widowed mother’s allowance and widow’s pension. A widow was entitled to a widow’s payment (a tax-free lump sum payment of £1,000) if she was under pensionable age (60) at the time when her husband died (or he was

not then entitled to a category A retirement pension). Widowed mother’s allowance (an ongoing payment) was payable to a widow if she was either pregnant by her late husband or entitled to child benefit in respect of a child of the marriage. Finally, widow’s pension (WP) was payable to a widow where: (i) at the date of her husband’s death she was over the age of 45 but under the age of 65; or (ii) she ceased to be entitled to a widowed mother’s allowance at a time when she was over the age of 45 but under the age of 65. So one could receive an ongoing widow’s benefit if one was either over 45 or had a dependent child.

In 1999, the UK Government adopted a major reform of survivors’ pensions, which came into force in April 2001. The Welfare Reform and Pensions Act 1999 introduced a bereavement payment which replaced the widow’s payment. The same conditions applied, except that the new payment was available to both widows and widowers whose spouse died on or after April 9, 2001. It also introduced a widowed parent’s allowance to replace the widowed mother’s allowance. Again the same conditions applied except that the new allowance was available to: (i) widows and widowers whose spouse died on or after April 9, 2001 and who were under pensionable age (60 for women and 65 for men) at the time of the spouse’s death; and (ii) widowers whose wife died before April 9, 2001, who had not remarried and were still under pensionable age on the that day. Finally, widow’s pension was effectively abolished for new claimants and replaced by a time-limited contributory bereavement allowance payable for 52 weeks from the date of bereavement to widows and widowers (without dependent children) over the age of 45 but under pensionable age at the spouse’s death (on or after April 9, 2001).

The legislation also contained important transitional provisions, in that widows whose husbands died before April 9, 2001 (and who satisfied the other entitlement conditions) continued to be entitled to widow’s pension. Similarly placed widowers were, of course, not so entitled.

The judgment in Runkee

In Willis v United Kingdom3 the ECtHR had ruled that the non-payment of the widow’s payment and widow’s mother’s allowance exclusively on the basis that the claimant was a man was not supported by any objective and reasonable justification and was, therefore, in breach of Art.14 of the Convention on Human Rights (taken in conjunction with Art.1 of Protocol 1 (P1-1) of the Convention). The Court did not find a breach in relation

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to widow’s pension on the facts of that case as Mr Willis would not have qualified for widow’s pension until 2006 at least.4

The widow’s pension rules had been challenged before the UK courts in the Hooper case—unsuccessfully at first level, successfully in the Court of Appeal, and ultimately unsuccessfully in the House of Lords. The House of Lords decided that continuing to pay pensions for widows bereaved before April 2001 was objectively justified on the ground that older widows as a class were more likely to be in need than older widowers as a class or younger widows as a class. The wives of Messers Runkee and White had both died before 2001 and, although both spouses had worked and paid social security contributions, the widowers were not entitled to widow’s pensions because of the gender discrimination in UK law. Runkee and White complained that this was in breach of Art.14 of the Convention (taken in conjunction with P1-1 and/or Art.8). They argued that the ECtHR had applied a strict test to gender discrimination, requiring “very weighty reasons” to justify such discrimination, even in cases concerning inequalities in a welfare system and thus involving issues of social and economic policy. They argued that it would be retrograde and would seriously weaken the protection given to the fundamental principle of equality of treatment were the Court now to adopt an approach allowing a broad margin of appreciation to states which maintain gender discrimination in their social security systems. They argued further that even if the difference in treatment pursued the aim of positive discrimination, it was still necessary for the state to show that the discriminatory means were reasonably necessary and proportionate to the aim pursued. Even assuming the existence of “factual inequalities” between the sexes, this did not without more justify the blanket discrimination at issue, where every widower was excluded from entitlement to the pension, and every widow who met the qualifying conditions was entitled, regardless of the individual’s financial circumstances.

The Court (which considered that the issue fell with the scope of P1-1) reiterated its longstanding approach to Art.14 cases stating that it does not prohibit a state from treating groups differently in order to correct “factual inequalities” between them.5 It went on to restate its somewhat contradictory position that, on the one hand, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the

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5 Runkee at [35].
Convention, while, on the other, a wide margin of discretion is usually allowed under the Convention when it comes to general measures of economic or social strategy.

Applying these principles to the facts of this case, the Court noted that the WP was first introduced in 1925, in recognition of the fact that older widows, as a group, faced financial hardship and inequality because of the married woman's traditional role of caring for husband and family in the home rather than earning money in the workplace. Despite the increase over the next 60 years in the number of women entering the workforce, in 1985 it was still considered necessary by Parliament to provide support to older widows, only half of whom were in paid employment of any kind. The Court pointed out that it was not until 1998 that the Government proposed the abolition of WP in view of the increasing numbers of women in employment or receiving income from an occupational pension scheme. It did not appear that at any stage evidence was presented to the Government or Parliament showing that older widowers without dependent children, as a group, were similarly disadvantaged and in need of special financial help, nor had any such evidence been presented to the Court. The Court accepted that since WP was not means-tested, the pension has been paid to certain widows who were less in need than individual widowers who were denied it. However, in a somewhat sweeping statement, the Court argued that means-testing can be uneconomical, and any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need.

Overall the Court was satisfied that, at its origin and until its abolition in respect of women whose spouses died after April 9, 2001, WP was intended to correct "factual inequalities" between older widows, as a group, and the rest of the population. The Court considered that, in the light of all the evidence presented to it, this difference in treatment was reasonably and objectively justified. Given the slowly evolving nature of the change in women's working lives and the impossibility of pinpointing a precise date at which older widows as a class were no longer in need of extra help the Court did not consider that the United Kingdom could be criticised for not having abolished WP earlier. Moreover, the Court

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6 Runkee at [37]-[42]. The Court relied entirely on the account set out in Lord Hoffmann's judgement in Hooper [2005] UKHL 29.

7 The case cited in support of this proposition—App. No.11098/84, Lindsay v United Kingdom (1987) 9 E.H.R.R. CD555—concerns assessment of married couples for tax purposes and might appear to provide limited endorsement to the Court's argument.

held that since it was decided to bring about equality through “leveling down”, it was not unreasonable of the legislature to decide to introduce the reform slowly, by preserving the rights of women widowed before April 2001. It followed that there has been no violation of Art.14 in respect of the non-payment to the applicants of widow’s pension. The Court did, however, following Willis, rule that the non-payment of widow’s payment was in breach of Art.14.9

Discussion

On the one hand, the outcome of this case is somewhat unsurprising given the Court’s decision in Stec v United Kingdom10 (and related cases), in which it upheld different pension ages for men and women and related provisions of UK social security law. Clearly if one assumes that gender discrimination in relation to widow’s pensions was at one time objectively justified, it is somewhat difficult for a court to decide precisely when it is no longer justified or to hold that a state which had amended its laws should have done so at some earlier date. On the other hand, however, what is particularly disappointing about this decision is the Court’s evident reluctance (also seen in Stec) to engage seriously with the issues and to give reasons as to why the UK Government’s approach was acceptable in this case (and how this case differed from Willis).13

First, one might question the assumption that gender discrimination in relation to widows’ pensions was ever justified under the ECHR.11 Payment of widows’ pensions was an integral part of a social security system which discriminated on grounds of gender. While, unlike some other aspects of the system, some women clearly benefited from widows’ pensions, the function of widows’ benefits was not only to compensate for the disadvantage faced by older women who were less likely to have been involved in the paid labour force but to discourage such women from working, thereby helping to create that state of disadvantage. However, this approach does not appear to have been seriously considered by the Court.12

9 The Government had not sought to argue this point.
11 See App. No.34462/97, Wessels-Bergervoet v Netherlands (2004) 38 E.H.R.R. 793. It is unclear in Willis (2002) 35 E.H.R.R. 21 whether the Court thought the discrimination at issue had never been justified or had been but was no longer.
12 A fortiori, one could make this argument in App. No.65731/01, Stec (2006) 43 E.H.R.R. 47 in relation to the difference in pensions ages which: (a) was only introduced in the UK in the 1940s; and (b) which many other countries never introduced.
Assuming that gender discrimination in relation to WP was justified at some point, the House of Lords held that:

"Once it is accepted that older widows were historically an economically disadvantaged class which merited special treatment but were gradually becoming less disadvantaged, the question of the precise moment at which such special treatment is no longer justified becomes a social and political question within the competence of Parliament."  

However, insofar as this might suggest that courts can never question the legislature’s judgment, this is clearly inconsistent with the approach of the ECtHR which has been prepared to find a breach of the Convention in such cases. The margin of discretion, while wide, is not unlimited.

The Court of Appeal in Hooper had based its finding of incompatibility on three main facts. First, the government had accepted in 1999 that the existing legislation was “unfair and outdated”. Secondly, there had been no significant change between 1995 (the date of bereavement in that case) and 1999 and, therefore, the system must have been equally unfair and outdated in 1995 and, thirdly, by 1995 equal treatment had been established in a large number of European countries which, the Court held:

"[Cut] the ground from the submission. . .that there were good reasons for the Government to take no steps to bring this country into line with our neighbours until 1998."  

Clearly one might agree or disagree with this assessment. However, what is striking in the ECtHR ruling is that it does not engage in any detail with such arguments.

It is also interesting that the ECtHR in Runkee looked at the issue solely from the perspective of the husbands. In Willis it had been argued that the non-payment of WP also involved discrimination against Mr Willis’ late wife who had paid social security contributions at the same rate as a married man but was entitled to more limited benefits for her

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13 Hooper [2005] UKHL 29 at [32].
15 R. (on the application of Hooper) v Secretary of State for Work and Pensions (Court Order) [2003] EWCA Civ 875 at [67].
16 Hooper [2003] EWCA Civ 875 at [64]-[66].
17 Hooper [2005] EWCA Civ 875 at [68].
18 Lord Hoffmann in the Lords was rather dismissive of the argument at [34]-[39]—also differing as to whether Russia and Turkey are located in Europe.
surviving spouse. In that case the Court ruled that no separate issue arose in this regard. However the point does not seem to have been considered in Runkee. In contrast the US Supreme Court struck down gender discrimination whereby survivors’ benefits were granted to a widow and her children but, in the case of a man, provided only in respect of the children, as in breach of the right to equal protection (in the Due Process Clause of Fifth Amendment to the US Constitution).19 In doing so the Court based its analysis heavily on the argument that this treatment involved discrimination against the wife operating so as, “to deprive women of protection for their families which men receive as a result of their employment”.20 The Court held that the discrimination was based on an “archaic and overbroad” generalisation not tolerated under the US Constitution, that male workers’ earnings were vital to their families’ support, while female workers’ earnings did not significantly contribute thereto. While accepting that the notion that men were more likely than women to be the primary supporters of their spouses and children was “not entirely without empirical support”, the Court ruled that such a gender-based generalisation could not:

“[S]uffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families’ support.”21

The state argued that payment of the pension only to widows was:

“[O]ne reasonably designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families.”22

The Court dismissed this argument with the remark that:

“[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.”

Again the contrast with the ECtHR judgment in Runkee is striking.

Finally, the ECtHR’s outcome-oriented judgments mean that it is extremely difficult to identify the principles which distinguish the outcome in Willis from that in Runkee. It would appear that it is acceptable for a legislature to adopt a blanket assumption of financial disadvantage in the case of “older” women (given the evidence adduced in Runkee and Hooper)

20 Weinberger (1975) 420 US 636 at [645].
21 Weinberger (1975) 420 US 636 at [645].
22 Weinberger (1975) 420 US 636 at [648].
but not acceptable to assume financial disadvantage in the case of women with children. However, as Willis was also decided under P1-1 rather than Art.8 (right to respect for family life), it is unclear where the difference between the two circumstances lies. In this regard, the judgment in Willis is even more lacking in detailed rationale than that in Runkee and there are several broad statements in the earlier judgment which must now be read as severely qualified by the later decision.

Conclusion

Where does this decision leave the issue of gender discrimination and survivors’ benefits under the ECHR? The decision in Runkee clearly indicates that the ECtHR will be likely to uphold differential treatment on grounds of gender where the contracting state can show that there is objective and reasonable justification—particularly if that state has taken action to remove existing inequalities. The status of Willis remains very unclear in the light of the Runkee decision. It does obviously indicate that where a state cannot prove such justification—as, for example, where benefits are subject to a mean-test—gender discrimination will be in breach of the Convention. Unfortunately, the lack of detailed consideration of the issues in Runkee makes it very difficult to predict how the Court might respond to a situation where a state has taken no action to remove discrimination which is “no longer” justified or where such a removal will occur over an extended time period.

It should be noted that the Court did find a breach of Art.14 in Zeman v Austria. In that case, which involved civil servants’ pensions, national legislation was in the course of introducing equal treatment for widows and widowers. However, transitional provisions introduced a further distinction between men and women in that men had to show that they were incapable of gainful employment and indigent. The Court, referring to its decision in Stec, considered that the gradual adjustment of existing differences in survivor’s pensions may be acceptable under the Convention. However, it ruled that very strong reasons would have to be put forward in order to explain the amendment in the relevant legislation which introduced further differentiation and thereby, “frustrated the
planned equalisation for part of the widowers, including the applicant, at
the very last moment”, and held that there has been a breach of Art.14.27

Nonetheless, the decision in Runkee reinforces that in Stec and suggests
that the Court has taken a step back from its earlier judgments
striking down gender discrimination in, for example, Wessels-Bergervoet v
Netherlands 28 and Willis. The Court would appear to be prepared to uphold
not only indirect gender discrimination29 and direct discrimination in
“new” policy areas (where it can be shown to be justified),30 but also
long-standing gender discrimination if the state concerned can show that
it is not too far out of line with national and international developments.

27 Zeman at [40].