

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Case No.** CAF/2565/2015

**Before:** Mr E Mitchell, Judge of the Upper Tribunal

**Decision:** The decision of the First-tier Tribunal (ref. *AFCS/00103/2014*) taken on 19 February 2014, involved no material error on a point of law. Its decision is not set aside and this appeal is **DISMISSED**.

**Hearing:** 20 July 2016 at Field House, Bream's Buildings, London

**Attendances:** Mrs Langford represented herself (informally assisted by Mr Wright and Ms Bamford, law students).

For the Respondent Secretary of State, Mr T Buley, of counsel, instructed by the Government Legal Department.

**Introduction**

1. Despite my sympathy for Mrs Langford, not diminished in any way by her dignified conduct of these proceedings, I have to dismiss her appeal. Since she was married to another at the date on which Air Commodore Green died, she is not entitled to the benefits granted to a surviving adult dependant by the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 ("2011 Order").

**Background**

2. Mrs Langford was the long-term partner of Air Commodore Green who died unexpectedly on 17 May 2011. Mrs Langford made a claim for benefits under the 2011 Order on 20 November 2013. The Secretary of State refused her claim on 8<sup>th</sup> January 2014. Mrs Langford appealed to the First-tier Tribunal

3. The First-tier Tribunal dismissed Mrs Langford's appeal on 19 September 2014. It found that, at the date of the Commodore's death, she was married to Mr Langford but "they had been separated for many years". Since Mrs Langford was married to someone else, she was prevented from marrying Air Commodore Green and could not therefore satisfy the 2011 Order's definition of surviving adult dependant.

4. The First-tier Tribunal rejected Mrs Langford's argument that the 2011 Order, as construed by the Secretary of State, resulted in discrimination contrary to Article 14 of the European Convention on Human Rights. She argued discrimination on two grounds, age and marital status.

5. In relation to marital status, the Tribunal said Mrs Langford relied on the Court of Appeal's decision in *Ratcliffe v Secretary of State for Defence* [2009] EWCA Civ 29 to argue marital status was a relevant status under Article 14. However, according to the Tribunal, *Ratcliffe* concerned pre-2005 rules and the compensation scheme was altered in response to the decision to provide for approximately equal treatment of married and unmarried partners. In *Ratcliffe*, Hooper LJ held "where alleged discrimination in the field of pensions is based on non-suspect grounds, courts will be very reluctant to find that discrimination is not justified". Mrs Langford had not supplied any evidence of "suspect grounds" for the provision made for surviving adult dependants in the 2011 Order.

6. In relation to age, Mrs Langford had argued the provision made in the 2011 Order "discriminates indirectly against older couples because they are more likely to be in a relationship where there is a subsisting marriage in the background to be a person from whom one partner is estranged or separated". Mrs Langford's argument was rejected because she provided no "statistical evidence to support her contention nor to show that that the discrimination she complains of is 'suspect'".

### **Legal Framework**

7. Article 29(1) of the 2011 Order provides for benefits payable for the death of a member. These include:

“(a) a survivor's guaranteed income payment payable until death to a surviving spouse, civil partner or surviving adult dependant;

(b) a bereavement grant payable to a surviving spouse, civil partner, surviving adult dependant, or eligible child”.

8. Articles 29(2) gives the Secretary of State power to withhold benefit where the member and the surviving spouse married less than six months before the death of the deceased. There is a similar power in respect of civil partners in Article 29(3).

9. "Surviving adult dependant" is defined by Article 30:

“A person is a surviving adult dependant in relation to a deceased member or former member if, at the time of the deceased's death—

(a) the person and the deceased were cohabiting as partners in a substantial and exclusive relationship;

(b) the deceased leaves no surviving spouse or civil partner;

(c) the person and the deceased were not prevented from marrying or forming a civil partnership; and

(d) either the person was financially dependent on the deceased or they were financially interdependent.”

10. Those are cumulative conditions (as shown by the use of “and” before the final condition) and so, where the person and the deceased were prevented from marrying, the person cannot be a surviving adult dependant for the purposes of the 2011 Order.

11. Part 2 of Schedule 1 to the 2011 Order provides that “a relationship is not an exclusive relationship if (a) one or both of the parties to the relationship is married to...someone other than the other party to the relationship...”.

12. Article 81 provides for a survivor’s additional guaranteed income payment, and Article 83 for an additional bereavement grant, but, again, a person must either be a surviving spouse, civil partner or “surviving adult dependant”.

### **The High Court’s decision in *Langford v Secretary of State for Defence* [2015] EWHC 875 (Ch)**

13. This case arose from Mrs Langford’s separate claim for a pension under the Armed Forces Pension Scheme Order 2005. Under the scheme rules in Schedule 1 to the Order, the Secretary of State had power to “award a surviving adult dependant a pension for life”. Rule E.2(3) provides that a person is a surviving adult dependant if the person satisfies the Secretary of State that, at the date of death, certain conditions were satisfied including that “the person and the member were not prevented from marrying”.

14. The Secretary of State decided that the rule E.2(3) conditions were not met and his decision was upheld by a Deputy Pensions Ombudsman. Mrs Langford appealed, on a point of law, to the High Court under section 151(4) of the Pension Schemes Act 1993.

15. The High Court (Mr Timothy Fancourt Q.C. sitting as a Deputy High Court Judge) rejected Mrs Langford’s argument that the phrase “prevented from marrying” did not refer to a person who was already married, being instead only concerned with impediments to marriage due to consanguinity or youth. The Judge found that the phrase applied whenever a person faced a legal impediment to marrying. Although not referred to by the Judge, he may well have had in mind, as I put to the parties at the hearing of this appeal, section 11(b) of the Matrimonial Causes Act 1973:

“A marriage... shall be void on the following grounds only, that is to say –

(b) that at the time of the marriage either party was already lawfully married...”.

16. So far as discrimination was concerned, it was common ground that “the Putative right to scheme benefits is property within A1 of ECHR” and “the Appellant has been subject to differential treatment within the ambit of the Convention right provided by A1P1”.

17. The Judge found that Mrs Langford's "status of living with one person as a life partner while remaining married to another could properly be described as a "personal characteristic" for Article 14 purposes. The Judge also pointed out that "whether the comparator is a true analogue" and "whether differential treatment is justified can merge into one another".

18. The Judge observed that a "person who is married may be expected, in the majority of cases, to have some claim on their spouse...for financial support if needed". And that difference "provides the justification for differential treatment" in Mrs Langford's case which was categorised as a "non-suspect" ground where the test for justification is lower than in suspect ground cases such as race or sex.

### **The arguments on this appeal and my conclusions**

19. In granting permission to appeal, I did not impose restrictions. Therefore, all grounds relied on by Mrs Langford in her notice of appeal could be argued. In her skeleton argument she put forward arguably additional grounds. At the hearing, Mr Buley confirmed the Secretary of State did not object to that. I permitted Mrs Langford to rely on all the arguments in her skeleton argument.

#### *Whether the First-tier Tribunal misconstrued the 2011 Order*

20. Mrs Langford argued that her extant marriage did not prevent her from being in a substantial and exclusive relationship with Air Commodore Green, i.e. limb (a) of the definition of "surviving adult dependant", because, for the purposes of Part 2 of Schedule 1 to the Order, "the natural meaning of the word 'married' pertains to a social and not exclusively legal status".

21. At the hearing, Mrs Langford drew attention to limb (c) of the definition of surviving adult dependant which refers to the deceased and the claimant not being prevented from marrying. If this is read with Part 2 of the Schedule, it shows, she argues, that limb (c) is not intended to catch a person whose ability to marry the deceased was restricted by the fact that the person was already married (only those unable to marry for reasons of consanguinity or youth). Otherwise, what would be the purpose of Part 2 of Schedule 1? So, on Mrs Langford's argument, neither Part 2 of Schedule 1 nor limb (c) of the definition of "surviving adult dependant" prevented her from being Air Commodore Green's surviving adult dependant.

22. Ingenious though Mrs Langford's argument is, I agree with Mr Buley for the Secretary of State that it is wrong.

23. It stretches the statutory wording past breaking point to argue that, in Part 2 of Schedule 1, "married" encompasses a social status as well as the legal status of marriage. "Married" means exactly what it says.

24. The Matrimonial Causes Act 1973 does not in terms prohibit the entering into of any type of marriage. Instead, it provides that certain purported marriages are void and others are voidable. The void categories in section 11 include that “at the time of the marriage either party was already lawfully married”. Where a purported marriage would be void, this must amount to the parties being prevented from marrying for the purposes of limb (c) of the definition of surviving adult dependant.

25. I accept that this interpretation means there is some duplication across the surviving adult dependant provisions. A person who is married is excluded by Part 2 of Schedule 1 as well as limb (c) of the definition. However, this does not indicate a legislative intention that the terms used should bear something other than their usual meaning. It is more likely simply to reflect a desire for legislative simplicity. Further, there will be cases where a claimant is excluded by limb (c) but not Part 2 of Schedule 1. But, in any event, if Part 2 of Schedule 1 does indicate a legislative intention to exclude from the ‘prevented from marrying’ category in limb (c) of the definition those who are already married that does not assist Mrs Langford. Part 2 of Schedule 1 would operate to deem her not to have been in an exclusive relationship with Air Commodore Green. At the hearing, I sensed that Mrs Langford might find this offensive but it is simply a reflection of the statutory scheme and not a comment on her actual commitment to the Commodore.

26. For the above reasons, I conclude that the Tribunal’s decision was in conformity with the 2011 Order, as interpreted according to purely domestic principles of statutory construction, and dismiss this ground of appeal.

*Whether the Commodore’s death was caused wholly or partly by service*

27. It is true that the First-tier Tribunal did not address this question but it did not need to once it had decided that Mrs Langford’s extant marriage prevented her from satisfying the statutory definition of “surviving adult dependant”. I dismiss this ground of appeal.

*Whether Article 1 of the First Protocol to the European Convention on Human Rights calls for a different result*

28. Article 1, headed “Protection of property”, provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

29. Section 3(1) of the Human Rights Act 1998 provides “so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”.

30. Mrs Langford argues the benefits she sought were a possession for the purposes of Article 1 because she had a legitimate expectation of receiving them were the Commodore to die. She relies on the European Court of Human Rights’ (ECtHR) decision in *Pine Valley Developments v Ireland* [1992] 14 EHRR 319. Mrs Langford argues the following features of her case establish that legitimate expectation:

(a) she was in a substantial relationship with the Commodore which was akin to marriage;

(b) the Commodore made clear promises and representations that she would be “looked after” by the R.A.F;

(c) the R.A.F. through its conduct accepted and acknowledged her substantial relationship with the Commodore;

(d) she was allowed to join the Armed Forces Pension Society which rendered her expectation of benefits under the 2011 Order legitimate.

31. Mrs Langford further argued that, denying her benefits under the 2011 Order, would not be a proportionate response to a legitimate aim. In the circumstances of her case, it would “have no logical justification...and should therefore be considered both arbitrary and irrational”. Mrs Langford relied on the decision in *R (Kelsall) v Secretary of State for the Environment* [2003] EWHC Admin 459.

32. I agree with Mr Buley for the Secretary of State that this ground must fail. Mrs Langford’s expectation of benefits under the 2011 Order did not amount to a possession for the purposes of Article 1 of the First Protocol. Mr Buley relies on the decision in *R (RJM) v Secretary of State for Work & Pensions* [2008] All ER (D) 220 (Oct).

33. *Pine Valley* was an Irish case arising from nullification of a grant of outline planning permission. The ECtHR did, however, find that a legitimate expectation arose where, in reliance on the outline planning permission, a development company purchased land. As a result, the planning permission was “a component part of the applicant companies’ property”.

34. I do not accept that *Pine Valley* assists Mrs Langford’s free-standing Article 1 argument. The decision was an application of the principle that, for a claim of some sort to amount to a “possession”, an applicant must show a legal entitlement to the economic benefit in question, or a legitimate expectation that the entitlement will materialise. Even if I assume this encompasses state benefits, it is clear that the only legitimate expectation Mrs Langford had

was for her claim to be decided in accordance with the 2011 Order. The Commodore was not in a position to give an undertaking that, were Mrs Langford to make a claim, she would be granted some kind of dispensation from the terms of the 2011 Order. And the evidence shows that the R.AF. / Secretary of State, while for many purposes acting as if the Commodore and Mrs Langford were a married couple, gave no undertaking that she would be entitled to those benefits that the 2011 Order grants to a surviving adult dependant as defined.

35. To conclude, Mrs Langford's only legitimate expectation was for her claim to be determined in accordance with the 2011 Order. I reject Mrs Langford's free-standing Article 1 of Protocol 1 argument (which arguably was not in fact advanced before the First-tier Tribunal).

*Whether Article 14 of the European Convention on Human Rights, taken with Article 1 to Protocol 1, calls for a different result*

36. The argument advanced on this appeal was similar to that rejected by the High Court in *Langford* except Mrs Langford also argued she had been discriminated on the ground of age, which she said was a 'suspect ground', because "age directly relates to the likelihood of being separated but not divorced".

37. The Secretary of State resisted by relying on the reasoning of the High Court in *Langford*. As in that case, the Secretary of State accepted that Mrs Langford's treatment by the 2011 Order fell within the 'ambit' of Article 14 of the Convention, taken with Article 1 of Protocol 1, but that the differential treatment was justified. In relation to the age aspect of Mrs Langford's argument the Secretary of State submits;

"There is nothing to show there is in fact a differential effect in this regard, and there is no obvious reason why this should be so (i.e. no reason why older people are more likely to be disadvantaged by a rule requiring that they not be married to a person other than the member of the Armed Forces in respect of whose death they are making a claim)".

38. I agree with the Secretary of State.

39. As Mr Fancourt Q.C. in *Langford* found, and with whose decision I agree, the differential treatment of a person who is married and a person who is not, under the 2011 Order, is justified because a "person who is married may be expected, in the majority of cases, to have some claim on their spouse...for financial support if needed". In framing the 2011 Order, i.e. deciding how to distribute limited state funds, the Secretary of State was entitled for this reason to treated married partners who would otherwise satisfy the definition of "surviving adult dependant" differently from unmarried partners.

40. I do not accept that Mrs Langford was discriminated against, directly or indirectly, on the ground of age. No evidence has been supplied to support the argument that older partners of service personnel are more likely than younger partners to be married to another, nor is that, in my view, inherently likely to be the case.

*Other grounds*

41. Mrs Langford argues her treatment amounts to a breach of contract although she concedes it “may not be a formal contract”. There was no contract entered into between the Secretary of State and Mrs Langford that she would be entitled to death benefits analogous to those provided for by the 2011 Order. This is obvious and this ground must fail.

42. Mrs Langford argues a proprietary estoppel, arising by way of representation, prevents the Secretary of State from denying her those benefits granted to a surviving adult dependant by the 2011 Order. Mrs Langford argues the Commodore’s pension was a form of property, to which he had authority to nominate her as beneficiary, he made clear and unambiguous representations that she would be looked after, and provided with a pension, by the R.A.F. which she reasonably relied on to her detriment.

43. The first point to make in relation to the proprietary estoppel argument is that these proceedings are not concerned with who might benefit from the Commodore’s pension rights. They are concerned with benefits granted by the 2011 Order to a surviving adult dependant. But, in any event, the Commodore was not in a position to make any representation that the Secretary of State would depart from the terms of the 2011 Order for Mrs Langford’s benefit. This must have been obvious to Mrs Langford. The Secretary of State did not make any representation that is capable of founding a proprietary estoppel. I reject this ground. I do not need to decide whether, in principle, a proprietary estoppel could operate in the way contended for by Mrs Langford – so as effectively to modify legislative provisions setting out how state benefits are distributed – but I think it is doubtful.

44. Mrs Langford also argues she can rely on an estoppel by convention. Such an estoppel is made out because: she and the Commodore operated under the assumption that she would be entitled to R.A.F. benefits if he died in service; the assumption that she was an officer’s wife “arose under a convention which pervades society within the R.A.F; she relied on the assumption; it was unconscionable for the Secretary of State to deny her claim given the way in which the R.A.F. benefitted from her support of the Commodore in his work.

45. Without in any way wishing to diminish the importance of the support provided by Mrs Langford to the Commodore during his lifetime, I must reject the estoppel by convention argument. There was no shared assumption between the Secretary of State for Defence, or anyone authorised by him to make service benefit or compensation decisions, and Mrs Langford that she would be granted benefits outside the terms of the 2011 Order.



46. Mrs Langford puts forward further grounds under the heading “The Exigencies of the Service and Circumstances of Chris’ Death”. Had the Commodore lived, they would have been married. Their plans to marry (and for her to obtain the divorce to which her husband would have consented) were de-railed by the demands of the Commodore’s military service. I do not doubt any of that but they provide no basis for departing from the terms of the 2011 Order. The same applies to Mrs Langford’s argument that the Secretary of State’s denial of benefits is morally unacceptable and against the public interest. These are not matters which the 2011 Order permits to be taken into account in deciding whether a person is entitled to benefits under the Order.

47. This decision has taken longer to complete than I anticipated, and indicated to the parties, at the hearing. I apologise for any frustration caused.

**(Signed on the Original)**

E Mitchell  
**Judge of the Upper Tribunal**  
**26 October 2016**