IN THE UPPER TRIBUNAL **Appeal Nos.** UA-2019-000638-BB
ADMINISTRATIVE APPEALS CHAMBER UA-2020-001686-BB
(Previously CG/2212/2019 and CG/769/2020)
On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

In UA-2019-000638-BB:

HM

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

In UA-2020-001686-BB:

MK

Appellant

- v –

Secretary of State for Work and Pensions

Respondent

Before: Upper Tribunal Judge Ward

Hearing dates: 27 and 28 June 2022

Representation:

Appellants:	For HM: Stephen Cottle and Desmond Rutledge, both acting pro bono, instructed by Hackney Community Law Centre For MK: Joshua Yetman, as pro bono counsel on behalf of the Free Representation Unit
Respondent:	Julian Milford KC and Jen Coyne, instructed by the Government Legal Department

DECISION

The decision of the Upper Tribunal is as follows:

1. The claimants were not discriminated against on the ground of marital status contrary to art.14 ECHR, taken with art.8 or A1P1. They were not in an analogous position to a person who had been married to, or in a civil partnership with, their

deceased partner. *SSWP v Akhtar* binds the Upper Tribunal so to hold. If it does not, the Upper Tribunal would reach that conclusion in any event. If, contrary to the Upper Tribunal's view, the claimants were in such an analogous position, the difference in treatment is justified.

2. The requirement that a person who, with no eligible children, makes a claim for bereavement payment and/or for bereavement allowance must have been married or in a civil partnership to be eligible, based on official statistics, impacts more on women than on men and so requires to be justified.

3. The Secretary of State has provided sufficient justification for the measure resulting in the differential impact set out at [2] above.

4. The asserted wish of MK and HM to enter into a civil partnership with their respective (opposite-sex) partners at the material time when it was legally impossible to do so involved a difference of treatment on the grounds of sexual orientation compared with a person with a same-sex partner who at that time was legally able to enter into either marriage or a civil partnership (as in *R(Steinfeld) v Secretary of State for International Development* [2020] AC 1), but, irrespective of the matters at [5] below, the Upper Tribunal, not being included in the list in s.4(5) of the Human Rights Act 1998, has no jurisdiction to make a declaration of incompatibility in respect of such discrimination.

5. The Upper Tribunal, *obiter*:
(a) applying dicta in *Wilson v First County Trust Ltd (No.2)* [2002] UKHL 40 considers that section 4 of the 1998 Act 1998 does not permit a declaration of incompatibility to be made where following an earlier declaration of incompatibility the legislation has been amended by Parliament (even if it were considered to remain incompatible with the Convention in its amended form);
(b) concludes that the appellants would need to be able to fulfil the "victim" requirement in s.7(7) of the 1998 Act but can do so.

6. For the reasons in [1] – [4], the appeals are dismissed.

REASONS FOR DECISION

1. The structure of this decision is as follows:

Introduction

2. In these cases the appellants seek to challenge the respondent's refusal to award them bereavement benefits following the deaths of their late partners, with whom they were in long-term relationships but not legally married. Without disrespect to any of the individuals involved, I shall refer for brevity to the appellants by their initials and likewise to their late partners. HM's partner was MS. MK's partner was LM.

3. MS died in late 2015. HM claimed on 9 November 2015. Her claim was refused by the respondent on 25 February 2016 and that refusal was upheld by the First-tier Tribunal ("FtT"). On 21 February 2018, the Upper Tribunal allowed HM's appeal and remitted the case to the FtT. On 8 May 2019 the FtT dismissed the appeal and on 12 March 2021, following an oral hearing, I gave permission to appeal.

4. LM died on 14 December 2016. MK's claim was received on 23 February 2017. Her claim was refused by the respondent on 3 March 2017. The refusal was upheld by the FtT on 19 February 2018 but that decision was set aside. On 23 September 2019 the refusal was again upheld by the FtT and on 1 May 2020 a judge of the FtT gave permission to appeal.

5. In neither case was the appellant responsible for a qualifying child at the time. Their claims, accordingly, were for a bereavement payment under section 36 of the Social Security Contributions and Benefits Act 1992 ("the SSCBA") and for a bereavement allowance under section 39B.

6. The cases are two of a small number of cases in the Upper Tribunal raising a similar point. In the other cases, the claimants do not have the advantage of the representation which is available to HM and to MK and those other cases are stayed behind these.

The key bereavement benefit legislation (as it then stood)

7. Section 36 provided at the time of the decision in HM's case:

> **36.— Bereavement payment.**
> (1) A person whose spouse or civil partner dies on or after the appointed day shall be entitled to a bereavement payment if—
> (a) either that person was under pensionable age at the time when the spouse or civil partner died or the spouse or civil partner was then not entitled to a Category A retirement pension under section 44 below; and
> (b) the spouse or civil partner satisfied the contribution condition for a bereavement payment specified in Schedule 3, Part I, paragraph 4.
>
> (2) A bereavement payment shall not be payable to a person if that person and a person whom that person was not married to, or in a civil partnership with, were living together as a married couple at the time of the spouse's or civil partner's death.

> (3) In this section *"the appointed day"* means the day appointed for the coming into force of sections 54 to 56 of the Welfare Reform and Pensions Act 1999.

(The section was slightly different by the time of the decision on MK's claim, but not in any way relevant to the present case.)

8. Section 39B provided at the material time:

> **39B.— Bereavement allowance where no dependent children.**
> (1) This section applies where a person whose spouse or civil partner dies on or after the appointed day is over the age of 45 but under pensionable age at the spouse's or civil partner's death.
>
> (2) The surviving spouse or civil partner shall be entitled to a bereavement allowance at the rate determined in accordance with section 39C below if the deceased spouse or civil partner satisfied the contribution conditions for a bereavement allowance specified in Schedule 3, Part I, paragraph 5.
>
> (3) A bereavement allowance shall be payable for not more than 52 weeks beginning with the date of the spouse's or civil partner's death or (if later) the day on which the surviving spouse's or civil partner's entitlement is to be regarded as commencing by virtue of section 5(1)(k) of the Administration Act.
>
> (4) The surviving spouse shall not be entitled to the allowance for any period after she or he remarries or forms a civil partnership, but, subject to that, the surviving spouse shall continue to be entitled to it until—
> (a) she or he attains pensionable age, or
> (b) the period of 52 weeks mentioned in subsection (3) above expires,
> whichever happens first.
>
> (4A) The surviving civil partner shall not be entitled to the allowance for any period after she or he forms a subsequent civil partnership or marries, but, subject to that, the surviving civil partner shall continue to be entitled to it until–
> (a) she or he attains pensionable age, or
> (b) the period of 52 weeks mentioned in subsection (3) above expires,
> whichever happens first.
>
> (5) The allowance shall not be payable—
> (a) for any period for which the surviving spouse or civil partner is entitled to a widowed parent's allowance; or
> (b) for any period during which the surviving spouse or civil partner and a person whom she or he is not married to, or in a civil partnership with, are living together as a married couple.

9. Those provisions were repealed, subject to transitional provisions, by the Pensions Act 2014. The Act created bereavement support payment, payable at different rates

according to whether qualifying children are or are not involved. The present case does not directly concern bereavement support payment, although it is entirely possible that the issues to which it gives rise might indirectly have implications for the eligibility rules for that benefit also.

10. The issues raised by the present cases, being based on claims where there are no qualifying children, are thus different from those considered by the Supreme Court in *Re McLaughlin's Judicial Review* [2018] UKSC 48 in relation to widowed parents' allowance and, in relation to the higher rate of bereavement support payment, by the High Court's decision in *R (Jackson and Simpson) v SSWP* [2020] EWHC 183 (Admin). In those cases it was the presence of qualifying children in the household which led to findings that there had been a breach of the respective claimants' human rights under art 14 of the European Convention on Human Rights ("ECHR"), read with article 1 of protocol 1 ("A1P1") and/or read with art.8, and to the making of a declaration of incompatibility. In response to that declaration, the government first issued for consultation a draft of a Remedial Order under schedule 2 of the Human Rights Act 1998 ("the HRA") and at the time of the hearing was considering responses to that consultation. It has subsequently laid before Parliament a proposed Remedial Order which is still subject to Parliamentary consideration; accordingly, there is no definitive response in place.

Summary of the grounds of appeal

11. The present appeals are based on there having been discrimination contrary to the HRA. It is common ground that art.14 is engaged, as the subject matter falls within the ambit of art. A1P1. Additionally, the appellants argue that the case falls within the ambit of art.8 (respect for private life); the respondent resists this. The discrimination is said to be (a) on the grounds of marital status (Ground 1); and (b) on the grounds of sexual orientation (now Ground 3), in that at the relevant time the ability to enter into a civil partnership – which like marriage, is a qualifying relationship for the purposes of bereavement benefits – was at the material time restricted to same-sex couples. Additionally, the appellants seek to argue that there is discrimination against them on the grounds of their sex. This did not form part of the grounds of either appellant until a comparatively late stage. Mr Milford has raised no objection and given that these are lead cases and the resources that have been put into them, it is preferable to ensure that the potential grounds of challenge are considered at this point, rather than risking the need for a second such appeal. It has become Ground 2.

12. Here is a convenient point to record that it is accepted that discrimination on the grounds of marital status is not a so-called "suspect ground" requiring "very weighty reasons" if it is to be justified. Gender and sexual orientation are "suspect grounds": see, respectively *Konstantin Markin v Russia* (App30078/06) (Grand Chamber) at [127] and *Beizaras and Levickas v Lithuania* (App 41288/15) at [114].

13. In the case of MK only, there was earlier a further ground, namely of discrimination on the ground of religious belief. That was abandoned when skeleton arguments were being submitted.

14. The parameters of a human rights case are well known:

a. is a relevant article engaged (sometimes expressed as does the matter fall "within the ambit" of a relevant article?)

b. is the person in an analogous situation with someone who is treated differently (I leave aside *Thlimmenos* claims, which do not arise in the present cases)?

c. has the person been treated less favourably?

d. can the difference in treatment be justified (a question which gives rise to a number of sub-questions, to which I return)?

15. It is not in dispute that the requirement to be a "spouse" (or in a civil partnership) is contained in primary legislation and as such that the only remedy that could be afforded, if the appellants' claims were to be upheld, would be a declaration of incompatibility. That is something which the Upper Tribunal has no power to make; it has been the position of HM through Mr Cottle, that such a remedy would in due course be sought from the Court of Appeal. The Upper Tribunal will in some cases nonetheless consider human rights cases where it has no power to award the remedy sought, by way of what has been described (in *PL v SSWP (JSA)* [2016] UKUT 177 (AAC)) as "jurisprudential spadework and analysis".

The witness evidence

16. The Upper Tribunal has been provided with a wealth of evidence in these appeals. The Secretary of State seeks to justify any relevant differential treatment there might be found to be by reference to witness statements provided by Helen Walker and Sidonie Edey. Ms Walker has held the post of Deputy Director (Life Events and Disadvantage) in the Poverty, Families and Disadvantage Directorate within the Department for Work and Pensions for some 5 years. Her role includes responsibility for bereavement benefits. Ms Edey has held the post of Head of Life Events Policy at the DWP since March 2021, where her responsibilities include bereavement benefits.

17. Ms Walker explains that bereavement payment was intended to help with immediate expenses following bereavement. Bereavement allowance was intended to assist the bereaved person by providing short-term financial assistance.

18. As to the history of such benefits, she explains that the scheme of bereavement benefits until 2001 had only provided for widows and there had been no support on offer to bereaved husbands. The Welfare Reform and Pensions Act 1999 brought reform, by introducing gender-neutral bereavement benefits (including those which the present case concerns). The Bill leading to the 1999 Act was considered in Standing Committee, where the Parliamentary Under Secretary of State for Social Security, Mr Hugh Bayley, addressed an amendment extending entitlement to bereavement benefits to cohabiting couples. Rejecting the amendment, Mr Bayley indicated

> "We continue to base entitlement to bereavement benefits only on legal marriage between couples at the time of death. We believe that that is right for two primary reasons. First, marriage is a cornerstone of the contributory benefits system. Marriage carries with it special responsibilities. The state recognises that fact and bereavement benefits reflect that recognition.
>
> Secondly, marriage provides a straightforward method of deciding whether benefits should be paid. It would be far more difficult to administer and police the benefits if they were extended to unmarried couples."

Mr Bayley went on to explain that other forms of benefits might be available which could assist those who did not qualify for bereavement payments.

19. A written answer in Parliament in 2004 had confirmed that the Government still was not intending to extend bereavement benefits to unmarried partners.

20. By 2011 the Government was consulting on further reform of bereavement benefits, which was eventually included within the Pensions Act 2014. In that consultation exercise it indicated that:

> "The following areas are out of scope for review:
> Marriage and Civil Partnership as a condition of entitlement. Currently, the law and tax and benefit systems only recognise the inheritance rights and needs of bereaved people if they have a recognised marriage or civil partnership. This is despite societal change resulting in a decline in marital status. We have no plans to extend eligibility for bereavement benefits to those who are not married or in a civil partnership."

21. Ms Walker gives evidence that the DWP was aware that the extension of bereavement benefits to unmarried couples was a political and campaigning priority for some. Nonetheless the Government's position was to restrict eligibility to those were married or in civil partnerships. Referring to material including the speaking notes prepared for the relevant Ministers, her evidence is that this was for six reasons:

> a. to promote the institutions of marriage and civil partnership, which are formal relationships of a contractual nature which confer rights and impose obligations on those who enter into them and which the Government regard as a stable basis on which to encourage people to form relationships;
>
> b. in pursuance of the general rule that entitlement to a contributory benefit has to be earned by being built up personally through national insurance contributions, to ensure that, in those circumstances where there is an exception to that principle, benefits derived from a person's contributions are only payable to someone else on condition of marriage or civil partnership, both in order to ensure the welfare system is affordable and to incentivise work;

> c. despite changes in the patterns of personal relationships at the time of the reforms, marriage and civil partnership remained the "dominant" (i.e. statistically most common) form of cohabiting relationship;
>
> d. a criterion based on marriage and civil partnership ensures administrative simplicity, in that they are usually easily and objectively verifiable, while other forms of relationship involve considerable variation in degree of cohabitation and emotional, practical and financial interdependence;
>
> e. restricting entitlement to marriage and civil partnership avoided the potential for multiple claims in respect of the same death; and
>
> f. other forms of assistance are available from other parts of the welfare system, among them Social Fund Funeral Payments and (from 2013) Universal Credit to help with living costs.

22. Various of these points were included in, for instance, the Minister's speaking note for the Committee Stage and in responses to campaigners pressing for the extension of the benefits to unmarried couple and in a response by the relevant Ministers in Committee (referring also to the degree of intrusion that would be involved) and in the House of Lords.

23. The Government's continuing position resulted in the inclusion in the Pensions Act 2014 of a requirement that the claimant must have been married to, or in a civil partnership with the deceased.

24. The Bereavement Support Payment Regulations 2017 (SI 2017/410) were subject to the affirmative procedure. The limitation to married couples and civil partners, being in the primary legislation, could not be changed by regulation. Nonetheless in debates, themes of avoiding increased expenditure, promoting administrative simplicity, avoiding intrusive questioning and the requirement for marriage/civil partnership if a person was to be able to benefit from someone else's contributions were all reiterated.

25. Finally, she explained the Government's intention to take forward a Remedial Order to address the issue identified by the decisions in *Re McLaughlin* [2018] UKSC 48 and *R(Jackson) v SSWP* [2020] EWHC 183 (Admin). She emphasised however that

> "the Government does not intend to make any Order providing for the payment of BSP to cohabitees without children (and, if BA and BP were still payable, the same would apply). That is because, for the reasons I have already set out above, the Government considers that the same rationale for not paying bereavement benefits to those who are not married or in civil partnerships continues to apply, where dependent children are not part of the equation."

26. Ms Edey's evidence responds to various matters raised by the appellants' written submissions.

27. As regards the draft Remedial Order, she emphasises that its purpose is to provide entitlement for survivor cohabitees with dependent children, but that did not mean that identifying and applying a definition of "cohabitee" was an easy or straightforward task: quite the opposite. Even once a Remedial Order has been approved by Parliament it would be for SSWP to translate it into an operational policy to deliver the benefit, requiring further consideration and development of guidance. For these reasons, it should not be viewed as a scheme operated by the DWP or as an answer to how "cohabitee" might be assessed for the purposes of bereavement payment and bereavement allowance. She points out that the existence of a child is something comparatively easy to evidence and does not require qualitative judgements. But if the presence of a child serves as an indicator of cohabitation, in the absence of one (as in the present cohort of cases) one is cast back on the need for much closer assessment of the relationship, which might well prove highly distressing – all the more so in the context of claims for bereavement allowance and bereavement payment, which necessarily relate to a period before 6 April 2017.

28. Ms Edey emphasises the importance that a benefit be paid accurately and quickly. She gives evidence as to the potential difficulties, including that different couples may have or lack access to different forms of evidence. She refers to the possibility that couples may feel they were relevant cohabiting partners notwithstanding that such cohabitation was not full-time and/or that finances were kept separate. Polyamorous relationships would pose a further challenge.

29. In relation to other legislative schemes put forward by MK as showing that it is possible to assess cohabitation, Ms Edey suggests that those schemes can be distinguished from the situation of claims for bereavement allowance and bereavement payment: the number of claimants of those DWP benefits is significantly larger, whereas the schemes relied upon by MK are limited to particular groups such as the deceased having been in the services or having been a secure tenant of local authority housing and would thus comprise a smaller group. Further, in most cases under the armed forces scheme, or concerned with local authority housing, there will be an existing link between the deceased and the organisation responsible, making assessment easier, which may well not exist in a claim for bereavement benefits from the DWP. Additionally, she emphasises the different policy context of each of the various schemes.

30. In conclusion, she provides evidence of publicly available material publicising the legal advantages (generally) of getting married or entering into a civil partnership. She provides an estimate of the cost of expanding bereavement allowance and bereavement payments to cohabiting partners without children, which she puts at over £100m on bereavement allowance and over £50m on bereavement payment.

31. The evidence filed on behalf of the appellants consists of the following:

> (a) a witness statement by Dr Mark Simpson, Senior Lecturer at Ulster University;

(b) a response prepared by Alison Penny, Coordinator of the National Bereavement Alliance;

(c) a witness statement by Lindesay Mace on behalf of Down to Earth, a project of Quaker Social Action;

(d) a paper outlining the results of a survey carried out by WAY Widowed and Young, on the challenges facing cohabiting couples without children;

(e) a witness statement by HM; and

(f) a witness statement by MK.

32. Dr Simpson's evidence comments on the six justifications put forward by Ms Walker (see [21]). As to the promotion of marriage, he provides references illustrating the rate of divorce, the decline in the number of those entering into opposite-sex marriage and the increase in the acceptance of "non-traditional" family forms. As to the proposition that a person should only be able to benefit from another person's contributions subject to a condition of marriage/civil partnership, he refers to the passage in the DWP's *Advice to Decision Makers* (at E4001) that

> "The general principle in social security legislation is that couples, be they married or unmarried, should be treated in a similar way."

33. As to the nature of personal relationships in the UK, he agrees with Ms Walker's evidence that marriage and civil partnership are the dominant form, but then goes on to demonstrate what a very small part in the figures is played by civil partnership, from which he puts forward that justification based on the prevalence of marriage and civil partnership could equally be applied to other forms of cohabitation, far more prevalent than civil partnership. Regarding administrative simplicity, he suggests that that may lead to inappropriate results (as in the circumstances considered by the Supreme Court in *Re McLaughlin*) and that, in view of people's at times complicated lives, social security decision-making may need to adjust. He refers to the instances where social security decision-making does grapple with the complexities – in particular in relation to the "living together as a married couple" test for Universal Credit where there is advice issued to decision-makers on the factors which it may be necessary to consider– suggesting that there is no reason why a similar test could not be applied to bereavement payments. As to the potential for multiple claims in respect of the same death, which he suggests is a low risk, he gives the example fo two pieces of delegated legislation in Scotland which have put a mechanism in place for dealing with conflicting benefit claims in respect the same child, showing that it can be done. Turning to the claim that other parts of the social security system can meet the needs of bereaved cohabitees, he draws attention to the differing ways in which contributory and means-tested benefits respond to a situation and provides a number of reasons why social fund funeral payments in particular are not a suitable alternative (and observes that in the case of married couples, such payments and bereavement payments can co-exist).

34. Ms Penny's paper similarly addresses the six justifications put forward by Ms Walker. The unsuitability of bereavement benefits as a vehicle to promote marriage/civil partnership is illustrated by the very low levels of public awareness of such benefits. Notwithstanding the claimed policy, virtually half the public believe that those who cohabit for a certain period of time have the same legal rights as married couples. Based on responses to the WAY Survey (see [36] below) the policy is felt as a punishment by those who have been denied benefit, rather than serving to promote marriage and civil partnership. Once the remedial order is made the applicable legislation will no longer be being used to promote marriage where there are children of the cohabiting couple and it would be inconsistent for it to do so where there are no children. She relies on the same argument in relation to the ability to rely on another person's contributions. Additionally, she makes the point that people pay the same contributions, whether they are married/in a civil partnership or not. As to marriage/civil partnership as the dominant form, she accepts this, while pointing out that the proportion of couples cohabiting has increased from 10.4% in 1996 to 21.4% in 2020. As to administrative simplicity, in order to demonstrate that it is not inevitably a strong point, she points to places where such assessments are, or are likely to be, required, such as under the Fatal Accidents Act, the need for criteria to be developed for the Remedial Order and to the far more numerous investigations fo whether people are living together as a married couple or the purposes of universal credit. She suggests a mechanism to counter the suggestion that investigation would be harder when one of the couple was no longer alive and that other administrative processes around the time of death may be felt as intrusive and thus that an investigation around a claim for bereavement payments may make little additional difference in that regard. Multiple claims could be addressed by splitting (or by whatever is developed for the Remedial Order). There is no evidence that bereaved cohabitees experience less grief or challenge in their bereavement. Indeed, cohabitees are likely on average to be younger and, as younger, people, are less likely to have built up alternative sources of support for survivors. Further, the death of a younger person is more likely to be sudden, adding to the financial difficulties likely to be experienced.

35. The evidence on behalf of "Down to Earth" indicates that it is the only UK-wide funeral costs helpline and assists some 700 people per year. The evidence sets out a number of case studies. Details are given of the types of financial difficulties experienced on bereavement from loss of the partner's income, having to take on sole responsibility for debts that were previously shared and meeting ongoing costs as an individual rather than as half of a couple; of the obstacles that can arise in claiming a social fund funeral payment; and of difficulties with such matters as making a claim for universal credit, or getting the bereaved person's name on a tenancy if it was not already there. In the experience of the organisation, the financial difficulties, and the emotional consequences of bereavement, are the same whether a couple were married/civil partnered or not.

36. "WAY Widowed and Young" supports men and women aged under 50 when their partner died. It adopts the contents of Ms Penny's paper (and in places repeats it). The evidence gives details of a survey conducted in January 2022 which received 293 responses. It provides evidence that bereaved cohabitants may face additional costs following the death of their partner, such as having to move house, additional

transport costs or to pay for bereavement counselling but the comparative figures for married cohabitants are not provided. Quotations are provided from bereaved cohabitants illustrating the difficulties which they faced. Married recipients of bereavement benefits used the lump sum to help towards funeral costs or bills and monthly payments to help with daily living costs such as food and bills. Illustrations are given of reasons why cohabitants were not married. A number of examples are given of how responders felt on realising that, having been cohabiting partners, they were not eligible for bereavement payments, of which the most common theme was that it had been felt to denigrate the validity of the relationship.

37. HM's evidence sets out the course of MS's illness which led to his death, the role she played in looking after him and the financial difficulties which first they, and subsequently she, experienced. She explains that she

> "had issues with the UK's marriage laws – women are still classed as "chattle" and I, therefore had issues with a civil marriage alone."

She gives evidence how the couple sought to reconcile their differing wishes in relation to formalising their union and the form of ceremony, conducted by a Church of England priest but not in law a marriage, which they ultimately underwent. The reason why it was not a marriage was that they felt there was a need for a ceremony to be held as a matter of urgency in view of MS's deteriorating condition and once they had agreed on a course of action there was insufficient time for her to obtain her divorce certificate from the relevant court (in New York), without which she could not be married. She states:

> "We supported, and were signed up to, the Equal Civil Partnership's campaign and helped the stalking-horse in that debate, Rebecca Steinfeld and her partner, by donating to their CrowdJustice crowd-funding. They were leveraging for a change in this law from around 2014, when the same-sex Civil Partnership change to the law was finally implemented. Things would things have been hugely different for [MS] and me if the option of become Civilly Partnered was available to us prior to his death." (*sic*)

38. MK's evidence is that she is a practising Roman Catholic. She and her husband had divorced in 2000, having separated in 1987. She had developed a devoted relationship with LM by 1992. Subsequently they discussed marriage and other ways of formalising their commitment to each other. They believed they could not marry in the eyes of the church due to MK's status as a divorcee. They were aware of the introduction of civil partnerships for same-sex couples, which provided legal rights and protections but were not recognised as a marriage. MK and LM believed the Catholic Church would not see civil partnerships as a marriage and thus that by entering into a civil partnership they could benefit from the legal protections without being considered remarried in the eyes of the church. They were aware that the application in *Steinfeld* had failed in the Administrative Court but was being appealed.

Ground 1: discrimination on the ground of marital status

39. Mr Milford submits that the Upper Tribunal is required to decide this against the appellants because of the Court of Appeal's decision in *SSWP v Akhtar* [2021] EWCA Civ 1353. Ms Akhtar had been a party to a marriage that was polygamous and, in English law, bigamous, in that at the time of their marriage (which was valid under the law of Pakistan) her late husband had still been married to his first wife, whom he had only later divorced; but under English law her husband's domicile in England and Wales at the time of their marriage had not permitted such a marriage to be entered into. Upper Tribunal Judge Wikeley had found that the refusal of bereavement payment to Ms Akhtar was a breach of her human rights. While he acknowledged that the requirement to be a "spouse" was contained in primary legislation, he considered that the delegated legislation specific to polygamous marriages in the social security context, the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 (SI 1975/561), could be read down in accordance with s.3 of the HRA to enable him to provide a remedy. The Court of Appeal reversed the decision and the difference between the present parties, in short, is whether the ratio for the Court of Appeal's ruling is concerned with purported marriages that are void because they were polygamous and bigamous and failed to meet the requirements of English law as to when such marriages can be recognised, or whether the ratio is a wider one, concerned with all relationships which fail to amount to a marriage recognised by the law of England and Wales.

40. In *Akhtar*, Moylan LJ observed:

> "202. The word "spouse" is not defined in the primary legislation. In the absence of any alternative definition, it is clear to me that the word "spouse" cannot be interpreted as meaning a party to a marriage which is void under English law. However, although I put it this way for the purposes of this case, I would also agree with Ms Leventhal's submission that, because of the developments referred to in paragraph 125 ([3.10] of the 1985 Report) and as explained in paragraph 199 above, "spouse" should be interpreted as meaning a party to a marriage recognised as valid under English law. As a result, I agree with the UTJ when he said, at [101]: "In the absence of any other definition of 'spouse' in the SSCBA 1992, one must fall back on the understanding supplied by matrimonial legislation".
>
> 203. Accordingly, in my view, the word "spouse" cannot mean a party to a marriage which is void under English law, for the simple reason that a party to a void marriage is not a spouse. There would have to be some express, or possibly implied, provision which makes it clear that the conventional construction does not apply. There is nothing in the primary legislation which would support this conclusion. In particular, there is nothing to suggest that the introduction of the term spouse (in place of widow) was intended to include a party to a void marriage. Further, as Ms Leventhal submitted, this conclusion is supported by the contrast drawn in sections 36 and 39A of the SSCBA 1992 between a spouse or civil partner and a person living together with another person, to whom they are not married or in a

> civil partnership, "as if they were a married couple or civil partners": section 39A(5)(b).
>
> 204. That this is the effect of the primary legislation in this case was not significantly disputed. "

41. Much of the decision in *Akhtar* was taken up by a learned and detailed examination of the treatment of polygamous marriages in English law generally, and specifically for social security purposes. The reason for that is because Ms Akhtar had argued that the 1975 Regulations (a) could apply to a marriage such as the one she had entered into (as described above) and this should bring her within s.36 or s.39A when she was otherwise excluded from them and (b) put her in an analogous situation to someone who had been validly married for the purposes of the law of England and Wales. The Court of Appeal rejected both.

42. Moylan LJ held (emphasis added):

> "220. I next deal with the issue of comparability or analogous situation. As Baroness Hale said in *McLaughlin*, at [26], this issue has to be addressed "in the context of the measure in question and its purpose". The measure in question is the grant of a bereavement payment. Its purpose can be seen to be providing financial assistance following the death of a husband, wife or civil partner. As the UTJ asked, the essential question is whether NA's position is analogous to that of a surviving spouse or civil partner.
>
> 221. Ms Rooney [counsel for the claimant] argued that NA's position is analogous to that of a surviving spouse because she and Mr A had gone through a religious ceremony of marriage in Pakistan which was valid under the law of Pakistan. It is clearly arguable that NA's position is closer to that of a surviving spouse than to a surviving cohabitant. However, I do not consider that, as the UTJ did, there is a "spectrum" of relationships in this context. <u>There is, in my view, "an obvious and relevant difference", namely the difference between those who have contracted a marriage which is valid under English law and those who have not. Marriages can be void for a number of reasons and I do not see how the position can vary or depend on the reason for the marriage being void.</u> The focus in *McLaughlin* was on the "public contract" because the court was analysing the difference between a married couple and a couple who had not entered into "the act of marriage". In all cases involving void marriages, the parties will inevitably have undertaken some act or ceremony. This will very probably be a public act or ceremony but the critical distinction is that it will not be an effective "public contract".
>
> 222. Accordingly, in my view, NA's position as a party to a religious marriage which is void in English law is not analogous to a party to valid marriage. A religious ceremony of marriage performed in England and Wales might create a valid marriage, a voidable marriage, a void marriage or it might be a non-qualifying ceremony. Taking the facts of the present case, in my view a party to a religious marriage performed in another

> country which is void because it is bigamous is in an analogous position to a party to a religious marriage performed in England which is void because it is bigamous. It is the bigamous nature of the marriage which is the relevant and important feature not that the marriage was polygamous nor that the marriage was a religious ceremony.
>
> 223. Accordingly, contrary to the UTJ's decision, I do not consider that NA is in an analogous position to a party to a marriage which is valid, or not void, under English law. It is, in my view, a clear distinction of the nature identified by Lord Nicholls in *R (Carson) v SSWP*, namely "an obvious, relevant difference"."

43. In my judgment, Mr Milford is correct in his characterisation of Ms Akhtar's case as being one of "cohabitation-plus", in that she had gone through a marriage ceremony, albeit not one recognised as valid under English law. If Ms Akhtar, whose case was arguably stronger than that of a surviving cohabitant (see Moylan LJ at [221]), could not succeed, a fortiori nor could a surviving cohabitant. The difference is between "those who have contracted a marriage which is valid under English law and those who have not" and in my view I am bound by *Akhtar* to hold that a cohabitant, who has not contracted a marriage which is valid under English law, is not in an analogous position with a person who has. I do not agree with the submission on behalf of the appellants that the court in *Akhtar* was concerned merely with the public policy reasons why bigamous marriages are not favoured: it certainly was concerned with that issue, because that was what Ms Akhtar relied upon in order to fall outside the limitations which would otherwise apply, but in the passages set out above Moylan LJ expressed himself in terms that were not limited to the specific reason why Ms Akhtar's marriage was void. I further accept Mr Milford's submission that it would be a very odd consequence if cohabitants – who had never attempted to marry each other– were in a stronger position in claiming to be in an analogous position with a "spouse" than those who had attempted to marry but whose marriage was, for one reason or another, not valid.

44. While Macur and Underhill LJJ expressed differing views on some parts of the case, there was no difference of substance about the aspect which is relevant for present purposes. As Underhill LJ put it at [254]:

> "As regards issue (ii), my reasons are, I believe, substantially the same as Moylan LJ's. In bare outline, if, as I believe, the intention of the legislation is to distinguish between cases where the parties were and were not validly married as a matter of domestic law, that is a legitimate distinction in the context of entitlement to a benefit of this character. Lawful marriage (or civil partnership) is a well-recognised status of fundamental importance in our society and one which it is entirely appropriate should be defined by formal rules. It is a reasonable legislative choice to limit entitlement to bereavement payments only to the surviving party to a marriage or partnership which is formally valid, even if there may be occasional hard cases where the validity of a marriage is vitiated by a defect of which the surviving party was unaware. That argument can be expressed equally as going to "analogous position" or to justification: those questions typically overlap in the article 14

> context. I agree with Moylan LJ that *McLaughlin* is distinguishable for the reasons that he gives."

45. Lest I be wrong in deciding that I am bound to apply *Akhtar* as set out above, I do not in any case accept the appellants' submission that cohabitants are in an analogous position. Much is made that cohabitants and spouses will share the same feelings of grief and face the same financial issues. I acknowledge the grief that will have been felt, but social security is concerned with meeting financial need, rather than compensation for emotions, however understandable. Benefits for sickness, disability or unemployment are paid to meet needs arising from those situations, not as compensation for the unhappiness or frustration which may flow from them. Ms Walker's evidence (see [17]) is that bereavement payment was intended to help with the immediate expenses following bereavement and that bereavement allowance was intended to provide short-term financial assistance. Further, Mr Milford is in my judgment correct in submitting that the age limitations in s.36(1)(a) and s.39B(1) which exclude (to simplify) those over pensionable age indicate that the benefits serve the purpose of helping to meet financial hardship (in that a person over pensionable age, excluded from the benefit, would be less likely to have a partner who had been working, leading to a loss of income on their death, but where there would be no reason to suppose that the grief experience would be any different).

46. Extracts from Hansard[1] were handed up, which record the Minister, Mr Richard Harrington, indicating the Government's view of the purpose of the benefits. In *R(SC) v SSWP* [2021] UKSC 26 at [163] – [185] Lord Reed urges caution in respect of the use of Parliamentary materials in human rights cases. However, "material placed before Parliament, and statements made in the course of debates, may be relevant as background information in ascertaining the objective of the legislation and its likely practical impact" (see the introductory summary at para 2(7)(iii)). The Minister's remarks are in the context of the period for which bereavement support payment was to be paid and explain how it is not intended to replicate the period of grief with the benefit but to support people with the additional cost associated with bereavement. The remarks concern a later, differently-structured benefit and are of limited assistance in the present context but so far as they go provide no reason to doubt the conclusion reached above from the legislation which the present case concerns that its purpose is not to address feelings of grief.

47. Mr Milford is correct in his submission that there is no evidence that compensation for grief is part of the purposes of the bereavement benefits in issue.

48. As regards whether cohabitants and married couples are typically in an analogous financial position, there is no evidence before me that is directed to this on a general level. (I do not regard the fact that the particular appellants had joint bank accounts with their late partners as sufficient on this point). There are differences in parts of the tax system – notably capital gains tax and inheritance tax – and for a limited range of married couples a modest additional income tax allowance. More fundamentally, cohabitants do not in life have access to the same financial regimes on separation as apply to married couples on divorce and may in consequence

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establish different financial arrangements. There may also be force in the point made by Mr Milford that for some cohabiting couples a desire to keep finances separate might have been part of their preference not to marry, but that is in the realms of speculation. The basic point is that there is no evidence enabling me to conclude that married and unmarried couples are in a financially analogous situation on the death of one of them. Further, even if I were not constrained by authority, there would still be a question whether (if established) an analogous financial situation, rather than the presence or absence of a "public contract" (see *Akhta*r at [221] and *McLaughlin* at first instance, discussed below) could be a relevant factor, but in the present case it is, as noted, not established on the evidence in any event.

49. Turning to existing authority, in *Re McLaughlin* [2016] NIQB 11, Treacy J (as he then was) observed as set out below.

> "[63] In the instant case the relevant facet is the marital status of the applicant. It is not suggested that the substance of the applicant's relationship, in terms of stability is analogous to that of a married couple. The question is therefore, does the absence of a public contract between the applicant and her late partner make the relationships sufficiently dissimilar to legitimise different treatment. For the reasons outlined below I believe that there is a different answer to this question in relation to the two benefits sought."

It appears likely that that there is either one "not" too many or, more probably, one "not" too few in the above sentence. Both the facts of *McLaughlin*, where Ms McLaughlin and her late partner had been together - with only two brief separations - for 23 years, and had had 4 children together, and the logic of the above paragraph and of [66] quoted below suggest that to be so.

50. Continuing from Treacy J's judgment:

> "Bereavement Payment – Comparability
>
> [66] Through marriage (or civil partnership) a couple regulates their relationship with each other and with the state through their public contract. The couple puts the state 'on notice' of their relationship. A cohabiting couple make no such public contract. This in itself is usually sufficient to make the two relationships sufficiently different in a material particular to lawfully treat the relationships differently in certain circumstances. By the act of marriage the couple 'opt in' to this different treatment – the treatment arises not by virtue of the quality of the relationship or the length of the relationship, but because the couple have made the contract and made the state aware of their changed circumstances.
>
> [67] For this reason I find that the applicant's claim for bereavement payments must fail.
>
> Widowed Parent's Allowance – Comparability

> [68] By contrast, the facet of the relationship that is relevant to the claimed Widowed Parent's Allowance is the co-raising of children. Therefore in relation to comparability of spouses/civil partners and cohabitees under this head, I consider that the relationships are analogous."

51. If, contrary to my view, *Akhtar* does not provide binding authority, Treacy J's decision, as a decision of the Northern Ireland High Court, is not binding upon me but is plainly entitled to considerable respect.

52. Mr Milford seeks to boost the weight to be given to it by submitting that it was endorsed by Baroness Hale when *McLaughlin* reached the Supreme Court, at [26] and [27]. In my view it is not clear whether she was intending to endorse not only Treacy J's reasoning with regard to widowed parent's allowance or also that regarding bereavement benefit. In any event, the Supreme Court was by then only concerned with the former, so as regards bereavement benefit, any remarks were *obiter*. In *Akht*ar at [152] the Court of Appeal records Baroness Hale's remarks, without (in my view) expressing a view as to how much of Treacy J's analysis she was intending to endorse. Accordingly, I do not by virtue of those remarks give significant additional weight to Treacy J's judgment over and above what I would give it in any event.

53. Mr Cottle on the other hand submits that *McLaughlin* at first instance:

> (a) proceeded by considering a different set of factors to those which he submits should apply in considering whether the parties were in an analogous position to a survivor of a lawful marriage; and
> (b) relied on decisions which had subsequently been reversed on appeal or otherwise disapproved.

54. As to (a), he comes up against not merely *McLaughlin* at first instance but the views expressed by e.g. Underhill LJ in *Akhtar* that in essence, when the legislation says "spouse" it means it and that is a status which is defined by formal rules. As to that status, see, on a European level, *Van Der Heijden v The Netherland*s (2013) 57 EHRR 13 at [57]:

> "Rather than the strength or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature".

55. As to (b), one such decision in his submission was *Re Brewster* which concerned whether a surviving cohabitant was entitled to a death grant under the Northern Ireland Local Government Superannuation Scheme. The rules of the Scheme required in the case of cohabitants that a nomination form had been completed before entitlement could be established and in that case no such form had been. The Northern Ireland Court of Appeal held ([2013] NICA 54) that that the rule was justified, but the Supreme Court ([2017] UKSC 8) subsequently disagreed. The reliance which Treacy J placed on the Court of Appeal's decision in *Re Brewster* was on dicta by Girvan LJ set out at [20] (*sic* – [21] must have been intended) of his decision:

> "[43] What this brief overview demonstrates is that there are functional and legal differences between parties living in a cohabitational relationship and married couples which make the relationship different in fact and in the eyes of the law. The overview also indicates the difficulties and sensitivities that exist in relation to formulation of law reform to deal with cohabitational relationships. In certain circumstances the relationship may be analogous to a marriage. In others it is not. Drawing the line when such relationships should be functionally equated to a marriage calls for a policy decision. In the absence of a mechanism for drawing that line the domestic law proceeds on the basis that the relationships are distinct and separate. The fundamental and central difference between the two relationships is that in the case of marriage the parties have committed themselves to a binding although not legally indissoluble commitment whereby the parties commit themselves to an exclusive relationship which has determined legal consequences in the event of dissolution on death or during life.
>
> …
>
> [52] The choice as to what evidences the level of commitment and constancy in a cohabitational relationship to justify payment of a survivor's pension is a question of social policy and thus would normally fall within the category of discrimination which could only be considered unlawful if it is manifestly without reasonable foundation. However, once that choice has been made and the decision has been made to consider cohabitational partners as satisfying the factual indicia of commitment and constancy chosen, the imposition of discriminatory conditions on a category which is considered by the policy maker to be factually analogous to that of spouses and civil partners does not appear to me to involve the exercise of a judgment on a question of general or broad social policy."

56. However, the Court of Appeal in *Re Brewster* found against Ms Brewster on the basis of justification, not on the lack of an analogous position, and in the Supreme Court ([2017] UKSC 8) it was common ground that there was an analogous situation and the appeal was determined on justification alone. While it is evident that the Supreme Court disagreed with the Court of Appeal on justification, there is nothing in their decision which undermines the particular passage in Girvan LJ's judgment on which Treacy J relied on his way to reaching a conclusion that, in relation to bereavement benefits, a surviving cohabitant and a surviving member of a married couple were not in an analogous position.

57. Similarly, Mr Cottle argued that Treacy J had relied on the decision of the European Court of Human Rights in *Shackell v UK* (App. 45851/99), a decision which the Supreme Court in *Re McLaughlin* later indicated should no longer be followed. *Shackell* was a decision where an application challenging a refusal to pay widow's benefit and widowed mother's allowance – so there were children of the family- to a surviving cohabitant was held to be manifestly ill-founded because there was no analogous situation and in any event the discrimination was justified. In *Re*

McLaughlin, Lord Mance, giving a judgment with which the other members of the majority agreed, indicated at [49] that that decision "should now be regarded as wrong or should not be followed, at least domestically". However, it is clear from that paragraph that that was because "the reasoning in *Shackell v United Kingdom* fails to address what I regard as the clear purpose of this allowance, namely to continue to cater, however broadly, for the interests of any relevant child." *McLaughlin* at first instance proceeds by setting out at length submissions made by the respondent, including (at [14]) reliance on *Shackell*. The learned judge's reasoning on "analogous position" was relatively brief, but if it is assumed that he was as regards bereavement payment endorsing the respondent's submission in the case (including reliance on *Shackell*) , it does not detract from the weight to be given to the decision, because the reason why *Shacke*ll was disapproved by the Supreme Court was in the specific context it was considering, namely bereavement benefits for families with children (indeed Treacy J likewise did not follow *Shackell* in its application to benefits for families with children).

58. Other domestic cases relied upon by Mr Cottle, such as *Ratcliffe v Secretary of State for Defence* [2009] EWCA Civ 39 serve to illustrate that (as I accept) whether there is an analogous situation must be looked at in the light of the scheme under examination, but, as in *Brewster*, there were particular features of the scheme which led the court to conclude that there was. In the present case, however, discounting as I do the relevance for benefit purposes of the shared experience of grief and concluding that the financial arrangements have not been shown to be sufficiently close, there are no features which would justify a different conclusion from that reached by Treacy J. In view of the sharp distinction between contributory and means-tested benefits in terms of eligibility and purpose, it would be a step too far to regard the approach to couples in the means-tested parts of the UK's elaborate social security system as part of the scheme relevant to who may be regarded as in an analogous situation for the purposes of bereavement payments.

59. *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916 was a case on the Fatal Accidents Act 1976, which as amended provides for the damages to be paid by tortfeasors to consist (by s.1) of dependency damages and (by s.1A) of bereavement damages. In that case the long-term cohabiting partner of the deceased was held to be in an analogous position to the married couples and civil partners who alone under the terms of s.1A could claim bereavement damages. That however flowed from the purpose of those damages. Sir Terence Etherton MR explained at [90]:

> "In the context of this particular scheme, it is not the special legal status and legal consequences of marriage and civil partnership that are material, in the sense of providing a rational distinction with other people and relationships: cf, for example, Burden's case, in which the ECtHR rejected the complaint of two unmarried sisters, who had lived together all their lives, that the liability to inheritance tax payable on the death of one of them, which would not be faced by the survivor of a marriage or civil partnership, would violate their rights under article 14 read with A1P1. Rather, it is the intimacy of a stable and long-term personal relationship, whose fracture due to death caused by another's tortious conduct will give rise to grief which ought to be recognised by an

> award of bereavement damages, and which is equally and analogously present in relationships involving married couples and civil partners and unmarried and unpartnered cohabitees. It is apparent from the very fact that bereavement damages are limited in section 1A(2)(a) to the spouse or civil partner of the deceased that bereavement damages are specifically intended to reflect the grief that ordinarily flows from the intimacy which is usually an inherent part of the relationship between husband and wife and civil partners."

As the Master of the Rolls indicated, it is the "context" of "the particular scheme" which has to be considered. Unlike those in *Smith*, the purposes of the benefits in the present case are, as has been shown, not the meeting of grief, so it is not possible to make the same analogy here as in *Smith*.

60. I also note the observations of the Court of Appeal in *Akhter v Khan (Attorney General and others intervening)* [2020] 2 WLR 1183, cited in *Akhta*r at [155]:

> "The judgment of the court (Sir Terence Etherton MR, King and Moylan LJJ), referred, at [9], to the importance attached to the status of marriage: a "person's marital status is important for them and for the state" because of the "specific rights and obligations" derived from that status "and not any other form of relationship":
>
> "It is, therefore, of considerable importance that when parties decide to marry in England and Wales that they, and the state, know whether what they have done creates a marriage which is recognised as legally valid."

Although this observation was limited to England and Wales, it clearly also applies to marriages contracted elsewhere. The judgment also noted, at [10], that

> "(c)ertainty as to the existence of a marriage is in the interests of the parties to a ceremony and of the state"

and, at [28]:

> "As referred to in para 9 above, marriage creates an important status, a status "of very great consequence", per Lord Merrivale P in *Kelly (orse Hyams) v Kelly* (1932) 49 TLR 99, 101. Its importance as a matter of law derives from the significant legal rights and obligations it creates. It engages both the private interests of the parties to the marriage and the interests of the state. It is clearly in the private interests of the parties that they can prove that they are legally married and that they are, therefore, entitled to the rights consequent on their being married. It is also in the interests of the state that the creation of the status is both clearly defined and protected."

61. Mr Cottle relies on *Nadine Rodriguez v Minister of Housing of the Government* [2009] UKPC 52. Mr Milford submits that the Privy Council was there consciously applying the view of the minority in the ECtHR's decision in *Burden,* something which it could do in a case such as *Rodriguez* which concerned the constitution of Gibraltar

but which would not be open to it applying s.2 of the HRA and complying with the principle in *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

62. In *Ullah* Lord Bingham observed:

> "It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

63. Mr Cottle submits that, the UK having decided to make a benefit available, the effect of the Human Rights Act and the Convention is to require it to be made available without discrimination and that would not contravene the *Ullah* principle. He refers me to *R(AB) v Secretary of State for Justice* [2021] UKSC 28, submitting that what is precluded (see [54]) is a development of the Convention law of such a substantial nature as was in issue there: here, the development that would be required is not "of a substantial nature". The same case holds (at [59]) that

> "In situations which have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law."

64. In my judgment, Mr Cottle's submission assumes what is to be decided: the circumstances in which discrimination contrary to the ECHR may be found are the subject of the jurisprudence of the ECtHR and thus I consider that to find discrimination in circumstances where the caselaw of that Court indicates that it would not to date have done so would contravene the *Ullah* principle, at any rate if the degree of departure is significant.

65. Mr Milford relies on a number of decisions of the ECtHR as demonstrating that in effect marriage is a particular status such that those who are not married are not in an analogous position with those who are. I accept that that is the effect of the decisions in *Lindsay* v UK (1986) 9 EHRR 513 and *Burden v UK* (2008) 47 EHRR 38.

66. In *Yigit v Turkey (2011) 53 EHRR 255*, the ECtHR admittedly proceeded on the basis that a person who had gone through a religious form of marriage, without validity under Civil Law, was in an analogous position to a person who had gone through a Civil law marriage and so decided the case on the basis of justification (as to which it acknowledged that "states have a certain margin of appreciation to treat differently married and unmarried couples, particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security.") Given that the same considerations can be viewed as going either to whether people who receive different treatment are in an analogous position or to justification, I do

not see that case, of itself, as demonstrating an acceptance by the Court that a status based on legal marriage is irrelevant.

67. In any event (and irrespective of whether to hold the contrary would contravene the *Ullah* principle), subject to the consideration below of whether the case also falls within the ambit of art.8 and the implications if it does, I am minded to accept for the reasons articulated in *Akhtar*, in *Akhter v Khan* and in *McLaughlin* at first instance, that there is a material difference between persons who are married or in a civil partnership (on the one hand) and those who are not (on the other).

68. Do the present cases fall additionally within the ambit of art.8? In support of his submission that they do not, Mr Milford relies on *SSWP v M* [2006] UKHL11 ("*Re M*"), submitting that to fall within the ambit of a Convention right, there must be more than a tenuous link to family or private life. As the House of Lords pointed out, art.8 is an open-ended right and there is a need to guard against unrestrained or unprincipled expansion of its scope.

69. He invites me to conclude that there is no link here to the values protected by art.8 which is more than tenuous. He invites me to reject Mr Cottle's submission that the key is the shared experience of grief (see elsewhere) and the submission based on refusal being an affront to the dignity of those refused benefit because they perceive it as a slight on their relationship. While he accepts that "family life" for art.8 purposes can encompass family life without children, he submits that benefit paid to support a survivor with no children (or other family) is nothing to do with family life. He notes that *SC*, where the circumstances were held to fall within the ambit of art.8, concerned families with children.

70. I have read, but need not set out, the helpful analysis of *Re M* by Sir Terence Etherton MR in *Smith*.

71. My conclusion is that the present case does fall within the ambit of art.8, for the following reasons.

72. "Family life" for the purposes of art.8 "is not confined solely to families based on marriage and may encompass de facto relationships: see *Van der Heijden v Netherlands* at [50] and the authorities cited there. The presence of children of the relationship may be relevant evidence, but is not determinative (ibid.). *Schalk and Kopf v Austria* (App. No.3014/04) is to similar effect. In *SC* at [41] Lord Reed relied on the line of authority relating to the provision of benefits for families with children to conclude that the case before him fell within the ambit of art.8. That was what *SC* concerned, but the presence of children is, as shown by the above cases, not a prerequisite.

73. In *Petrovic v Austria* (1998) 33 EHRR 307, the court referred to a test of whether "the subject-matter of the disadvantage … constitutes one of the modalities of the exercise of a right guaranteed" by the article. Such an approach has been adopted in subsequent cases. There is no doubt or dispute that "family life" can extend to a cohabiting couple without children. In my view, the state shows respect for such family life by providing an allowance offering a degree of reassurance to the couples

eligible for it that, when their relationship is terminated by death, there will be a contribution to meet the financial needs of the cherished survivor.

74. I note that in *Estevez v Spain*, a case from 2001 cited in *Re M* at [75], the decisive factor why at that time the claim of a surviving same-sex partner to a survivor's social security benefit failed was because the trend across Europe towards recognising same-sex unions was then only emerging. The implication is that the case would otherwise have fallen within the ambit of art.8 by reason of "family life".

75. I would also conclude that "private life" is engaged for the purposes of art.8 in view of its wide scope as summarised in *Dadouch v Malta* (App. No. 38816/07) at [47]:

> "47. The Court recalls that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Beyond a person's name, his or her private and family life may include other means of personal identification and of linking to a family. An individual's ethnic identity must be regarded as another such element. Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, 4 December 2008, and the case-law cited therein)."

76. Mr Milford submits that *Dadouch* is not comparable with the present case as it is about refusal to register a marriage. So it is, but its relevance for present purposes is in the ECtHR's observations, expressed in general terms, about the extent of art.8. That still leaves the "ambit" question (which I have addressed above). I also note that in *Estevez* (cited above) the ECtHR appears to have concluded that the case might have fallen within the ambit of art.8 on the basis of respect for private life (the court went on to find the difference in treatment in that case to be justified.)

77. I am aware of the recent decision (11 October 2022) in *Beeler v Switzerland* (App.No. 78630/12) which was issued while this decision was being prepared. It provided useful guidance at [72] on when such a case may fall within the ambit of art.8. I have received no application from a party to make a further submission based on the decision. My conclusion on whether the matter falls within the ambit of art.8 does not depend on *Beeler* but is, I believe, consistent with it.

78. I therefore conclude that the case does additionally fall within the ambit of art.8. . Does that make a difference? It is unclear on what basis if any this would make a difference in his case to whether there is an analogous situation. In *McLaughlin* at first instance, there were claims based on (a) art 14/art 8 (b) art 14/A1P1 and (c) breach of art.8. At [64] and [65] the judge rejected the submission of a breach of art.8, citing *Petrovic* and *Yigit,* but there is no suggestion that whether the case fell within the ambit of art. 8 rather than A1P1 made any difference to the discrimination

claim. When the case reached the Supreme Court, it was held that the facts of *McLaughlin* did fall within the ambit of art.8. Baroness Hale at [16], citing *Petrovic* and *Okpisz*, indicated that "this could matter, in relation both to whether the claimant and her children are in an analogous situation to a surviving spouse or civil partner and their children and to the justification for the difference in treatment between them." While those cases concerned child benefit (and thus there were children in the family), she also relied upon *Aldeguer Tomas v Spain* 65 EHRR 24, which concerned the right to bereavement benefit of a surviving homosexual partner in a relationship where there were no children. In that case the parties did not dispute that the case fell within the ambit of art.8 and this conclusion was upheld by the Court, though with little reasoning. In view of Baroness Hale's remarks above, I accept that whether a case falls within the ambit of art.8 may be relevant to whether there is an analogous situation, but the only reason that has been advanced why it might make a practical difference in this case is that of grief, which I have not accepted above. I can therefore see no compelling reason why if (as I consider) the case falls within the ambit of art.8 (as well as, as is common ground, A1P1), in the circumstances of this case it makes any difference to "analogous situation" and therefore remain of the view provisionally expressed at [67] above.

79. Accordingly, in summary:

> a. I consider that I am bound by *Akhtar* to hold that the appellants are not in an analogous position to the survivors of a lawful marriage;
> b. if I am not bound by *Akhtar*, I respectfully consider that that conclusion is correct; and
> c. the circumstances of the case fall within the ambit of art.8 as well as that of article 1 protocol 1, but it makes no difference to the conclusion on "analogous situation".

Ground 2: indirect discrimination on ground of gender

80. In *SC*, Lord Reed explained indirect discrimination in the context of a human rights challenge in the following terms:

> "49. Thirdly, "[t]he court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a de facto situation. This is only the case, however, if such policy or measure has no 'objective and reasonable' justification, that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realised": *Guberina* , para 71. The judgments cited in support of that proposition included *DH v Czech Republic.* This is what is described in the Convention case law as "indirect discrimination". It can arise in a situation where a general measure or policy has disproportionately prejudicial effects on a particular group. It is described as "indirect" discrimination because the measure or policy is based on an apparently

> neutral ground, which in practice causes a disproportionately prejudicial effect on a group characterised by a salient attribute or status.
>
> 50. The concept of indirect discrimination has only gradually come to be recognised by the European court. An early example is *Hoogendijk v The Netherlands* (2005) 40 EHRR SE22, where a requirement to qualify for a social security benefit affected more women than men. The court held that "where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule - although formulated in a neutral manner - in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex" (p 207). The government having failed to do so on the facts of the case, the court held that "the question therefore arises whether there is a reasonable and objective justification for the introduction of [the measure in issue]". On the facts, it was held that there was."

81. After referring to *DH v Czech Republic* which he described as demonstrating a "broadly similar approach" and *SAS v France* (2014) 60 EHRR 11, he summarised the position at [53]:

> "53. Following the approach laid down in these and other cases, it has to be shown by the claimant that a neutrally formulated measure affects a disproportionate number of members of a group of persons sharing a characteristic which is alleged to be the ground of discrimination, so as to give rise to a presumption of indirect discrimination. Once a prima facie case of indirect discrimination has been established, the burden shifts to the state to show that the indirect difference in treatment is not discriminatory. The state can discharge that burden by establishing that the difference in the impact of the measure in question is the result of objective factors unrelated to any discrimination on the ground alleged. This requires the state to demonstrate that the measure in question has an objective and reasonable justification: in other words, that it pursues a legitimate aim by proportionate means (see, in addition to the authorities already cited, the judgment of the Grand Chamber in *Biao v Denmark (2016) 64 EHRR 1, paras 91 and 114*)."

82. In the context of indirect discrimination, what has to be justified is the measure itself, not whether treating women differently from men can be justified. Lord Reed observed at [188]:

> "As previously explained, a presumption of discrimination on the ground of gender having been raised as a result of the fact that the limitation affects a greater number of women than men, it is necessary to consider whether the measure has an objective and reasonable justification: that is to say, whether it pursues a legitimate aim, and does so by proportionate means. In that regard, the European court has held that very weighty reasons have to be put forward before a difference in treatment on the ground of gender can

> be regarded as compatible with the Convention, whether the alleged discrimination is direct or indirect (*Di Trizio v Switzerland* (Application No 7186/09) (unreported) given 2 February 2016 ("*Di Trizio*"), paras 82 and 96)."

83. The appellants submit that the test in *Hoogendijk* is made out on the evidence and therefore that the Secretary of State must provide justification.

84. Mr Milford suggests that the provision is not "neutrally formulated", as it must be, but rather is targeted. However, as between men and women I consider that it is neutrally formulated on its face as those of either gender may be a bereaved partner who has been in a cohabiting relationship.

85. Mr Milford then submits that the available evidence is directed to the wrong question. In his submission it matters not that 7 out of 10 claimants of bereavement benefits are female and only 3 out of 10 male, with the consequence that the requirement that the parties be married or in a civil partnership disadvantages more women than it does men. Rather, he submits, the question is whether the impact of that requirement is more adversely felt by women wishing to claim the benefits than by men. As the impact of the requirement will be felt by an equal proportion of men claiming the benefit and of women claiming the benefit, there is, he submits, no indirect sex discrimination requiring to be justified.

86. In support of this submission, he relies on dicta in *R(The Motherhood Plan and another) v HM Treasury* [2021] EWCA Civ 1703, where at [56] the Court of Appeal observed:

> "56 Notwithstanding those differences in formulation, it is clear that the same principles underlie the concept of indirect discrimination in the Convention, EU and domestic contexts. Broadly speaking, the concept of a "measure" does the same work as a "PCP" in EU law, and the requirement that it has "disproportionately prejudicial effects" (or "affects a disproportionate number of members") on the relevant group essentially corresponds to the requirement that it puts members of that group at "a particular disadvantage". As Lord Reed PSC notes, the Strasbourg case law is not yet fully developed, and some differences in approach or application may emerge at the margins, but the essential similarities are such that it is in our view legitimate in an article 14 case at least to have regard to the EU and domestic jurisprudence."

87. Relying on this, Mr Milford relies on *Secretary of State for Trade and Industry v Rutherford (No.2)* [2006] UKHL 19. That case was brought under art.141 EC (equal pay for equal work or work of equal value) to challenge the exclusion of those who had reached the age of 65 from the right to claim unfair dismissal. Even though there was evidence that more men than women continued working after turning 65, that was held not to be the question. Rather, the majority of their Lordships held, it was necessary to ask whether those seeking the advantage from one group were disadvantaged in comparison with those not from that group who sought the advantage. As the exclusionary rule bit equally on men and women who had turned

65 and wished not to be excluded from the right to claim unfair dismissal, justification was not required: see [62] where the ratio is expressed as a formula and at [72] where Baroness Hale provided an illustration:

> "72. It is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantaged and the disadvantaged groups. So it is no answer to say that the rule applies equally to men and women, or to each racial or ethnic or national group, as the case may be. The question is whether it puts one group at a comparative disadvantage to the other. However, the fact that more women than men, or more whites than blacks, are affected by it is not enough. Suppose, for example, a rule requiring that trainee hairdressers be at least 25 years old. The fact that more women than men want to be hairdressers would not make such a rule discriminatory. It would have to be shown that the impact of such a rule worked to the comparative disadvantage of would-be female or male hairdressers as the case might be."

88. The challenge in *SC* was to the limitation of the individual element of child tax credit to an amount calculated as the amount payable in respect of two children. The claims of indirect discrimination were (a) indirect discrimination against women as compared with men and (b) indirect discrimination against children as compared with adults. Claim (b) was quickly dismissed because child tax credit does not affect children and adults in comparable ways: see [63]. The evidential background to claim (a) can be found at [195]- [199] of *SC*:

> "197. In short, more women than men are affected because more women than men are bringing up children. That is an objective fact. There is no suggestion that that is itself the result of discrimination on the ground of sex.
> …
> 199. Once it is understood that the legitimate aims of the measure could not be achieved without a disproportionate impact on women, arising from the demographic fact that they form the majority of parents bringing up children, the only remaining question which can be asked, in relation to proportionality, is whether the inevitable impact on women outweighed the importance of achieving the aims pursued."

89. Nowhere in Lord Reed's judgment does there appear to be any suggestion that what had to be considered was whether the impact of the two-child rule was such that it would be harder for a female parent of children to comply with it than it would be for a male parent to do so.

90. It seems to me therefore that *SC* supports the appellants' position on this aspect. I accept that *Rutherford* could be read, via *Motherhood Plan*, as providing some support for the proposition for which Mr Milford relies upon it, but if that approach was the correct one in the present context, it would have provided an answer to the claim in *SC* of indirect discrimination against women as compared with men, yet it appears not to have been cited there. If and to the extent that *SC* and *Rutherford* are in conflict I follow *SC* as (a) it is the more recent decision (b) it is specifically a human rights case, when *Rutherford* was not and (c) *Motherhood Plan* does no more than

open the door to having regard to cases of other fields of discrimination/equal treatment law.

91. With that in view, I turn to the evidence in the present case. The appellants rely in particular on *Bereavement Support Payment claimants - summary statistics, April 2017 to March 2020* (7 December 2021)" [2]. The paper not only provides data about bereavement support payment but also comparative data about the legacy benefits which the present case concerns.

92. The paper states:

> "33. The gender of bereavement benefit claimants is compared, for new claimants in the final three years of legacy benefits, to the first three years of BSP. The vast majority of bereavement benefit claimants are female, at 71% under the legacy system, and similarly at 73% in the BSP claimant group.
>
> 34. This higher proportion of female (surviving claimants) is largely owing to a higher death rate in men of working age, than women, who tend to live longer. As reported by the ONS, 'Life expectancy at birth in the UK in 2017 to 2019 was 79.4 years for males and 83.1 years for females. Another reason is that the claimant must be of working age to claim, not the deceased partner. With many marriages, the man is older than the woman, as found in ONS reports for England and Wales, 'the average age at marriage of opposite-sex couples was 38.0 years for men and 35.7 years for women in 2017. Therefore, it is likely there would be more woman claimants than men."

93. While this data is concerned with those who have claimed (and are thus likely to have been married) rather than those who have not done so (including those who as cohabitants were aware that they could not meet the statutory conditions of entitlement) only the average age at marriage is specific to marriage. That there should be such an age difference on average between men and women in a relationship (whether married or not) may be inferred in the absence of contrary evidence. In any case, the more significant factor ("largely owing") is the higher death rate in men of working age than in women and that would appear equally applicable regardless of marital status.

94. The test in *Hoogendijk* is set out at [80] above. Applying that test to the above data, I conclude in the light of the approach demonstrated in *SC* that the exclusion of those who are not married from claiming bereavement benefits impacts disproportionately on women and so requires justification.

95. Mr Milford submits that even in indirect discrimination cases, it is necessary for the claimant and a comparator to be in an analogous situation. This submission relies on *Lindsay v UK* (1987) 9 EHRR CD 555. However, it is not clear that that was

[2] https://www.gov.uk/government/publications/bereavement-support-payment-claimants-summary-statistics-april-2017-to-march-2020

an indirect discrimination case; indeed, in 1987, that concept was yet to be developed by the ECtHR (see Lord Reed's observations in *SC* about *Hoogendijk*, a much later case (from 2005). Moreover, a requirement for an analogous situation (at any rate if it goes beyond a hypothetical person – in this case, of the opposite gender – in the same situation appears inconsistent with indirect discrimination as now understood and, if it does not go beyond, it, the requirement is met.

Ground 3: discrimination on ground of sexual orientation -whether any remedy available

96. The submission for MK is that she was indirectly discriminated against because, as a member of an opposite-sex couple, it was not open to her and LM to enter into a civil partnership and thus it was harder for her to meet the condition in s.36 and s.39A of being the "spouse or civil partner" of the deceased than it would have been for a partner in a same-sex couple. HM adopts a similar position.

97. As is well known, following the judgment of, and declaration of incompatibility by, the Supreme Court, in *Steinfeld and Keidan v Secretary of State for International Development* [2018] UKSC 32 the Civil Partnerships Act 2004 was amended by the Civil Partnership (Opposite-sex Couples) Regulations (SI 2019/1458) with effect from 2 December 2019 (some 3 years after LM had passed away) to extend civil partnerships to opposite-sex couples. The discrimination arose because on 13 March 2014 the Marriage (Same Sex Couples) Act 2013 came into force, permitting same-sex couples to marry. Between 2014 and 2019 same-sex couples thus had a choice of ways to have their relationship formally recognised, a choice which was not open to opposite-sex couples.

98. MK *could* have got married – in a civil ceremony if not in church – at any time from 2000 on but chose not to for her personal reasons. Between 2005 and 2014 a same-sex couple could enter into a civil partnership, but an opposite-sex one only into marriage: the routes were different, but essentially equal. MK's complaint (and the only way in which a viable discrimination claim on this ground can be formulated) in essence is that she was denied the opportunity to meet the "spouse or civil partner" condition by whichever of those routes she preferred, when between 2014 and 2019 a same-sex couple would have had that choice. I agree with Mr Milford that that is in essence the same complaint as that of Steinfeld and Keidan who, likewise for personal reasons, wished to formalise their relationship in legal terms otherwise than by the route of marriage.

99. In *Steinfeld* it was conceded that an opposite-sex couple wishing to formalise their relationship were in an analogous situation to a same-sex couple wishing to do so and that there was discrimination. The issue was whether the difference in treatment could be justified by the Government's wish to wait and see how matters developed following the introduction of same-sex marriage in 2014. The Government's argument failed. I see no reason to take a different view here (and indeed, Mr Milford does not invite me to do so). There was discrimination against those opposite-sex couples who would have wished to enter into a civil partnership within the period 2014-2019, had such an opportunity been open to them.

100. Mr Milford's position, as set out in the respondent's written response in MK's case, is that (a) the only possible remedy would be a declaration of incompatibility (if available); (b) that remedy is not available because the discrimination identified in *Steinfeld* has already been remedied; (c) a claim that the SSCBA should have been amended so as to permit a valid claim based on cohabitation would be a claim to fill an alleged statutory lacuna, rather than to remedy a statutory incompatibility, and would be precluded by s.6(6) of the Human Rights Act and (d) MK (and by analogy HM) are not arguably a "victim" for the purposes of art.34 of the ECHR and HRA s.7.

101. It is not suggested that there is any way of reading down the legislation under s.3 HRA so as to be Convention compliant. The short answer is that the only potential remedy is indeed a declaration of incompatibility and the Upper Tribunal has no jurisdiction to make one. The submissions before me concentrated on remedy and associated matters. I am hesitant about defining the extent of a jurisdiction which the Upper Tribunal does not itself possess. However, as I have received submissions about such matters, it seems appropriate to do so, even though the remarks are necessarily *obiter*. If the matter goes further, a higher court will reach its own view.

102. Section 4 of the HRA provides:

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
>
> (3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
>
> (4) If the court is satisfied—
> (a) that the provision is incompatible with a Convention right, and
> (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,
> it may make a declaration of that incompatibility.
>
> (5) In this section *"court"* means
> [a list is then set out]
>
> (6) A declaration under this section (*"a declaration of incompatibility"*)—
> (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
> (b) is not binding on the parties to the proceedings in which it is made."

103. The effect of a declaration of incompatibility is to bring to the attention of Parliament the courts' view that an item of legislation is incompatible with the ECHR, but it is for Parliament to decide whether or not to change the law, and if so, how

thereafter. The power to take remedial action is conferred by s.10 and schedule 2 of the HRA. It includes (Sch 2, para 1(1)(b)) a provision that a remedial order may be made so as to have effect from a date earlier than that on which it is made.

104. Section 6 (so far as relevant) provides:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section "public authority" includes—
> (a) a court or tribunal, and
> (b) any person certain of whose functions are functions of a public nature,
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
> …
> (6) "An act" includes a failure to act but does not include a failure to—
> (a)introduce in, or lay before, Parliament a proposal for legislation; or
> (b)make any primary legislation or remedial order."

105. Section 7 (so far as relevant) provides:

> (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
> …
> (b) rely on the Convention right or rights concerned in any legal proceedings,
> but only if he is (or would be) a victim of the unlawful act.
> …
> (6) In subsection (1)(b) *"legal proceedings"* includes—
> …
> (b) an appeal against the decision of a court or tribunal.
>
> (7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.
> …"

106. Mr Milford submits that it is no longer possible for a court to make a declaration of incompatibility as the legislation has already been amended following the declaration of incompatibility in *Steinfeld*. The declaration made in that case was that

sections 1 and 3 of the Civil Partnership Act (to the extent that they preclude a different sex couple from entering into a civil partnership) are incompatible with article 14 of ECHR taken in conjunction with article 8 of the Convention. He draws attention to the use of the present tense in the declaration. He further relies on dicta of Lord Hobhouse in *Wilson v First County Trust Ltd (No.2)* [2002] UKHL 40 at [127] (emphasis added):

> "127. *The Legislature, s.4*: In order to preserve the traditional supremacy of Parliament in the constitution of the United Kingdom, legislation cannot be invalidated by the Act even if it is incompatible with the Convention. This involves a recognition that the United Kingdom can, by reason of legislation on the statute book, be in breach of the Convention if Parliament should so choose and it is the statute which must be upheld and applied by the Judiciary. This situation is further confirmed by s.4(6) and s.6(2). A declaration of incompatibility under s.4 is thus unique. It has no effect in law except to provide a minister with the opportunity, by way of delegated legislation, to use the powers conferred by s.10 and Schedule 2. Section 4 is different in character from any of the other provisions of the Act. It does not have as its subject matter the rights or obligations of any person in municipal law. It does not even affect the rights of the parties before the court at the time: s.4(6). It merely contains a provision enabling - the word used is "may" - the court, should it think fit, to make a declaration about the current state of the statute law of this country. <u>The declaration applies only to the present: s.4(2) and s.4(4). If the legislation in question has been amended or repealed no question of a declaration under s.4 can arise.</u>"

107. Mr Milford further submits that making a declaration of incompatibility where Parliament has already responded to an earlier declaration would offend against s.6(6) of the HRA and also against parliamentary privilege and article 9 of the Bill of Rights. He relies on the decision of a Divisional Court in *R(Wheeler) v Prime Minister* [2008] EWHC 1409 (Admin) as demonstrating that one cannot, based on public law principles, complain about a failure to introduce a particular Bill into Parliament.

108. Mr Milford freely accepts that his submission would leave MK without a remedy but submits that is an unavoidable consequence of how Parliament chose to remedy the incompatibility found in *Steinfeld*.

109. Mr Yetman, for the appellants on this issue, submits that HRA s.4, by referring to "any proceedings", confers a broad discretion to make a declaration of incompatibility and that it is open to a court to make such a declaration by reference to law as it previously stood. The section contains no temporal restriction. He relies on [60] of *Steinfeld*, where the role of the courts is described, as indicating that there is jurisdiction.

110. He submits that a declaration of incompatibility may be made under s.4 in an appropriate case without falling foul of s.6(6). He further submits that sections 6 and 7 are concerned with stand-alone human rights claims and do not apply to ss.3 and 4. He draws support from *Re an application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27] ("the NIHRC case") at [62]:

> "62. True it is that sections 3 and 4 of the HRA are not made expressly subject to the "victimhood" requirement which affects sections 6 and 7: *R (Rusbridger) v Attorney General* [2004] 1 AC 357, para 21, per Lord Steyn; though they must undoubtedly be subject to the usual rules regarding standing in public law proceedings. However, a capacity to commence general proceedings to establish the interpretation or incompatibility of primary legislation is a much more far-reaching power than one to take steps as or in aid of an actual or potential victim of an identifiable unlawful act. Further, Parliament's natural understanding would have reflected what has been and is the general or normal position in practice, namely that sections 3 and 4 would be and are resorted to in aid of or as a last resort by a person pursuing a claim or defence under sections 7 and 8: see *Lancashire County Council v Taylor* [2005] EWCA Civ 284; [2005] 1 WLR 2668, para 28, reciting counsel's submission, and paras 37-44, concluding that, to exercise the court's discretion to grant a declaration to someone who had not been and could not be "personally adversely affected" would be to ignore section 7. This being the normal position, it is easy to understand why there is nothing in section 71 to confer (the apparently unlimited) capacity which the Commission now suggests that it has to pursue general proceedings to establish the interpretation or incompatibility of primary legislation under sections 3 and/or 4 of the HRA, in circumstances when its capacity in the less fundamental context of an unlawful act under sections 6 and 7 is expressly and carefully restricted."

111. As to the impact of the breach identified in *Steinfeld* and addressed by the remedial order made in respect of it, he submits that that consideration by Parliament does not obviate the need for a remedy. It matters not that MK (and by analogy HM) are in effect arguing that Parliament in responding to *Steinfeld* should have responded differently and, ultimately, Parliament is always free to ignore the view of the courts expressed through a declaration of incompatibility.

112. Lord Hobhouse's remarks set out at [106] appear to have been dicta, expressed in the context of providing guidance about the operation of the HRA when few cases would as yet have made their way up the court system. They are from a very authoritative source, but how Lord Hobhouse's emphasis on the use of the present tense plays out when, as may often be the case, courts, particularly appellate courts, are concerned with what the situation was, rather than what it is, is not entirely clear. It would seem odd, for instance, if a court could not make a further declaration in circumstances where it had previously made one and Parliament had acted upon it, but in a way which was itself a further breach of the Convention, but that merely emphasis the point that the provision enabling a declaration to be made is concerned with current law – at very least law that was current at the time of the events giving rise to the case. At the time with which we are concerned- when MK and LM were considering the options for their relationship between the introduction of same-sex marriage and LM's death - that was indeed the current law and it was discriminatory (as was established by *Steinfeld)*.

113. I conducted my own legal researches to see if there was any other assistance to be had. In *Doherty v Birmingham CC* [2009] AC 365 the Court was concerned with the lack of a mechanism in the relevant statute to enable a traveller being evicted from their pitch to raise human rights-based defences. At [105] and [164] two members of the court discussed whether they would have made a declaration of incompatibility had the relevant statute not been amended while the case was before them. It is not entirely clear whether they considered the amendment to the legislation deprived them of jurisdiction or, rather, was a factor leading them to exercise their discretion against making a declaration of incompatibility.

114. *R (Chester) v Secretary of State for Justice* [2013] UKSC 63 concerned the denial of voting rights to certain prisoners. In that case a remedial order had been made previously in respect of the same offending statutory provision and the Government had considered the matter and decided not to act. At [39] Lord Mance (with whom a majority of the other justices agreed) concluded that he would exercise his discretion against making a further declaration of incompatibility and thus by necessary implication he considered there was jurisdiction to do so. However, as noted, in that case the legislation had not been amended.

115. I derive little assistance from *Wheeler* – the present cases do not involve an attempt to rely on general principles of public law to argue that a Bill should have ben introduced -but on the asserted effect of an existing statutory provision.

116. Turning to Mr Yetman's submissions on this aspect, *Rusbridge*r, cited above, held that it was not necessary when seeking a declaration in public law proceedings that the "victim" requirement found in s.7 HRA be met. However, these are not in that sense "public law proceedings". The relevant aspect of the *NIHRC* case concerned whether the Commission had power

> "to bring proceedings to establish the interpretation, or incompatibility with Convention rights, of any primary Westminster legislation it saw as requiring this for the better protection of human rights. The issue is one of statutory construction, not a priori preconception. It is in fact no surprise, in my view, that Parliament did not provide for the Commission to have capacity to pursue what would amount to an unconstrained actio popularis, or right to bring "abstract" proceedings, in relation to the interpretation of United Kingdom primary legislation in some way affecting Northern Ireland or its supposed incompatibility with any Convention right. On the contrary, it is natural that Parliament should have left it to claimants with a direct interest in establishing the interpretation or incompatibility of primary legislation to initiate proceedings to do so; and should have limited the Commission's role to giving assistance under sections 69(5)(a) and 70 and to instituting or intervening in proceedings involving an actual or potential victim of an unlawful act as defined in section 7 of the Human Rights Act 1998." (per Lord Mance at [61]).

117. The remarks on which Mr Yetman relies are thus made in a context which envisages a clear divide between proceedings claiming that human rights have been infringed or in which human rights are raised as a defence (on the one hand) and

"abstract proceedings" to obtain a ruling on a point of interpretation of a statute or on its compatibility with human rights (on the other). However, on a statutory appeal against the refusal of benefit, the route to raising a human rights point is established: see, for instance, *RR v SSWP* [2019] UKSC 52. It arises because of the duty in s.6(1) on tribunals (as a "public authority") not to act in a way which is incompatible with a Convention right (subject to the terms of that section) and via the right conferred by s.7(1)(b) to raise the point in appeal proceedings. While a ruling that an individual's rights have been infringed may in practice be followed in other cases, or be acted upon by making legislative change, such consequences do not inevitably follow and the ruling is not a declaration. Such cases are firmly in the territory of sections 6 and 7 and in my view it follows that s.6(6) where it applies is necessarily relevant to determining whether there is unlawfulness under s.6(1), which in turn holds the key to the remedies for which ss.3 and 4 provide.

118. Equally, to be able to assert the point at all, the "victim" requirement in s.7(7) has to be met. However, in the present cases, I would conclude that the appellants can meet that requirement. I note the link made by s.7(7) with art.34 of the ECHR. I have read the review of authorities in *R (Pitt and Tyas) v General Pharmaceutical Council* [2017] EWHC 809 (Admin), which directs one to, inter alia, the ECtHR case of *Senator Lines GmbH v Austria and others* [2006] 21 BHRC 640. The Court of Appeal in Northern Ireland in *Taylor v Department for Communities and others* [2022] NICA 21, recently provided guidance in relation to *Senator Lines* which I find helpful:

> "[19] In *Senator Lines GMBH v Austria and Others* [2006] 21 BHRC 640 the Grand Chamber of the ECtHR, in determining whether the particular application was admissible, reflected on the concept of "*potentia*l *victim.*" Referring to concrete examples in its jurisprudence, the court recalled one case where an alien's removal had been ordered but not enforced and another where a law prohibiting homosexual acts was capable of being, but had not been, applied to a certain category of the population which included the applicant. The judgment continues, at page 11:
>
> "However, for an applicant to be able to claim to be a **victim** in such a situation **he must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient**..."
> [emphasis added]
>
> [21] Rejecting his argument, the Grand Chamber reasoned and concluded as follows. In order to be able to lodge a petition in pursuance of article 34, a person, non-governmental organisation or group of individuals had to be able to claim to be **the victim** of a violation of the convention rights. In order to claim to be a victim of a violation, a person had to be directly affected by the impugned measure. The ECHR did not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they considered, without having been directly affected by it, that it might contravene the convention. It was, however, open to a person to contend that a law violated his rights, in the absence of an individual measure of

> implementation, if he was required either to modify his conduct or risk being prosecuted or if he was a member of a class of people ***at "real risk"*** of being directly affected by the legislation. Given their age, the wills they had made and the value of the property each owned, the applicants had established that there was a real risk that, in the not too distant future, one of them would be required to pay substantial inheritance tax on the property inherited from her sister. Accordingly, both were directly affected by the impugned legislation and thus had victim status.
>
> [22] Plainly a vague or fanciful possibility of a future Convention violation will not suffice. In short, "*risk*" in this context denotes *real risk*. This requires, per *Senator Lines*, a reasonable and convincing evidential foundation."

119. In the present cases, I consider that the evidence does provide such a foundation. What is being complained about is the lack of choice in how to meet the legislative requirements for entitlement to bereavement benefit at the material time. MK's perception was that the Roman Catholic church would in some way see civil partnership as acceptable, when entering into what in law (if not in the eyes of the church) would be a second marriage would not be. HM had reservations about marriage based on her perception that marriage in English law "classed women as chattels". Both appellants were following the litigation in *Steinfeld* and, in the case of HM, contributing to crowd-funding it. Whatever one may make of the positions adopted by the two appellants, there is no suggestion that they were not genuinely held. As I have said, the issue is about the withholding, on a discriminatory basis, of choice, in an area where the choices were intensely personal and not appropriately subject to evaluation by others, and in my judgment the evidence is sufficient to demonstrate that there was a real risk that the appellants would (with their partners) have entered into civil partnership had that choice not been withheld from them.

120. My conclusions on this aspect are therefore set out below.

121. At the end of the day, while as will be apparent from [112] I have some unease about what exactly Lord Hobhouse may have intended by his remarks and the corollary of Mr Yetman's submissions is that they are incorrect, they are the only authority (or at least the authority most directly in point) I have to go on. I conclude that there is no jurisdiction under the HRA for a court to make a further declaration of incompatibility in respect of the incompatibility of article 14 of ECHR with article 8 of the Convention, which would essentially mirror that made in *Steinfeld* which was considered (and subsequently acted upon) by Parliament.

122. An attempt to raise human rights based points in the context of the present proceedings is subject to the terms of s.6 (including to the extent that relevant, s.6(6)) and s.7 (including s.7(7)). The appellants can however establish that they meet the "victim" requirement.

123. Nothing that I have said in grappling with the above issue should be taken of course as expressing or implying any view as to how a higher court should exercise such discretion, if any, as it may have under s.4; that is entirely a matter for that court.

Justification

124. In the light of the conclusions reached above, this section is primarily relevant to Ground 2. It may additionally be relevant to Ground 1 if my conclusion and my alternative position on that Ground are incorrect.

125. In *SC* Lord Reed conducted an in-depth analysis of domestic and Strasbourg caselaw from [97] onwards, examining the "manifestly without reasonable foundation test" which had been in use domestically to that point. He observed

> "158. Nevertheless, it is appropriate that the approach which this court has adopted since *Humphreys* should be modified in order to reflect the nuanced nature of the judgment which is required, following the jurisprudence of the European court. In the light of that jurisprudence as it currently stands, it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a "suspect" ground is to be justified. Those grounds, as currently recognised, are discussed in paras 101-113 above; but, as I have explained, they may develop over time as the approach of the European court evolves. But other factors can sometimes lower the intensity of review even where a suspect ground is in issue, as cases such as *Schalk*, *Eweida* and *Tomás* illustrate, besides the cases concerned with "transitional measures", such as *Stec*, *Runkee* and *British Gurkha*. Equally, even where there is no "suspect" ground, there may be factors which call for a stricter standard of review than might otherwise be necessary, such as the impact of a measure on the best interests of children.
>
> 159. It is therefore important to avoid a mechanical approach to these matters, based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant. As was recognised in *Ghaidan v Godin-Mendoza* and *R (RJM) v Secretary of State for Work and Pensions*, the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security; but, as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification.

> 160. It may also be helpful to observe that the phrase "manifestly without reasonable foundation", as used by the European court, is merely a way of describing a wide margin of appreciation. A wide margin has also been recognised by the European court in numerous other areas where that phrase has not been used, such as national security, penal policy and matters raising sensitive moral or ethical issues.
>
> 161. It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the "manifestly without reasonable foundation" formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. It follows, as the Court of Appeal noted in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department (National Residential Landlords Association intervening)* [2020] EWCA Civ 542; [2021] 1 WLR 1151 and *R (Delve) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199; [2021] ICR 236, that the ordinary approach to proportionality will accord the same margin to the decision-maker as the "manifestly without reasonable foundation" formulation in circumstances where a particularly wide margin is appropriate."

126. In a subsequent passage, he emphasised the need to apply the principle of proportionality "in a manner which respects the boundaries between legality and the political process."

127. The effect of the judgment in *SC* was summarised by Andrews LJ in *R(Salvato) v SSWP* [2021] EWCA Civ 1482 at [34]:

> "Lord Reed concluded that the "manifestly without reasonable foundation" formulation still had a part to play, but that the approach which the Court had followed since *Humphreys* should be modified in order to reflect the nuanced nature of the judgment which is required. He stressed the importance of avoiding a mechanical approach based on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant. The Courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security, but as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification."

128. The Court of Appeal observed that where the particularly wide margin is in play, the ordinary approach to proportionality (which I take as that set out in *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 38 and 39; [2014] AC 700) and the "manifestly without reasonable foundation" test produce the same result. Mr Cottle referred me

to the well-known test as set out by Lord Sumption at [20] of *Bank Mellat*, including its requirement for "an exacting analysis of the defence of the measure":

> "[The] effect [of existing authorities] can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

129. Counsel for the appellants submitted that there was a need for more careful scrutiny when a case fell within the ambit of art.8 than if it fell within that of A1P1. However, I have not been taken to any authority in support of that proposition. Particularly relevant were, it was submitted, the issues of hardship, distress and dignity.

130. Mr Milford submits that there should be a wide margin of discretion, reflecting that deciding the criteria for an award of benefit is a matter of social and/or economic policy and that the difference in treatment is contained within primary legislation, where Parliament has reached a considered view. He also notes that in *Akhtar* at [227] on materially similar facts, Moylan LJ held that it was appropriate to accord a "particular wide margin" of discretion to the state, although any difference of treatment would have been justified even if a smaller margin had been appropriate.

131. To the extent that the Upper Tribunal is reviewing the proportionality of a difference in treatment on the ground of marital status, that is not a "suspect ground". Mr Milford accepts that where (as in ground 2) the difference in treatment is based on a "suspect" ground, such as gender, the intensity of review is likely to be higher, but submits that even on a narrower margin, the difference is justified.

132. Turning to the *Bank Mellat* criteria, the focus is on the two latter limbs. Mr Milford submits that the Government is entitled to take the view that formal forms of union should be encouraged for the perceived benefits they bring. While other forms of union are on the rise, the evidence shows that marriage remains the dominant form. Council of Europe states have yet to reach a point where the promotion of marriage is considered unjustified; rather, it is a matter of political and social choice, to be exercised by elected governments.

133. In response to Mr Cottle's submissions, Mr Milford suggests the small take-up of civil partnership does not detract from his submissions: formal forms of union (marriage and civil partnership) together remain dominant. Nor does it matter that some people may be unaware of the precise detail about the preference conferred on marriage and civil partnership in parts of the fiscal and legal systems – people will know on a general level that such a preference exists and thus, contrary to Mr Cottle,

the measure can promote the aim. Nor is there any less intrusive measure available: even if (which the respondent does not accept) the financial arrangements of married and cohabiting couples were to be the same, the promotion of marriage and civil partnership over other forms of union necessarily involves treating the former more favourably.

134. The cornerstone of the contributory principle is that a person receives benefits as a result of their own contributions. Exceptions from that principle should be narrow. While extending it to the entitlement of a bereaved spouse/civil partner can be justified in view of the aim of promoting such relationships, to extend beyond that would undermine both that aim and the contributory principle itself.

135. As to the administrative complexity and burden, he invites me to accept and place weight upon the evidence of Ms Edey, summarised at [28] and [29] above. There is no easy and verifiable general means of checking a relationship, particularly where, as here, there are no children. Multi-factorial tests are difficult to do at scale. Just because relationships may have to be assessed in the context of the proposed Remedial Order does not mean that to do so will be easy or that such assessments should be adopted more generally. If the bright line of marriage/civil partnership is removed, it will give rise to many cases where the relationship will be difficult to assess.

136. The differing approaches in other schemes referred to by the appellants are for smaller cohorts and in different policy contexts and for the reasons put forward by Ms Edey (see [29] above) do not provide suitable comparisons. Similarly, contexts in which the DWP does carry out an assessment, such as of a person's disability, can be distinguished, as can the assessment carried out for the purpose of making funeral payments from the social fund, which has a condition that the claimant or their partner must be in receipt of one of a number of state benefits, which "radically" restricts the pool of claimants.

137. He further relies on the evidence as to the cost of extending entitlement, put at £150m+ (see [30]).

138. Accordingly, Mr Milford submits that, whether the margin be broad or narrow, the difference in treatment (or the measure) is justified.

139. That, in his submission, is equally true if, contrary to his case, there is prima facie indirect discrimination on the grounds of gender under ground 2 which requires to be justified. He submits that *Motherhood Plan* demonstrates that there is no difference to the standard of justification required even where a suspect ground is concerned. He invites me to follow the approach of Elias LJ in *AM (Somalia) v Entry Clearance Officer* [2009] UKHRR 1073 at [61], cited with approval in *Motherhood Plan* at [120]:

> "Like Maurice Kay LJ, I would accept that any rule which differentiated benefits or rights specifically by reason of disability would require weighty reasons; prima facie it is hard to see how it could be justified and there would need to be very good reason to explain why it was being adopted. But

> it would be absurd to apply the same requirement to cases of indirect discrimination, particularly in circumstances where there is equality of treatment and the contention is that there should not be."

140. It was suggested, *obiter*, in *Motherhood Plan* at [127] that the nuanced approach mandated by *SC* is capable of accommodating "the point that a less intense level of review may be appropriate where the discrimination complained of is indirectly (even involving a "suspect ground") rather than direct." The Court of Appeal in the same passage accepts the distinction drawn in *AM Somali*a as "legitimate and consistent with Lord Reed PSC's judgment in *SC*" and, moreover, appears to have gone out of its way to add to its analysis of the first-instance judgment, which it was in any event upholding, the point about indirect discrimination.

141. However, in *SC* at [189], Lord Reed said that – despite acknowledging the force in a different approach – he was following the approach of the ECtHR in *Di Trizio v Switzerland* (App No 7186/09), in which that Court had held that very weighty reasons have to be put forward before a difference in treatment on the grounds of gender can be regarded as compatible with the Convention, whether the alleged discrimination is direct or indirect. Nonetheless, he went on to reach the conclusion at [199] (see [143] below), essentially deferring to Parliament's consideration of the issue.

142. So, in the context of the justification required by ground 2, I need to examine whether "very weighty reasons" for the measure exist, but with a less intense level of review (because the alleged discrimination is indirect).

143. In *SC*, the question was whether the limitation of child tax credit to a maximum amount calculated as the amount payable in respect of two children ("the two-child rule") was unlawful. The rule had been introduced by primary legislation (s.13(4) of the Welfare Reform and Work Act 2016) and had received considerable scrutiny and debate during its passage through Parliament, set out at paras 16-20 of *SC*. It was common ground that women constitute 90% of single parents bringing up children as well as 50% of parents jointly bringing up children (*SC* at [195]-[196]). The Supreme Court's reasoning was that more women than men were affected because more women than men are bringing up children, which was an "objective fact." The differential impact on women was not a special feature of the two-child rule. I set out para. 199 in full:

> "Once it is understood that the legitimate aims of the measure could not be achieved without a disproportionate impact on women, arising from the demographic fact that they form the majority of parents bringing up children, the only remaining question which can be asked, in relation to proportionality, is whether the inevitable impact on women outweighed the importance of achieving the aims pursued. Parliament decided that the importance of the objectives pursued by the measure justified its enactment, notwithstanding its greater impact on women. I see no basis on which this court could properly take a different view."

144. In the present case it appears undisputed that women form the majority of cohabitants who would wish to claim bereavement payments. There is a close analogy with the statistical evidence about responsibility for children in *SC*. That leaves the sole "remaining question" – did the inevitable impact on women outweigh the importance of achieving the aim pursued? I am of course concerned with a different scenario and justification is context-specific. However, the robustness with which Lord Reed, giving the judgment of a unanimous seven-judge Supreme Court in the final two sentences of para 199, deferred to Parliament on a matter which, like the present case, concerned benefits and family matters which Parliament had considered, is striking and provides useful calibration for my consideration of the issues in the present case.

145. I also bear in mind Lord Reed's warning at [162] of *SC*:

> "It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in *JD*, para 11:
>
> > "Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts."
>
> In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As Judges Pejchal and Wojtyczek commented (ibid):
>
> > "Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated.""

146. In the present case, I am satisfied having conducted a "high level review" (*SC* at [183]) that the topic was raised before Parliament. The requirement to have been married was considered when the Welfare Reform and Pensions Act 1999 was

passed, then with the addition of civil partnership, when the Pensions Act 2014 was passed and when the Bereavement Support Payment Regulations 2017 were approved under the affirmative procedure. I do not consider that that conclusion is invalidated by the fact that on occasion the extension of the benefit to cohabitees was said to be "out of scope": that would not have precluded a challenge to that position being made. There is evidence before me of the financial difficulties experienced by bereaved cohabitants who cannot access bereavement benefits, of the feeling that their relationship was less valued by the state because of the non-availability or refusal of such benefits and of the grief and distress experienced. The evidence largely consists of individuals' reports of their experiences in these very human aspects, likely to have been understood by those considering proposals for the above legislation. Particularly as campaigns to extend the benefits to cohabiting couples have been pursued for some years, there is no reason for me not to adopt the position that such matters have been considered by Parliament. To the extent that evidence for the appellants is in reality arguments for policy change (as in my view some of it is), that is for Parliament rather than for courts and tribunals.

147. In consequence, I consider I would need a clear basis for taking a different view from that taken by Parliament. Such a view was taken in *Re McLaughlin* in the Supreme Court, by the acceptance by the majority that widowed parents' allowance was paid to benefit the children in a family. That had a number of consequences for the majority view. *Yigit v Turkey*, where the ECtHR held to be justified a difference in treatment for the purposes of survivors' benefit between people who had entered only into a religious marriage and those who had had civil marriages, was characterised by Baroness Hale as "notably…involv[ing] only the mother" (at [30]) with the consequence that the significance of the case appears to have been lessened for the purposes with which she was concerned. It was relevant to the majority's decision that, as regards families with children, "in the great majority of Council of Europe States children of the deceased are directly eligible for bereavement benefits up to a certain age" (so it did not matter whether their parents had been married or not). The UK, by contrast, was "unusual" (at [30]). In states where that did not occur, marital status was irrelevant to whether a survivor's pension could be paid to a child of the deceased, with only one exception ([41]). Thus there was a European consensus. Further, the perceived purpose of widowed parents' allowance meant that the majority (at [45]) relied by way of reinforcement (and so *obiter*: see *SC* at [93]) on the UK's unincorporated international obligations under art.3 of the United Nations Convention on the Rights of the Child and art.10 of the International Covenant on Economic Social and Cultural Rights 1966. However one reads Lord Reed's observations at [74]-[96] of *SC* concerning reliance on unincorporated international treaties, the ability to refer to them, even if only for reinforcement of the Supreme Court's view as in *McLaughlin*, is not available here, as there is no relevant treaty.

148. By contrast, in the present case, it is less easy to distinguish *Yigit* and the line of cases it reflects. Indeed, it raises the question whether to go further would contravene the *Ullah* principle (see [62] above). I have not been taken to any evidence suggesting that the UK is an outlier in European terms in only paying bereavement benefits where no children are involved to those who are married or in a civil partnership. Indeed, I note the evidence at [42] and [43] in *Yigit*, admittedly

from some 10 years ago, that there is no consensus about the treatment of unmarried cohabitation.

149. I turn to examining the justifications put forward in Ms Walker's evidence. Whether marriage and civil partnership should be preferred over other forms of relationship is pre-eminently a matter of social policy and thus one for the legislator rather than courts or tribunals. As noted, there is no indication that, across Europe, it is no longer considered acceptable to give such preference. As I indicate at [146] ,it is unrealistic to suppose that the very human difficulties liable to be experienced by bereaved cohabiting partners, excluded from the benefits in question, will not have been in the mind of legislators. The policy of successive Governments of supporting marriage and, more recently, civil partnership goes well beyond bereavement benefits and is not undermined by evidence suggesting that awareness of the specific aspect of bereavement benefits (and so, of their conditions of entitlement, including the requirement to have been married or in a civil partnership) is low.

150. I do not accept that the fact that bereavement benefits are only payable when a partner is deceased detracts from the rationality of their connection to the aim of promoting marriage. Knowledge of future provision for the bereaved partner for those who are married or in a civil partnership may serve to promote those structures in life.

151. Nor is it undermined by the now very small number of civil partnerships. The rationale for encouraging civil partnerships when that was the only route available for a same-sex couple to formalise their relationship may, with the advent of same-sex marriage, have lost much of its force, but civil partnership, like marriage, nonetheless confers a legal status and is objectively verifiable. The proposed remedial order necessarily will have to be applied to (however they come to be defined) cohabiting couples with children, so it will no longer be possible for the legislation governing widowed parents' allowance, since the Supreme Court has held that it is for the benefit of the children, to be a vehicle for promoting marriage and civil partnership; the same applies to the higher rate of bereavement support payment. However, that does not have the consequence that it can no longer be such a vehicle in relation to couples without children. The effect of *McLaughlin* and *Simpson* is that providing for the children through widowed parents' allowance or now the higher rate of bereavement support payment necessarily has to outweigh the aim of promoting marriage and civil partnership. As part of considering justification in the context of the scheme under consideration, as one must, there is no reason why the aim cannot have a continuing life outside that context. The door to it doing so was left open by Lord Mance in *McLaughlin* at [52]:

> "A policy in favour of marriage or civil partnership may constitute justification for differential treatment, when children are not involved. But it cannot do so in relation to a benefit targeted at the needs and well-being of children."

152. The justification based on the contributory principle may at first sight appear less convincing. The aim of incentivising work, to the extent that it is achieved by the provision of a contributory bereavement benefit, would be promoted more widely if such benefit were extended to cohabiting couples. Affordability is a legitimate

consideration, but care is needed to balance that against the impact on those who are excluded in order to achieve it. The contributory part of the social security system extends beyond bereavement benefits to contribution-based jobseeker's allowance, contributory employment and support allowance and, most significantly, to pensions. With the reform of pensions in 2016, the earlier remark of Mr Hugh Bayley, set out at [18] above, that "marriage is a cornerstone of the contributory benefits system" is not as apposite as it once was, when it was possible to a greater degree for a person to rely on the contribution record of their spouse or civil partner for pension purposes, but even post-2016 that is still possible in certain transitional cases. The trend, though, exemplified in the reformed pension arrangements since 2016, is moving away from exceptions to the principle that a person may only rely on their own contributions record. When regard is had to that wider picture, the respondent's policy of wishing to limit the ability to benefit from another's contribution record – even in the relatively confined context of bereavement benefits - only to those who have been married to them (or in a civil partnership with them) is readily understandable and should carry weight. It is, in essence, a "thin end of the wedge" point.

153. I do not regard as particularly compelling the fact that marriage and civil partnership are (taken together) the statistically most common form of relationship. Human rights legislation is frequently concerned with protecting the interests of those who are statistically in a minority.

154. In relation to administrative simplicity, I accept the appellants' point that the respondent does in a number of contexts[3] assess whether people who are not married or civil partners are living together as a married couple (or as civil partners). While techniques exist to help with making such an assessment – lists of "signposts" and so on – I accept Ms Edey's evidence that the variety of human relationships can make it a very difficult task. This claimed justification is in essence about whether there should be a "bright line" rule, the appellants contending there should not be and the respondent that there should.

155. While there may indeed be some cases where questioning by the respondent would be perceived as intrusive (one of the respondent's stated concerns), a certain amount of emotionally challenging administrative process in one context or another may be accepted by those concerned as necessarily associated with the death of someone close and I consider a wish to avoid the need for such questioning only a secondary justification in support of a bright-line rule. More fundamental is that the use of bright-line rules achieves a balance between the money available to be paid as benefit and the administrative costs of doing so. More spent on the latter means less available for the former. For this reason, the fact that there are some areas where a fact-sensitive assessment is carried out does not mean that a bright-line rule cannot be justified elsewhere. This applies, too, to the assessment which the proposed Remedial Order will require.

[3] Including even (in specific contexts) in connection with the bereavement benefits in issue in this case– see SSCBA s.36(2) and s.39B(5)(b) – but such cases are likely to be rare

156. Even where a bright line is justified, there remains the question of whether it is possible to justify drawing it where it is. Marriage and civil partnership are readily verifiable. Speaking generally, they are statuses which are open to those in most partnerships, at any rate where the legal aspects of any previous relationship has been terminated e.g. through divorce. For those reasons, it is not an inappropriate place to draw the bright line.

157. Mr Cottle relies on *Francis v SSWP* [2006] 1 WLR 3202 to support the proposition that "administrative convenience cannot in itself be a sufficient justification for discrimination without some other justification as to why those in an analogous or relevantly similar situation are being excluded" (at [30]). At [29] the Court of Appeal accepted that administrative convenience was a material consideration, but considered that the evidence did not clearly disclose there would be seriously adverse consequences if those in the position of the claimant in that case were held to be entitled. The Court addressed two of the difficulties claimed by SSWP, concluding that neither was made out. However, as will be apparent from the conclusions at [161] below, in the present case there is "some other justification".

158. It is true that there is the potential for other competing claims based on the same death, but there are other techniques in social security law for dealing with such problems, so the justification is, once again, arguing for the existence of a bright-line rule. There is no evidence of the anticipated extent of the problem and I do not consider it a weighty factor in the respondent's justification of the position.

159. As regards the availability of alternative sources of support from the social security system, the respondent's case is thin. There is a significant difference between a contributory benefit, paid as of right when the relevant conditions are met, and a means-tested benefit. People who were married may receive the contributory benefit even if they already have significant resources and the benefit is nonetheless available to assist them with their outgoings at a difficult time. A bereaved cohabitant by contrast would have to be quite severely lacking in income and capital in order to access a means-tested benefit - particularly a social fund funeral payment, which is hedged around with onerous conditions.

160. The respondent also seeks to rely, at least to some degree, on the husbanding of scarce state resources. The projected cost, were these appeals to be successful and widely applied, is disputed and has not been greatly developed before me. I accept however, that such success in the present cases would likely lead to pressure for a similar result in relation to the lower rate of bereavement support payment (com-are the progress from *McLoughlin* in the Supreme Court to *Jackson*) and thus that the amount on any view is likely to be substantial.

161. The analysis of justification is having to be applied in two different contexts. Out of the reasons advanced by Mr Milford on the basis of Ms Walker's and Ms Edey's evidence, I consider that the Government's aim of promoting marriage and civil partnership, to maintain the integrity of the contribution system and to avoid excessive administration together amount to the very weighty reasons necessary to justify the differential impact of the provisions in question on women and men. The view is consistent with the view adopted when the matter has been considered by

Parliament, which in my view must be taken as having been reached notwithstanding the obvious potential for financial problems following bereavement affecting the survivor. The view applies irrespective of whether ground 2 is considered on the basis of art.14 with A1P1 or art.14 with art.8; the implications of consideration under the latter alternative are in my view sufficiently addressed by the requirement for "very weighty reasons".

162. I do not consider that this falls foul of the *Bank Mellat* tests. I agree with Mr Milford that it is hard to see how the promotion of marriage and civil partnership could be effected without conferring advantages on them over other forms of relationship. Nor can I see how the aim of avoiding excessive administration could be achieved when the other available ways inevitably involve more. Whether a fair balance is struck between the interests of those adversely affected and the wider community largely comes back to the wide margin which is to be given to the view the elected legislature in matters of social policy.

163. For the fallback position if my conclusions on Ground 1 were to be wrong, the margin of appreciation to be afforded is wider (see *Akhtar* at [227]) and the justification put forward is *a fortiori* made out. The fallback position applies to discrimination on the ground of marital status, which is not something going to the core of a person's identity and considering it under art.14 with art.8 would not materially affect the outcome.

Concluding remarks

164. It follows from the above that the appeals must be dismissed.

165. I conclude by thanking all counsel for their helpful submissions and by apologising that it has taken a long time to produce this decision, lengthy and complex as it necessarily is.

C.G.Ward
Judge of the Upper Tribunal
Authorised for issue on 11 January 2023
(With corrections made under rule 42: 25 January 2023)