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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McLaughlin's (Siobhan) Application [2016] NIQB 11

IN THE MATTER OF AN APPLICATION BY SIOBHAN McLAUGHLIN FOR JUDICIAL REVIEW

and

IN THE MATTER OF DECISIONS OF THE DEPARTMENT FOR SOCIAL DEVELOPMENT ("DSD")

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TREACY J

Introduction

[1] The applicant challenges decisions of the Department for Social Development ("the DSD") refusing her benefits, after the death of her partner, in accordance with the provisions of s36 and 39A of the Social Security Contributions and Benefits (NI) Act 1992 ("the 1992 Act"). Mr David McMillan QC along with Ms Laura McMahon appeared for the applicant and Mr Tony McGleenan QC along with Mr Donal Lunny appeared for the respondent. I am grateful to both sets of Counsel for their detailed written and oral submissions.

[2] The applicant lived with her partner as man and wife for 23 years. Her partner died in January 2014. They had four children together and the applicant is now the sole provider for their children aged 19, 17, 13 and 11 years old. A key component of the family income is derived from State Benefits. Had the applicant been married to her partner at the time of his death, she would have had an entitlement to certain benefits. She has been refused payment of these benefits on the sole ground that she was not married. Her claim for each of two state benefits [Bereavement Benefit and Widowed Parent's Allowance] was denied because she was neither married nor a civil partner at the date of her partner's death.

Order 53 Statement

[3] The relief sought is:

> a. An Order of Certiorari to bring up to this Honourable Court, and quash, the decision of the Respondent refusing to pay the benefits to the applicant;
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> b. If the 1992 Act can not be read and given effect in a way that is compatible with Convention rights as appears above, a declaration that the 1992 Act is incompatible with the Applicant's Convention rights (as appears above) pursuant to s. 4 of the Human Rights Act 1998.
>
> c. If the 1992 Act cannot be read and given effect in a way that is compatible with Convention rights as appears above, a declaration that the there has been an unlawful interference with the Applicant's Convention rights.
>
> d. Damages
>
> ..."

[4] The grounds on which the relief is sought are:

> a. The decision unlawfully discriminated against the Applicant on the basis of marital status contrary to s. 6 of the Human Rights Act 1998 ("The 1998 Act") and Article 14 of the European Convention on Human Rights ("The Convention") in conjunction with Article 8.
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> b. The decision unlawfully discriminated against the Applicant on the basis of marital status contrary to s. 6 of 1998 Act and Article 14 of the Convention in conjunction with Article 1 of the First Protocol.
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> c. The decision failed to have any or adequate regard for the Applicant's private or family life and her personal autonomy, as required by s. 6 of the 1998 Act and Article 8 of the Convention in choosing not to enter into a marriage with Mr Adams.

d. The Respondent ought to have read and given effect to the 1992 Act in a way that was compatible with the Applicant's Convention rights, in accordance with s.3 of the Human Rights Act 1998. In particular, it should have interpreted the word "*spouse*" as including a person in the position of the Applicant having regard to her relationship with Mr Adams.

Legislative and Convention Framework

[5] The relevant statutory provisions are as follows:

Social Security Contributions and Benefits (Northern Ireland) Act 1992

36(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, para 4.

(2) A bereavement payment shall *not* be payable to a person if –

(a) that person and a person of the opposite sex to whom that person was not married were living together as husband and wife at the time of the spouse's or civil partner's death.

(b) that person and a person of the same sex who was not his or her civil partner were living together as if they were civil partners at the time of the spouse's or civil partner's death.

39A (1) This section applies where –

(a) a person whose spouse or civil partner dies on or after the appointed day is under pensionable age at the time of the spouse's or civil partner's death, or

(b) a man whose wife died before the appointed day –

(i) has not remarried before that day, and

(ii) is under pensionable age on that day.

(2) The surviving spouse or civil partner shall be entitled to a widowed parent's allowance at the rate determined in accordance with section 39C below if the deceased spouse or civil partner satisfied the contribution conditions for a widowed parent's allowance specified in Schedule 3 part I, paragraph 5 and –

(a) the surviving spouse or civil partner is entitled to child benefit in respect of a child or qualifying young person falling within subsection (3) below; ...

...

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 for any period throughout which she or he-

(a) satisfies the requirements of subsection (2)(a) or (b) above; and (b) is under pensionable age.

5. **A widowed parent's allowance** shall not be payable –
…

(b) for any period during which the surviving spouse or civil partner and a person of the opposite sex to whom she or he is not married are living together as husband and wife;
...

39C (1) The weekly rate of a widowed parent's allowance shall be determined in accordance with the provisions of sections 44 to 45A below (and

Schedule 4A to this Act) as they apply in the case of a Category A retirement pension, but subject, in particular, to the following provisions of this section and section 46(2) below.

(2) The weekly rate of a bereavement allowance shall be determined in accordance with the provisions of section 44 below as they apply in the case of a Category A retirement pension so far as consisting only of the basic pension referred to in subsection (3)(a) of that section, but subject, in particular, to the following provisions of this section.

(3) In the application of sections 44 to 45A (below and Schedule 4A to this Act) or (as the case may be) section 44 below by virtue of subsection (1) or (2) above—

(a) where the deceased spouse was over pensionable age at his or her death, references in those sections to the pensioner shall be taken as references to the deceased spouse, and

(b) where the deceased spouse was under pensionable age at his or her death, references in those sections to the pensioner and the tax year in which he attained pensionable age shall be taken as references to the deceased spouse and the tax year in which he or she died.

(4) Where a widowed parent's allowance is payable to a person whose spouse dies after (5th October 2002), the additional pension falling to be calculated under sections 44 to 45A below (and Schedule 4A to this Act) by virtue of subsection (1) above shall be one half of the amount which it would be apart from this subsection.

(5) Where a bereavement allowance is payable to a person who was under the age of 55 at the time of the spouse's death, the weekly rate of the allowance shall be reduced by 7 per cent. of what it would be apart from this subsection multiplied by the number of years by which that person's age at that time was less than 55 (any fraction of a year being counted as a year).

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

A1P1

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

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

Submissions

[6] The applicant sought an Order from the Court quashing the decision of the respondent refusing to pay the relevant benefits to her. She further sought a Declaration that the 1992 Act is incompatible with her Convention rights pursuant to s4 of the Human Rights Act 1998 and a Declaration that there had been an unlawful interference with her Convention rights. The applicant contended that her exclusion from these benefits unlawfully discriminated against her on the basis of her marital status. In the alternative the applicant contended that the respondent ought to have

read and given effect to the impugned provisions of the 1992 Act in a way which was compatible with the applicant's Convention rights, in particular the applicant contended that the word 'spouse' should be interpreted as including a person in the position of the applicant.

[7] The respondent submitted that the refusal of the applicant's claim was in accordance with the provisions of s36 and 39A of the 1992 Act which was not an act to which s6(1) of the HRA applied. Further, the respondent referred to Ground 5[d] of the applicant's revised Order 53 Statement which claimed that the DSD ought to have interpreted the word "spouse" in s36 and s39A of the 1992 Act as including cohabitees such as the applicant. This interpretation, the respondent submitted, was not possible and referred the applicant s36(2)(a) and s39A(4) of the 1992 Act.

[8] Further, the respondent referred to the clear intention of parliament to restrict the relevant benefits to persons who were legally married as summarised in the affidavit of Anne McCleary and submitted that the wider interpretation would not "go with the grain of the legislation" per Lord Rodger at para121 of Ghaidan v Godin Mendoza [2004] 2 AC 557.

[9] Regarding her ECHR arguments, the respondent denied that it had been guilty of any unlawful discrimination against the applicant under art14 of the ECHR or any breach of art 8 or A1P1.

The 1992 Act and the Applicant's Claim for Bereavement Benefits

[10] The respondent stated that the relevant parts of s36 and s39A of the 1992 Act restrict the class of persons eligible to claim Bereavement Payments and Widowed Parent's Allowance to spouses and civil partners and accepted that the Deceased in the present case had made sufficient National Insurance contributions to entitle the applicant, had she been his surviving spouse or civil partner, to both benefits.

Alleged Article 14 Discrimination

[11] The respondent referred the Court to Brewster v NILGOSC and DOE [2013] NICA 54 in which Coghlin LJ cited with approval the two arguably complementary approaches to the question of discrimination enunciated by Brooke LJ in Michalak and by Baroness Hale in AL [Serbia] v Secretary of State for the Home Department {2008] 1 WLR 1434:

> "[64] In Michalak v London Borough of Wandsworth [2003] 1 WLR 617 Brooke LJ formulated a test, subsequently approved in Ghaidan -v- Godin Mendoza [2004] 2 AC 557, for the establishment of discrimination contrary to Article 14, in the following terms:
>
> > 'It appears to me that it will usually be convenient for a court, when invited to

> consider an Article 14 issue, to approach its task in a structured way … If a court follows this model it should ask itself the four questions I set out below. If the answer to any of these questions is "no", then the claim is likely to fail and it is generally unnecessary to proceed to the next question. These questions are:
>
> (i) Do the facts fall within the ambit of one or more of the substantive Convention provisions?
>
> (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ("the chosen comparators") on the other?
>
> (iii) Were the chosen comparators in an analogous situation to the complainant's situation?
>
> (iv) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?'

In AL (Serbia) -v- Secretary of State for the Home Department [2008] 1 WLR 1434 Baroness Hale narrowed this approach in relation to questions (ii) and (iii) stating:

> 'This suggests that, unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification.'"

[12] Whilst the respondent accepted that there may be a significant overlap between Brooke LJ's questions [iii] and [iv], and that in some cases it may be preferable to focus upon question [iv], it submitted that question [iii] must still be considered in cases where, like the instant one, there exist "very obvious relevant differences

between the two situations". The respondent accepted that being unmarried is an *"other status"* within the terms of art14 of the ECHR and also accepted that:

(a) the facts of the case fall within the ambit of A1P1 in a case concerning a claim to social security benefits; and

(b) it is arguable that the facts of the case also fall within the ambit of art 8.

Comparability

[13] The respondent did not accept that the applicant's situation and that of a surviving spouse or civil partner are analogous but rather there exist obvious and relevant differences between the two situations. It submitted in this regard that marriage and civil partnership each involve a public undertaking and a contract between the parties. Each confers legal rights and responsibilities upon the contracting parties, not only as between themselves, but also in respect of third parties and the State. By way of contrast, it submitted, cohabitation involves neither public undertaking nor contract and it fails to confer upon cohabitees the bundle of legal rights and responsibilities that derive from marriage and civil partnership. This fundamental difference between marriage/civil partnership and cohabitation has been acknowledged in several recent cases eg in Brewster [2013] NICA 54 Higgins LJ stated:

> "[16] It is undoubtedly correct that marriage retains a special status within society and that those who commit to it enjoy particular rights which flow from that commitment and status. Civil partnership attracts similar status and rights. Informal cohabitation arrangements whether of long or short duration do not. They lack the formal and public commitment which attends every marriage or civil partnership. This has been recognised in many cases – Lindsay -v- UK 1987 9 EHRR CD 555, Burden -v- UK 2007 44 EHRR 51 and X -v- Austria 2013 1FCR 387. In Van der Heijden -v- Netherlands 2013 57 EHRR 13 the European Court reiterated its views on this subject albeit in the context of testimonial privilege accorded to spouses and registered partners."

[14] The European Court of Human Rights has held in art 14 discrimination cases concerning social security death benefits, taxation, and testimonial privilege that cohabitees are not properly analogous to spouses or civil partners – in Shackell v UK, 27 April 2000, a case which had almost identical facts to the present case, the Court held:

> "In the present case Ian Green paid full contributions as a self-employed earner and the refusal to grant the applicant widow's benefits was based exclusively on the finding that she had not been married to him. The

> Court will assume that the right to widow's benefits may be said to be a pecuniary right for the purposes of Article 1 of Protocol No. 1. There is therefore no need, in the present circumstances, to determine whether the facts of the case also fall within the scope of Article 8 of the Convention.
>
> However, the Court recalls that Article 14 of the Convention safeguards individuals placed in similar positions from any discrimination in the enjoyment of the rights and freedoms set out in the Convention and Protocols (see the Marckx -v- Belgium judgment of 13 June 1979, Series A no. 31, p. 5). The applicant in the present case seeks to compare herself to a widow, in other words a woman whose husband, as opposed to partner, has died. The Court recalls that the European Commission of Human Rights held, in a case concerning unmarried cohabitees who sought to compare themselves with a married couple that:
>
> > 'These are not analogous situations. Though in some fields, the de facto relationship of cohabitees is now recognised, there still exist differences between married and unmarried couples, in particular, differences in legal status and legal effects. Marriage continues to be characterised by a corpus of rights and obligations which differentiate it markedly from the situation of a man and woman who cohabit-it" (Lindsay -v- the United Kingdom, Comm. Dec. 1.11.86, D.R. 49, p. 181).'
>
> The Court notes that that decision of the Commission dates from 1986, that is, over 14 years ago. The Court accepts that there may well now be an increased social acceptance of stable personal relationships outside the traditional notion of marriage. However, marriage remains an institution which is widely accepted as conferring a particular status on those who enter it. The situation of the applicant is therefore not comparable to that of a widow."

[15] In Burden v UK [2008] 47 EHRR 38 the Grand Chamber of the Court approved Shackell and held that cohabiting sisters were not analogous to spouses.

> "[63] Moreover, the Grand Chamber notes that it has already held that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Art.12 of the Convention and gives rise to social, personal and legal consequences. In Shackell, the Court found that the situations of married and unmarried heterosexual cohabiting couples were not analogous for the purposes of survivors' benefits, since "marriage remains an institution which is widely accepted as conferring a particular status on those who enter it". The Grand Chamber considers that this view still holds true.
> …
> [65] As with marriage, the Grand Chamber considers that the legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decide to incur, set these types of relationship apart from other forms of cohabitation. Rather than the length 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. Just as there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand, the absence of such a legally binding agreement between the applicants renders their relationship of cohabitation, despite its long duration, fundamentally different to that of a married or civil partnership couple."

[16] In Van der Heijden v The Netherlands [2013] 57 EHRR 13, a discrimination claim mounted by a cohabitee who could not avail of testimonial privilege in a criminal case mounted by the State against her partner [Mr A], the Court held:

> "[69] The Court does not accept the applicant's suggestion that her relationship with Mr A, being in societal terms equal to a marriage or a registered partnership, should attract the same legal consequences as such formalised unions. States are entitled to set boundaries to the scope of testimonial privilege and to draw the line at marriage or registered partnerships. The legislature is entitled to confer a special status on marriage or registration and not to confer it on other de facto types of cohabitation. Marriage confers a special status on those who enter into it; the right to marry is protected by art.12 of the Convention and gives rise to

> social, personal and legal consequences. Likewise, the legal consequences of a registered partnership set it apart from other forms of cohabitation. Rather than the length 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. The absence of such a legally binding agreement between the applicant and Mr A renders their relationship, however defined, fundamentally different from that of a married couple or a couple in a registered partnership. The Court would add that, were it to hold otherwise, it would create a need either to assess the nature of unregistered non-marital relationships in a multitude of individual cases or to define the conditions for assimilating to a formalised union a relationship characterised precisely by the absence of formality."

[17] Although spouses/civil partners and cohabitees have been held to be in analogous situations in a number of other discrimination decisions, those decisions can properly be distinguished from the instant case.

[18] Re G [2009] 1 AC 173 was a discrimination case concerning the Adoption (Northern Ireland) Order 1987. Properly analysed, the respondent submitted that the real focus of the case was not on the issue of comparability but on the question of justification and, in particular, how the complete exclusion of certain classes of person, on the ground of their marital status, from the pool of potential adoptive parents could ever be justified given that the primary consideration for the Court in any adoption was the welfare of the relevant child. Lord Mance, in holding that cohabitees were analogous to spouses, distinguished the ECHR decisions in Burden and Shackell on the basis that they were decisions in the fields of taxation and social benefits. Unlike In re G, but just like Shackell, the instant case is concerned with social benefits.

[19] Ratcliffe v Secretary of State for Defence [2009] EWCA Civ 39 concerned death benefits under an armed forces occupational benefits scheme. The Court considered cohabitation and marriage to be analogous because the government itself had, by the relevant time, considered both classes to be analogous in the relevant area of policy.

> "[72] In my view, the decision whether a married and unmarried couple are in an analogous situation must be made in the light of the scheme under examination. By the end of 2003 unmarried couples were being treated substantially the same as married couples for the purposes of the Occupational Pension scheme and the Government had announced that it would by 2005 be treating them the same for the purposes of the 2005 Order. This distinguishes the present case from the

> situation in Burden. Thus in 2004 it would, in my view, be wrong to say that they were not, in the context of armed forces benefits, in an analogous position for the purposes of art 14. To this extent I would reach a different conclusion to that of the Pensions Appeal Commissioner, in para 29 of his decision (per Hooper LJ)."

[20] In Re Morrison's Application [2010] NIQB 51, another case concerning death benefits under an occupational scheme, this court relied upon Ratcliffe and held (at paras[26] – [36]), in the context of the particular regulations in that case which, like those in Ratcliffe, sought to equate certain cohabitees with spouses/civil partners, that it would be wrong to say that the applicant was not, at the relevant time, in an analogous position to a spouse or civil partner.

> "[32] Likewise the 2006 Injury Benefit Regulations extended the protection to survivors of a relationship which was not marriage (i.e. civil partners). Furthermore the 2007 Pension Regulations (which were then legislatively separated for Revenue reasons) extended the protection to include partners in an exclusive, committed and long-term relationship.
> …
>
> [35] The 2006 Injury Benefit Regulations, by excluding the applicant from eligibility treat her differently from the way they would treat her if she were the deceased widow. Para. 72 of Ratcliffe recognised that unmarried partners of members of the UK armed forces are in a position analogous to that of spouses to such members for the purposes of the relevant pension and compensation schemes. That this is so appears to have been explicitly recognised by the government itself in the 2007 Pension Regulations which equated the status of an unmarried partner who can demonstrate co-habitation and a stable relationship with that of a spouse or civil partner in the 2007 Pension Regulations. This is an analogy which is also reflected in the treatment of unmarried couples in relation to pension provision in respect of other public sector workers (see para 49(iii) below).
>
> [36] Thus in 2008 it would, in my view, be wrong to say, in the context of police force injury benefits, that the applicant was not in an analogous position for the purposes of Art 14. In any event for the reasons adumbrated by Baroness Hale in the passage cited at

> para.31 above the real focus of the enquiry must relate to the justification, if any, for the maintenance of the difference." [emphasis added]

[21] Similarly in Brewster at paras [21], [25] and [30] (another case concerning death benefits under an occupational scheme) Girvan LJ emphasised the fact that, in the particular circumstances of that case, the legislature considered the applicant to be factually analogous to a married person.

> "[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."

[22] In PM v UK [2005] ECHR 504 the applicant was an unmarried, separated father who was held to be analogous to a married father who had divorced or separated because both were under the same financial obligations regarding the maintenance of their children – see paras 22, 23,27 and 28. Thus, unlike in the instant case where the focus is upon the applicant's nexus to the Deceased and the comparability of their relationship to a marriage or civil partnership, the focus in PM was upon the nexus between the applicant and his child, in respect of whom he bore an identical maintenance obligation to that borne by any married father who had divorced or separated. Furthermore, the Court in PM also had regard to the fact that the rationale for the relevant tax relief applied equally to persons in the applicant's position as it did to married fathers who had divorced or separated:

> "The purpose of the tax deductions was purportedly to render it easier for married fathers to support a new family; it is not readily apparent why unmarried fathers, who undertook similar new relationships, would not have similar financial commitments equally requiring relief" – (para28)."

[23] Sahin v Germany [2001] 36 EHRR 765 was a case with similar facts to PM where the focus was upon, not the relationship between the unmarried father and his former partner, but the unmarried father's nexus with his child by that partner. It is also a case in which it appears that the German government did not take the comparability point and where much emphasis was placed on the birth status of the relevant child and the importance of avoiding discrimination on that ground [see eg paras(88) and (94) of the judgment].

[24] Petrov v Bulgaria [2012] ECHR 880 is best viewed in its proper context *viz* a case where the respondent State put forward no justification whatsoever for the difference of treatment between married and unmarried prisoners – see para54 of judgment.

[25] Similarly, Munoz Diaz v Spain [Application No. 49151/07, 8 December 2009] is a case where the applicant had a Roma marriage with the deceased, where she enjoyed reasonable grounds for believing that the State had recognised that marriage, where it was clear that in other cases the State had made the relevant benefit available to persons who, like the applicant, did not have a civil marriage, and where the applicant alleged discrimination on the basis of her membership of the Roma Community – see eg paras (51) and (54) of the judgment. It is also a case, like Sahin, where it appears that the government did not take the comparability point.

[26] Unlike in the cases of Ratcliffe, Morrison and Brewster, the respondent submitted it is clear that the legislative scheme in the instant case concerning bereavement benefits does not treat spouses/civil partners and cohabitees as analogous. Whereas the legislative schemes under consideration in those cases

treated certain cohabitees as analogous to spouses and civil partners for the purpose of death benefits, the 1992 Act expressly excludes all classes of cohabitee from eligibility for such benefits.

[27] Furthermore, the respondent rejected as ill conceived the other comparability arguments put forward by the applicant in her affidavit in particular the respondent contended:

(a) In respect of Carer's Allowance [the first benefit mentioned by the applicant at para10 of her affidavit of 11 August 2014], this was payable because the applicant satisfied the relevant eligibility criteria, which *do not* include a criterion that the carer and person cared for are, or are analogous to, husband and wife.

(b) As for State Pension Credit [the second benefit mentioned by the applicant at paragraph 10] it, unlike the bereavement benefits with which the instant application is concerned, is a *means tested benefit* and it is therefore entirely logical and appropriate for DSD, when considering any claim for it, to consider not only the income and capital of the applicant for the benefit but also certain other income and capital which is likely to be at his disposal *viz* the income and capital of his spouse residing in the same household *or* that of his civil partner residing in the same household *or* that of a person who is neither his spouse nor civil partner but with whom he resides as if they were spouses or civil partners [see s5 and s17 of the State Pension Credit Act (Northern Ireland) 2002 in this regard]. Thus, the State Pension Credit regime ensures that regard is had to the true means of an applicant when determining his entitlement to a means tested benefit. To do otherwise would be to ignore the economic reality of the situation and it would also serve to undermine the institutions of marriage and civil partnership. After all, if DSD was confined to considering only the income and capital of the applicant and that of his spouse or civil partner when considering applications for means tested benefits, such a system would create a financial incentive for persons to cohabit without marrying or entering into a civil partnership.

[28] The respondent also rejected as ill conceived the suggestion that the applicant's position was analogous to that of an unmarried cohabiting partner claiming under schemes such as the ones in issue in Morrison and Brewster. Referring to the affidavit of Grace Nesbitt such contributory pension schemes are voluntary [whereas the payment of National Insurance is compulsory under the 1992 Act] and they involve a defined membership which, in return for contributions, gains access to certain defined benefits. Such schemes are, in effect, private pension schemes which are not truly analogous with contributory state benefits. As Lord Hoffman pointed out in Carson:

> "[12] … the analogy is weak because … contributions are hardly distinguishable from general taxation …"

and

> "[21] … National Insurance contributions have no exclusive link to retirement pensions, comparable with contributions to a private pension scheme".

[29] If public sector pension schemes have extended benefits to unmarried cohabitees in certain circumstances it is because their membership agreed to the extension and, perhaps more importantly, agreed to meet the costs of such an extension.

[30] Given all the circumstances set out above the respondent contended that the applicant's discrimination case falls at the first hurdle because she is not in an analogous situation to a spouse or civil partner nor is she in an analogous position to a person claiming under an occupational scheme.

Justification

[31] If the Applicant is deemed to be in an analogous situation to that of a surviving spouse or civil partner, then the respondent contended that its different treatment of the applicant pursues a number of legitimate aims including the promotion of the institutions of marriage and civil partnership and the maintenance of an efficient social security benefits system. Furthermore, it seeks to pursue those aims in a proportionate way and referred the court to the following:

(a) The provisions of sections 36 and 39A of the 1992 Act seek to restrict the class[es] of person whose members are eligible to claim State benefits derived, not from their own National Insurance contributions, but from another person's National Insurance contributions.

(b) The restriction serves to promote the institutions of marriage and civil partnership by conferring eligibility to claim upon only the spouse or civil partner of the person who made the contributions.

(c) The restriction also serves to make the benefits system more efficient. It takes account of practical considerations such as the difficulty [and associated administrative burden] of ascertaining the precise nature and quality of relationships other than marriage or civil partnership given the absence of any public undertaking or contract as well as potential problems associated with widening eligibility such as competing claims in respect of the one deceased [for example, from both an estranged spouse and a cohabitee or from each of two or more alleged cohabitees]. In this particular regard the respondent submitted the decision of the Privy Council in Rodriguez v Minister of Housing [2009] UKPC 52 is instructive insofar as the Board was of the opinion that it would be lawful for the Respondent to have in place a policy which made the relevant benefit [a joint tenancy] available only to couples who had an officially recognised status, be it marriage or civil partnership:

> "[31] In the opinion of the Board, therefore, the appellant is entitled to a declaration that she has been treated in a discriminatory manner, in contravention of her rights under sections 7 and 14 of the Constitution. In reaching this conclusion, the Board is not seeking to dictate to the Housing Allocation Committee exactly what its policy should be. But it should be a policy which does not exclude same sex partners who are in a stable, long term, committed and inter-dependent relationship from the protection afforded by a joint tenancy. The Board recognises that, in the small number of such applications which are likely to be made, the Committee will have to make more inquiries than they do in other cases. This is something which public officials are used to doing in the United Kingdom. The Committee may well wish to adopt some simple indicia of interdependence and stability, rather than to embark upon a more intrusive inquiry. The Board would also like to stress that this decision does not oblige Gibraltar to introduce same sex marriage or civil partnership. It would only observe that this would enable the authorities to continue to grant privileges to those couples who had chosen to enter an officially recognised status and to deny them to those who had declined to do so."

[32] The respondent submitted that it was clear that the State has considered the above points when deciding not to extend eligibility for Bereavement Payments and Widowed Parent's Allowance to cohabitees and referred to the House of Commons Library Standard Note SN00431 Bereavement Benefits of August 2013 at pp8 and 9 and, in particular, to the following extract:

> "The issue was debated at some length during the Commons Committee Stage of the Welfare Reform and Pensions Bill 1998-99. In response to Liberal Democrat amendments to extend bereavement benefits to unmarried cohabiting couples, the then Parliamentary Under Secretary of State for Social Security, Hugh Bayley, mentioned practical considerations as well as issues of principle:
>
> The amendments are all about marital status. Under amendment No. 210, entitlement to bereavement benefits would be extended to cohabiting couples. We intend to 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 systems. 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 he paid. It would be far more difficult to administer and police the benefits if they were extended to unmarried couples."

[33] The respondent also referred to the fact that it has a broad margin of discretion when it comes to striking a balance between competing rights in a case such as the present which involves alleged discrimination on a non-suspect ground [marital status] in an area [social security benefits] where the legislature is traditionally afforded a very broad discretion.

[34] In Swift v Secretary of State for Justice [2014] QB 373 Lord Dyson MR considered that a wide margin of discretion should be afforded to the State in a matter concerning different treatment based upon a 'non-suspect' ground: -

> "[24] … a wide margin of discretion should be accorded to the legislature in this case. The difference in treatment based on the duration of cohabitation is not founded on what has been described in the case law as a "suspect" ground of discrimination. In R (Carson) -v- Secretary of State for Work and Pensions [2006] 1 AC 173 Lord Walker of Gestingthorpe explained at paras 55-60 that not all possible grounds of discrimination are equally potent. The United States Supreme Court has developed the doctrine of "suspect" grounds of discrimination which the court will subject to particularly severe scrutiny. "Suspect" grounds of discrimination are those based on personal characteristics (including sex, race and sexual orientation) which an individual cannot change. The same approach has been adopted in the Strasbourg jurisprudence. Thus, for example, in Stec v United Kingdom (2006) 43 EHRR 1017, para 52, the court drew a distinction between (i) discrimination based exclusively on the ground of sex (requiring very weighty reasons in justification) and (ii) general measures of economic or social strategy (where a wide margin is usually allowed). In relation to the latter, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the European Court of Human Rights will generally respect the legislature's policy

> choice unless it is "manifestly without reasonable foundation". It is true that these observations were made in relation to the margin of appreciation accorded by the Strasbourg court to member states. But the same approach was adopted by Baroness Hale of Richmond JSC in a domestic context in Humphreys -v- Revenue and Customs Comrs [2012] 1 WLR 1545, paras 15-19: see also R (RJM) -v- Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening) [2009] AC 311.
>
> [25] I accept that, unlike the Carson, RJM and Humphreys cases, the present case is not concerned with state benefits. Such cases are the most obvious examples of decisions by the legislature on questions of what is in the public interest on social or economic grounds."

[35] In Brewster Higgins LJ expressly acknowledged that marital status was a non-suspect ground of discrimination: -

> "[21] … The difference in treatment between married/civil partners and unmarried partners in a stable relationship, is not based on what are referred to as personal characteristics ('suspect grounds') that cannot be changed such as sex and race. The decision whether to give a statutory right to pension provision to cohabitees following the death of a partner is clearly an important issue of social and economic policy. It was that which underpinned the extensive consultation which took place, principally with those most interested and affected, prior to the implementation of the regulations. In my view Parliament is entitled to a wide margin of appreciation and discretion in relation to its decision as to which cohabitees should benefit and how they should be identified."

[36] In R [Carson] -v- Secretary of State for Work and Pensions [2005] UKHL 37 Lord Walker referred with approval to the following dictum of Laws LJ in the Court of Appeal in that case concerning the very wide margin of discretion to be afforded to the legislature in matters of macro-economic policy:

> "In any particular area the decision-making power of this or that branch of government may be greater or smaller, and where the power is possessed by the legislature or executive, the role of the courts to constrain its exercise may correspondingly be smaller or greater. In the field of what may be called macro-economic policy, certainly

> including the distribution of public funds upon retirement pensions, the decision-making power of the elected arms of government is all but at its greatest, and the constraining role of the courts, absent a florid violation by government of established legal principles, is correspondingly modest. I conceive this approach to be wholly in line with our responsibilities under the Human Rights Act 1998. In general terms I think it reflects a recurrent theme of the Strasbourg jurisprudence, the search for a fair balance between the demands of the general interest of the community and the protection of individual rights: see Sporrong v Sweden (1982) 5 EHRR 35."

[37] The respondent submitted that unless the legislature's policy choice in this case can be shown to be manifestly without reasonable foundation, that choice should not be impugned.

[38] The recent Upper Tribunal decision in ES v Secretary of State for Work and Pensions [2010] UKUT 200 is, the respondent submitted, instructive in this particular regard. That case involved a claim for bereavement benefits by a long-term cohabite in which Levenson J held:

> "30. Mr Richards having accepted that "the protection and promotion of the legal institution of marriage is, in principle, a legitimate aim" it is difficult to see how he can argue that all differences in treatment in social security provision between married couples and others are necessarily irrational.
>
> 31. That leaves the question of whether there is "a reasonable relationship of proportionality between the means employed and the aims sought to be realised". The benefits in question in this appeal are not means tested. At the time of Mr L's death the lump sum bereavement payment was £2,000 and the bereavement allowance for a survivor aged 54 was £84.35 weekly. An unmarried survivor with no financial resources might have been entitled to an amount not far short of £2000 for the funeral expenses and (assuming that there were no children and that other conditions of entitlement were satisfied), would have been entitled to housing costs in many cases in addition to £60.50 weekly income support or income based jobseekers' allowance (or £110.15 if incapable of work). I am not suggesting that these amounts are generous, or that there are no anomalies or cases where the system operates unfairly. The

> Administrative Appeals Chamber is only too familiar with such cases. However, it cannot really be said that, in the context of the overall social security system, the difference in treatment between married and unmarried survivors for the purposes of bereavement benefits is such a disproportionate method of favouring formal legal marriage over unmarried cohabitation as to amount to unlawful discrimination for the purposes of the Human Rights Act 1998.
>
> 32. The question is not what my policy would be if I were responsible for drafting the legislation. The questions are whether the Secretary of State has provided a rational explanation for the policy of the law in this case, which he has, and whether the method of achieving the objectives of that policy are proportionate, which they are. The State has, as has been observed above, a wide margin of appreciation in the implementation of social policy and in economic matters. The legal position in the present case is well within that margin."

[39] Furthermore, the respondent submitted that that the recent decision of Serife Yigit v Turkey [2011] 53 EHRR 25 demonstrates that, by not allowing cohabitants to claim social security bereavement benefits which are available to spouses, the approach of the UK government is in line with that of a majority of other Council of Europe Member States:

> "[42] Of the 36 countries surveyed, four (France, Greece, Portugal and Serbia) expressly recognise cohabitation. In other countries, although such arrangements are not expressly recognised, they produce legal effects to one degree or another. This is the case in Austria, Belgium, the Czech Republic, Denmark, Hungary, Italy, the Netherlands, Slovenia and Switzerland. However, the majority of states do not recognise cohabitation at all (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Finland, Georgia, Germany, Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, Monaco, Poland, Romania, "the former Yugoslav Republic of Macedonia", Ukraine and the United Kingdom).
>
> [43] In 24 countries (Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Cyprus, the Czech Republic, France, Germany, Greece, Hungary, Ireland, Luxembourg, Moldova, Monaco, the Netherlands, Poland, Romania, Serbia, Slovenia, Spain, Switzerland,

> "the former Yugoslav Republic of Macedonia" and Ukraine), the national legislation allows the surviving spouse, subject to certain conditions, to claim benefits based on the deceased's social-security entitlements. Of these countries, only six (Austria, Belgium, France, Hungary, the Netherlands and Spain) extend this right to cohabitants. In most of the Member States of the Council of Europe, only married couples who have contracted a civil marriage qualify for health insurance cover on the death of one of the partners; hence, cohabitants are not eligible.
>
> [44] In Denmark, Hungary, the Netherlands, Portugal, Slovenia and Spain a survivor's pension may be awarded to a surviving cohabitant in certain circumstances. In the vast majority of countries which have a survivor's pension, cohabitants are not eligible to receive it."

[40] Therefore, in all of the circumstances, the respondent submitted that the applicant does not enjoy an arguable case that the 1992 Act unlawfully discriminates against her contrary to Art 14 in conjunction with either Art 8 or A1P1.

Alleged Breach of Article 8

[41] The respondent does not accept that the applicant enjoys any viable claim that there has been a breach of her art8 rights and referred the Court to a number of judgments of the European Court.

[42] In Petrovic v Austria, 27 March 1998, the claimant alleged that the State's refusal to pay him a benefit known as parental leave allowance amounted to a breach of Art8 rights. However, the European Court of Human Rights rejected his claim under this head holding as follows:

> "[26] In this connection the Court, like the Commission, considers that the refusal to grant Mr Petrovic a parental leave allowance cannot amount to a failure to respect family life, since Article 8 does not impose any positive obligation on States to provide the financial assistance in question."

[43] In Serife Yigit v Turkey (Application No.3976/05, 20 January 2009) the Grand Chamber held that restricting access to certain social security death benefits only to the parties to a civil marriage did not offend against art 8:

> "[100] It should be reiterated in this regard that the essential object of art.8 is to protect the individual against arbitrary interference by the public authorities. There may in addition be positive obligations inherent in

effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the state is recognised as enjoying a certain margin of appreciation. Furthermore, in the sphere of the state's planned economic, fiscal or social policy, on which opinions within a democratic society may reasonably differ widely, that margin is necessarily wider. This applies also in the present case.

[101] As to the applicant, she chose, together with her partner, to live in a religious marriage and found a family. She and ÖK were able to live peacefully as a family, free from any interference with their family life by the domestic authorities. Thus, the fact that they opted for the religious form of marriage and did not contract a civil marriage did not entail any penalties - either administrative or criminal - such as to prevent the applicant from leading an effective family life for the purposes of art.8. The Court therefore finds no appearance of interference by the state with the applicant's family life.

[102] Accordingly, the Court is of the view that art.8 cannot be interpreted as imposing an obligation on the state to recognise religious marriage. In that regard it is important to point out, as the Chamber did, that art.8 does not require the state to establish a special regime for a particular category of unmarried couples. For that reason the fact that the applicant does not have the status of heir, in accordance with the provisions of the Civil Code governing inheritance and with the domestic social-security legislation, does not imply that there has been a breach of her rights under art.8.

[103] In conclusion, there has been no violation of art.8 of the Convention."

The Mirror Principle

[44] The respondent contended that it was apparent from the above analysis that there exists a clear line of decision from the Grand Chamber of the Strasbourg Court which is firmly against the applicant in this matter. The key cases in this regard are Burden and Serife Yigit. In Burden the Court held that the situations of married and unmarried heterosexual cohabiting couples were not analogous for the purposes of survivors' benefits. In Yigit the Court held that the State, in the context of social

security death benefits, was justified in treating couples who were not parties to a civil marriage less favourably than those who were.

[45] In Manchester City Council v Pinnock [2011] 2 AC 104 Lord Neuberger MR considered the position of the domestic court where such a clear line of authority exists:

> "This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law: see eg R v Horncastle [2010] 2 AC 373. Of course, we should usually follow a clear and constant line of decisions by the European court: R (Ullah) v Special Adjudicator [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in Doherty v Birmingham City Council [2009] AC 367 , para 126, section 2 of the 1998 Act requires our courts to 'take into account' European court decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line."

[46] This dictum was expressly and recently approved by the UKSC in Regina [Chester] v Secretary of State for Justice and McGeoch v Lord President of the Council [2014] A C 271.

[47] Further, Lord Brown in Regina [Al-Skeini and others] v Secretary of State for Defence [2008] 1 AC 153 stated:

> "[105] The ultimate decision upon this question, of course, must necessarily be for the European Court of Human Rights. As Lord Bingham of Cornhill observed in R (Ullah) v Special Adjudicator [2004] 2 AC 323, 350 (para 20), "the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court." In the same paragraph Lord Bingham made two further points: first, that a national court "should not without strong reason dilute or weaken the effect of the Strasbourg case law";

> secondly that, whilst member states can of course legislate so as to provide for rights more generous than those guaranteed by the Convention, national courts should not interpret the Convention to achieve this: the Convention must bear the same meaning for all states party to it. Para 20 ends: "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.
>
> [106] I would respectfully suggest that last sentence could as well have ended: "no less, but certainly no more." There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg. …"

Loss

[48] The respondent contended that as a result of her failure to secure Widowed Parent's Allowance, the applicant is currently not significantly worse off financially. Had she obtained Widowed Parent's Allowance, her Employment Support Allowance [a means tested benefit which exceeds in amount the Widowed Parent's Allowance to which she would have been entitled if married to the Deceased] would, save for an amount of £10.00, have been reduced 'pound for pound'. In short, an award of Widowed Parent's Allowance would have resulted in the applicant being only £10 per week better off.

[49] Whilst the applicant has, as a result of her status, lost out on a Bereavement Payment of £2,000 she was entitled to apply for social fund funeral payments.

Delay

[50] On this issue the respondent contended that the applicant failed to bring her application promptly or within 3 months of the date of the relevant decision as required by Order 53 Rule 4(1). The key dates in this regard are 29 January 2014 [date of refusal of claim by DSD], 17 February 2014 [date original decision upheld by DSD upon review], and 17 April 2014 [date of dismissal of appeal to Appeals Tribunal]. The Applicant's application for leave was not issued until 18 August 2014, some 4 months after the last of the above dates. The respondent noted that the Applicant has offered no explanation or excuse in her affidavit of 11 August 2014 for her delay.

Exhausting Alternative Remedies

[51] The respondent contended that the applicant had the right to seek leave to appeal the Appeal Tribunal's decision of 17 April 2014 to a Commissioner under art15 of the Social Security (Northern Ireland) Order 1998 and reg58 of the Social Security and Child Support (Decisions and Appeals) Regulations (Northern Ireland) 1999. She also had the right to seek leave to appeal any unfavourable decision of the Commissioner to the Court of Appeal under s22 of the Social Security Administration (Northern Ireland) Act 1992 and reg 33 of the Social Security Commissioners (Proceedings) Regulations (Northern Ireland) 1999.

[52] In Re O'Neill (Daniel) [2009] NICA 19 the Court of Appeal considered the question of alternative remedies in the context of a judicial review concerning social security benefits:

> "[12] Fourthly, this discrete challenge is defeated by reason of the Appellant's failure to challenge the impugned decision by exercising his right to appeal to an independent tribunal. This is a statutory right, which was brought to his attention in the letter dated 26 July 1994. In the field of social security, it is clearly preferable that dissatisfied claimants should give vent to their grievances by appealing to the relevant tribunal, rather than initiating judicial review proceedings. This will almost invariably be the more efficient, convenient and efficacious method of procedure. Moreover, it entails a remedy of real value. The applicable legal principles are summarised in Re Ballyedmond's Application [2000] NI 174, p. 178A-179G. The dominant principle is that where a failure to pursue an alternative statutory remedy occurs, an application for judicial review is not available save in exceptional or special circumstances."

[53] In R (on the application of the Kurdistan Workers' Party and others) v Secretary of State for the Home Department [2002] EWHC Admin 644 Richards J considered the same question in a context, like the present, where the inferior tribunal, unlike the Judicial Review Court, lacked the power to make a declaration of incompatibility. He held as follows:

> "[86] The fact that a declaration of incompatibility cannot be made by an inferior tribunal, but only on appeal to the High Court or Court of Appeal, does not generally render proceedings before the inferior tribunal inappropriate or render an application for judicial review appropriate. The appropriate course is still generally to pursue the proceedings before the inferior tribunal and then on appeal to the High Court or Court of Appeal, rather than to apply for judicial review. An obvious example is that of criminal proceedings in the Crown Court, where a

> declaration of incompatibility is available only on appeal to the Court of Appeal but the general appropriateness of pursuing all issues in the criminal proceedings instead of applying for judicial review has been stressed in Kebilene [2000] 2 AC 326, [1999] 3 WLR 972 and in R (Pretty) -v- DPP [2002] 1 All ER 1, [2001] 3 WLR 1598. Thus in the PMOI and LeT appeals to POAC the incompatibility arguments have properly been advanced with a view to seeking declarations from the Court of Appeal on a further appeal if that becomes necessary."

[54] The respondent submitted that there was no evidence in this case that the applicant had exhausted her alternative remedy of seeking leave to appeal to the Commissioner.

[55] Further, the respondent did not accept that the applicant's alternative potential remedy, as outlined above, would be an ineffective one. She could, like the applicant in ES v Secretary of State for Work and Pensions, have sought to persuade the Commissioner that "spouse" should be interpreted as including cohabitees. If unsuccessful before the Commissioner she could have pursued the matter to the Court of Appeal and, like the appellant in Ratcliffe, sought to persuade that court either to adopt a wider interpretation of the relevant part of the statute or, in the alternative, make a declaration of incompatibility.

Discussion

[56] I do not accept the respondent's contention that the continuing state of affairs that the applicant complains about in these proceedings is vitiated by delay.

[57] I am also satisfied that in the circumstances of this case (as in Brewster and Morrison) judicial review is the appropriate vehicle for addressing the applicant's arguments. Even if the applicant has an alternative remedy as contended by the respondent I am not persuaded that this is a case in which its existence should preclude recourse to the more obvious remedy of judicial review.

[58] I begin this section by reminding myself that the applicant, following the death of her partner of 23 years and father of her four children, was refused Bereavement Benefit and Widowed Parent's Allowance. In each case the benefit was refused because she and the deceased were neither married nor in a civil partnership. This refusal was in accordance with the provisions of s36 and 39A of the 1992 Act which restrict the class of persons eligible to these benefits to spouses and civil partners. It is accepted that the deceased had made sufficient National Insurance contributions to entitle the applicant, had she been his surviving spouse or civil partner, to both benefits. The applicant contends that the impugned decisions unlawfully discriminated against her on the ground of her marital status.

[59] The applicant's grounds of challenge in the amended Order 53 Statement are set out at para [4] above. Ground 5(d) asserted that the word "spouse" in s36 and s39A should be interpreted as including cohabitees such as the applicant. I cannot accept that submission since such an "interpretation" is simply not possible. In this respect I refer to s36[2] and s39A(4) set out at para [5] above. I accept the proposition that neither of these provisions can sensibly bear the construction for which the applicant contends. It is obvious that the clear intention of Parliament was to restrict the relevant benefits to those who were married or in a civil partnership. The relevant background to the provisions is helpfully set out in the affidavit of Anne McCleary which I do not need to repeat not least because the clear intention of Parliament is manifest from the terms of the legislative scheme. Adopting the approach of Lord Rogers in Ghaidan the construction urged upon the court would not "go with the grain of the legislation".

[60] Since the refusal of the benefit was in accordance with s36 and s39A of the 1992 Act such refusal cannot be an act to which s6(1) of the Human Rights Act 1998 applies. This is because s6(2) expressly provides:

> "(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."

See also R (Hooper & Ors) v SOS for W&P [2006] 1 All ER 487

Comparability

[61] The constant theme of domestic and Convention jurisprudence has been to recognise that generally marriage and civil partnership are not analogous to cohabitation. In certain circumstances a co-habitational relationship may be regarded as analogous. Having reviewed the relevant domestic and Convention jurisprudence Girvan LJ in Brewster succinctly summarised the position in the passages set out at para [20] above.

[62] The question whether co-habitational relationships can be regarded as analogous to marriage/civil partnership for the purposes of particular benefits has proved a vexed question. In AL (Serbia) Lady Hale suggested that unless there are very obvious relevant differences between the two situations that it was better to concentrate on the reasons for difference in treatment and whether they amount to an objective and reasonable justification (see para[11 above). Whether there exist in

a given case "very obvious differences" between the two situations is scheme and context sensitive. Much will depend on the overall context including the purpose of the benefit in question. Relationships, whatever their legal make up, vary widely from couple to couple. The extent to which relationships can be considered to be comparable for the purposes of imposing some burden or granting some benefit must depend on some relevant facet of the relationships to be compared. The facet that is relevant must depend on the purpose of the burden or benefit to be imposed. Relevant facets for example might be whether or not the comparators have children, whether or not the comparators have entered into a public contract, or the duration and stability of the relationships to be compared.

[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.

Article 8

[64] The applicant's personal autonomy, as protected by Art 8, is not infringed by the impugned decision. The applicant exercised her personal autonomy in choosing not to marry her partner and, during his lifetime, it would have been an infringement of Art 8 to impose upon the couple the obligations of a contract that they had not entered into. After death it cannot be the case that the applicant can now renege on her previous decision.

[65] Insofar as the applicant claims an entitlement to the benefits based on Art 8 I am following the decisions in Petrovic v Austria (27 March 1998) and Serife Yigit which decided that Art 8 does not impose any obligation on the state to provide the financial assistance sought.

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.

Justification

[69] Where the sole beneficiary of the benefit claimed is the partner of the deceased, the justification arguments outlined by the respondent are accepted. Those arguments are, briefly, that the different treatment is justified as it pursues legitimate aims including the promotion of the institutions of marriage and civil partnership and the maintenance of an efficient social security benefits system.

[70] However, where the benefit is granted due to parentage and co-raising of the children, the refusal of the benefit is not justified on these grounds. This is because the responsibilities of one parent in relation to their children after the death of their partner do not arise from and are not necessarily connected to the public contract that they made at the time of marriage/civil partnership. Parents are under the same or similar financial obligations regarding the maintenance of their children irrespective of whether they are married, in a civil partnership or cohabiting.

[71] The complete exclusion of the applicant on the grounds of her marital status from a benefit whose purpose is to alleviate the financial burden on a family resulting from the death of a parent cannot be justified. The rationale for the benefit applied equally to persons in the applicant's position as it does to married widows with children. The purpose of the benefit was to diminish the financial hardship on families consequent upon the death of one of the parents.

[72] Even allowing for the State's margin of appreciation I do not consider that the exclusion of the applicant from Widowed Parent's Allowance on the grounds of her marital status can be justified. Indeed, it may seem somewhat strange to rely, as a justification for the restriction, on the contention that it promotes the institution of marriage and civil partnership when parents, whatever the status of the relationship, owe the same or similar financial or legal duties towards their children. The restriction appears to be inimical to the interests of children.

[72] Further as in PM and Sahin the focus should be upon the survivors nexus with the child of the partner. Were it otherwise it might be said that the birth status of the children would result in them being treated less favourably.

[73] In light of the foregoing I hold that the impugned restriction is a violation of Art 8 when read with Art 14 of the Convention in that it unjustifiably discriminates against the applicant on the grounds of her marital status.