Neutral Citation Number: [2017] EWCA Civ 1916

Case No: B3/2016/3774

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Edis
[2016] EWHC 2208 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2017

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE McCOMBE
and
SIR PATRICK ELIAS
(sitting as a Judge of the CoA Civil Division)

- -

Between :

JACQUELINE SMITH (suing in her own right and as the surviving partner of JOHN BULLOCH, deceased)	**Appellant**
- and -	
LANCASHIRE TEACHING HOSPITALS NHS FOUNDATION TRUST (1)	
-and-	
LANCASHIRE CARE NHS FOUNDATION TRUST (2)	
-and-	
THE SECRETARY OF STATE FOR JUSTICE (3)	**Respondents**

- -
- -

Vikram Sachdeva QC, **Stephen McNamara** and **Catherine Dobson** (instructed by **Slater and Gordon**) for the **Appellant**
David Blundell (instructed by **the Government Legal Department**) for the **Third Respondent**
The **First** and **Second Respondents** did not appear and were not represented

Hearing date : 7 November 2017

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Judgment Approved

Sir Terence Etherton MR :

1. The issues on this appeal are whether (1) the provisions concerning the right to bereavement damages under section 1A of the Fatal Accidents Act 1976 ("the FAA") are to be interpreted as extending to a person who was living with the deceased in the same household for at least two years before the death as husband or wife or civil partner ("a 2 years + cohabitee") because they would otherwise be incompatible with Article 14 of the European Convention on Human Rights ("the Convention"), taken in conjunction with Article 8 of the Convention; and (2), if they cannot be so interpreted, the court (a) should declare them to be incompatible, and (b) the Secretary of State for Justice should pay damages to the appellant under the Human Rights Act 1998 ("the HRA") equal to what would have been the bereavement award at the date of death.

2. The appeal is from the order of Edis J entered on 8 September 2016 dismissing the claim of the appellant, Jacqueline Ann Smith ("Ms Smith"), for a declaration that section 1A of the FAA should be so interpreted or for a declaration that it is incompatible with her rights under Article 8 of the Convention or under Article 14 read in conjunction with Article 8.

The legislative context

3. Section 1 of the FAA requires a tortfeasor who has caused death to pay damages for the benefit of "dependants" of the deceased. As amended, section 1 defines "dependant" to include, in addition to a spouse or former spouse and a civil partner or former civil partner of the deceased, a 2 years + cohabitee. Section 1A of the FAA also requires the tortfeasor to pay bereavement damages to the spouse or civil partner of the deceased and various other persons, but not including a 2 years + cohabitee. The introduction of bereavement damages into the FAA was made by the Administration of Justice Act 1982 ("the 1982 Act"). The 1982 Act also extended the definition of "dependant", for the purposes of dependency damages, to include a 2 years + cohabitee. The resulting distinction between a dependency claim and a claim to bereavement damages in that respect was not discussed in Parliament at all during the passage of what became the 1982 Act. There is no evidential material which explains the reason for the distinction.

The factual background and the proceedings

4. Ms Smith and Mr John Bulloch lived in the same household as man and wife between March 2000 and the date of Mr Bulloch's death on 12 October 2011. They never married. It is accepted that their relationship was equal in every respect to a marriage in terms of love, loyalty and commitment.

5. Mr Bulloch died as a result of the admitted negligence of the first and second defendants, Lancashire Teaching Hospitals NHS Foundation Trust and Lancashire Care NHS Foundation Trust ("the NHS Trusts").

6. Ms Smith, as a 2 years + cohabitee, brought proceedings against the NHS Trusts for dependency damages under section 1 of the FAA. That claim was compromised and the NHS Trusts have subsequently played no further part in the proceedings.

7. Ms Smith did not make a claim against the NHS Trusts for bereavement damages under section 1A of the FAA. The Secretary of State for Justice was joined as the third defendant so that the claim for bereavement damages could be pursued. The amended Particulars of Claim state that no claim for such damages was made against the NHS Trusts because, unlike the provisions for dependency damages under section 1 of the FAA, the express terms of section 1A(2)(a) of the FAA do not extend to 2 years + cohabitees.

8. The amended Particulars of Claim assert that a literal reading of section 1A(2)(a) of the FAA is incompatible with Article 8 of the Convention, alternatively Article 8 read with Article 14 of the Convention. The Particulars of Claim claim by way of relief: (1) either (a) a Convention-compliant reading of the section permitting claims for bereavement damages for 2 years + cohabitees, or (b) a declaration pursuant to section 4 of the HRA that section 1A(2)(a) of the FAA is incompatible with the Convention, and (2) damages of £11,800 pursuant to section 8 of the HRA, that being the statutory amount of bereavement damages applicable at the date of the deceased's death (when the cause of action accrued).

The legislation

9. The legislative history of sections 1 and 1A of the FAA is examined in detail in paragraphs [11] to [27] of the Judge's judgment. It is not necessary to set it out again here.

10. As amended the FAA provides as follows (so far as relevant):

> "**1. — Right of action for wrongful act causing death.**
>
> (1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.
>
> (2) Subject to section 1A(2) below, every such action shall be for the benefit of the dependants of the person ("the deceased") whose death has been so caused.
>
> (3) In this Act *"dependant"* means—
>
> (a) the wife or husband or former wife or husband of the deceased;
>
> (aa) the civil partner or former civil partner of the deceased;
>
> (b) any person who—
>
> (i) was living with the deceased in the same household immediately before the date of the death; and

(ii) had been living with the deceased in the same household for at least two years before that date; and

(iii) was living during the whole of that period as the husband or wife or civil partner of the deceased;

(c) any parent or other ascendant of the deceased;

(d) any person who was treated by the deceased as his parent;

(e) any child or other descendant of the deceased;

(f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;

(fa) any person (not being a child of the deceased) who, in the case of any civil partnership in which the deceased was at any time a civil partner, was treated by the deceased as a child of the family in relation to that civil partnership;

(g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

(4) The reference to the former wife or husband of the deceased in subsection (3)(a) above includes a reference to a person whose marriage to the deceased has been annulled or declared void as well as a person whose marriage to the deceased has been dissolved.

(4A) The reference to the former civil partner of the deceased in subsection (3)(aa) above includes a reference to a person whose civil partnership with the deceased has been annulled as well as a person whose civil partnership with the deceased has been dissolved.

(5) …

(6) Any reference in this Act to injury includes any disease and any impairment of a person's physical or mental condition.

1A. — Bereavement.

(1) An action under this Act may consist of or include a claim for damages for bereavement.

(2) A claim for damages for bereavement shall only be for the benefit—

(a) of the wife or husband or civil partner of the deceased; and

(b) where the deceased was a minor who was never married or a civil partner —

(i) of his parents, if he was legitimate; and

(ii) of his mother, if he was illegitimate.

(3) Subject to subsection (5) below, the sum to be awarded as damages under this section shall be £12,980.

(4) Where there is a claim for damages under this section for the benefit of both the parents of the deceased, the sum awarded shall be divided equally between them (subject to any deduction falling to be made in respect of costs not recovered from the defendant).

(5) The Lord Chancellor may by order made by statutory instrument … amend this section by varying the sum for the time being specified in subsection (3) above."

11. The figure of £12,980 is the current amount of bereavement damages. As I have said earlier, the amount at the time of Mr Bulloch's death was £11,800.

The HRA

12. The HRA contains the following relevant provisions.

"**3.— Interpretation of legislation.**

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) …

4.— Declaration of incompatibility.

(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 puisne judge of the High Court.
>
> (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."

The Convention

13. Article 8 and Article 14 are as follows:

> "Article 8 Right to respect for private and family life
>
> 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 wellbeing 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 Prohibition of discrimination
>
> 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."

The Judge's judgment

14. The claim against the Secretary of State was heard by the Judge on 27 and 28 July 2016. He handed down a careful, detailed and extensive judgment on 8 September 2016, in which he dismissed the claim. The following is a summary of his reasoning.

15. Having described the claim, set out the issues, the relevant provisions of the legislation, the Convention and the HRA, the facts and the legislative history, and considered social attitudes and conditions in the UK in 2016, the Judge examined in some detail the judgments in *Swift v. Secretary of State for Justice* [2012] EWHC 2000 (QB), [2012] PIQR P21 (Eady J) and [2013] EWCA Civ 193, [2014] QB 373 (CA) ("*Swift*") and the judgment of Andews J in *R (Steinfeld and Keidan) v. Secretary of State for Education* [2016] EWHC 128 (Admin) ("*Steinfeld*").

16. The Judge summarised (at [56] and [57]) the Secretary of State's defence and submissions as follows: (1) bereavement damages are not within Article 8; (2) even if Ms Smith's Article 8 rights are engaged, the limitation which precludes Ms Smith from recovering such damages does not interfere with those rights; (3) if it is an interference with those rights, it is justified; (4) the limitation is not within the ambit of Article 8, so as to engage Article 14; (5) if it is within the ambit of Article 8, it does not amount to unlawful discrimination within Article 14 because (a) Ms Smith lacks status for the purposes of Article 14, (b) Ms Smith is not in an analogous position to a widow, and (c) any difference in treatment is justified.

17. On the engagement of Article 8, the Judge said (at [74]) that Ms Smith's case plainly involves a claim that Article 8 imposes a positive obligation to extend bereavement damages to 2 years + cohabitees and so a cautious approach was applicable. The Judge rejected the submission of a direct engagement of Article 8 for the reasons set out in paragraphs [75] and [76] as follows:

> "75. If the Claimant's case involves a positive obligation then in my judgment it does not directly engage art.8 because there is no direct and immediate link between the measures sought by an applicant and her private or family life and no special link between the situation complained of and the particular needs of her private or family life. If there were, then the state would be required to enact a provision such as s.1A of the FAA and it is not alleged that this is the case. It has not been argued that, but for the enactment of s.1A, the UK is in breach of art.8. This is a measure which the state could choose to enact, or not, without consideration of the direct engagement of art.8. The question therefore is whether the measure is within the ambit of art.8.
>
> 76. I accept that the mere fact that the family life which is to be respected had come to an end by death does not mean that art.8 (or its ambit) is not engaged. The cases cited at [54(iii)] above

> and relied on by the claimant establish that proposition. It would however stretch the basis of those cases to extend them to hold that the bereavement damages are paid for a purpose either directly within art.8 or even within its ambit…"

18. The cases cited at paragraph [54(iii)] of the Judge's judgment included *Pannullo and Forte v. France* [2001] ECHR 741 (2003) 36 EHRR 42, *Ploski v. Poland* [2002] ECHR 735 ("*Ploski*"), *Znamenskaya v. Russia* (2007) 44 EHRR 15, *Yigit v. Turkey* (2011) 53 EHRR 25 and *V v. Associated Newspapers and others* [2016] EWCOP 21, all of which he distinguished.

19. Before turning to the question whether the bereavement damages regime under the FAA falls within the ambit of Article 8, so as to engage Article 14, the Judge addressed the nature of bereavement damages. He said (at [79]) that the award of such damages is compensation for a loss not otherwise available at common law, namely grief. He said:

> "… It is not an award intended to mark society's respect for the relationship which the tortfeasor has destroyed but to require the tortfeasor to compensate the individual for its loss. It is a personal payment to the individual to compensate for loss and not a payment designed to promote any continuing family life. It is not related to private life at all."

20. The Judge elaborated that point (at [80]), as follows:

> "The payment is not a mark by society of the value of the broken relationship, but is a payment required of a party who has caused a death through negligence or breach of an actionable statutory duty. It is part of the compensation payment for that fault. The state (as such) does not make any payment to anyone to compensate for the grief caused by the death of a partner."

21. Turning to the legal test of "ambit", the Judge said that the key principles are to be derived from *M v. Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 ("*M*"), *R (on the application of Clift) v. Secretary of State for Work and Pensions* [2006] UKHL 54, [2007] 1 AC 484 ("*Clift*") and *Mathieson v. Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250 ("*Mathieson*"). Having examined relevant parts of those cases, the Judge concluded (at [92]) that the law on ambit for Article 8 purposes is that stated by Lord Bingham in *Clift* at [13], who held as follows:

> "Plainly, expressions such as "ambit", "scope" and "linked" used in the Strasbourg cases are not precise and exact in their meaning. They denote a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a right is infringed. This calls, as Lord Nicholls said in *M*, at para 14, for a value judgment. The court is required to consider, in respect of the Convention

> right relied on, what value that substantive right exists to protect."

22. In paragraphs [93] and [94] of his judgment the Judge gave the reasons for his conclusion (stated at [95]) that the claim in the present case does not fall within the ambit of Article 8. In paragraph [93] he said that the link with Article 8 "must be real rather than tenuous, and the suggested infringement sufficiently serious". He continued:

> " … if a measure does not engage art.8 it will often fall outside its ambit for the same reasons. In my judgment this is the case here. … The claimant expressly submits that the case is not about money but about recognition of her relationship. That being so, once I have concluded that the bereavement damages regime does not indicate any disapproval by the state of the way that she and the deceased chose to live, the complaint does not achieve the level of serious impact required to put it within the ambit of art.8. Alternatively, the absence of a right to compensation for her grief from the [NHS Trusts] is only tenuously linked to respect for the family life which she enjoyed with the deceased and not linked at all to her private life."

23. In paragraph [94] the Judge referred to the fourfold test for justification reproduced in paragraph [33] of Baroness Hale's speech in *R (Tigere) v. Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820, where she set out the four issues as follows:

> "(i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?"

24. The Judge said, with reference to that test, that:

> "the presumption appears to be that whether Convention rights are directly engaged or whether the infringement is of a right which is within the ambit of an Article of the Convention, the right will be of fundamental importance. The "fair balance" test involves measuring the interests of the community against the rights of the individual and appears to me to assume that either a Convention right will be directly engaged or that something so closely connected with such a right will be involved that it should be accorded the same degree of protection." [emphasis in the original]

25. Having concluded (at [95]) that for those reasons the claim in the present case does not engage or fall within the ambit of Article 8, and that the claim must therefore be dismissed, the Judge nevertheless went on to deal with the other defences raised by the Secretary of State in case the matter went on appeal.

26. Having referred to *R (on the application of RJM) v. Secretary of State for Work and Pensions* [2008] UKHL63, [20009] 1 AC 311, and *Mathieson* and *Clift*, the Judge concluded (at [101]) that it was clearly established by decisions binding on him that Ms Smith does have "other status" for the purposes of Article 14.

27. The Judge then turned to the question whether Ms Smith is in an analogous position to a widow for the purposes of the bereavement damages scheme in section 1A of the FAA. Having referred (at [103]) to the distinction drawn between those who are married and those who are not in several Strasbourg cases relied upon by the Secretary of State and to two cases decided in the Court of Appeal (Criminal Division) and commentary on them in the Criminal Law Review, the Judge concluded (at [104]) that Ms Smith is clearly in an analogous position to the survivor of a civil partnership or marriage. He said, as follows:

> "This really follows from my finding on "other status". That status is not simply being unmarried, because that would not necessarily imply the existence of a relationship. The point is that she had an "other status" because she was an unmarried person living with a partner in a relationship closely analogous to marriage. I accept the force of the cases cited by the Secretary of State listed at [103] above which show that the ECtHR accepts that marriage has a special status, and that those who are not married may not be in the same position as those who are. However, these do not say that a married person is not in an analogous position to an unmarried person living with another as man and wife. They say that the position is different and may justify different treatment. … The situations are sufficiently similar to require discrimination to be justified if any rights within the ambit of art.8 are infringed by it. That is not a high threshold of similarity, and some differences are permitted between comparable positions which may remain analogous."

28. The Judge then addressed the question whether, if he was wrong about the engagement of Articles 8 and 14, the Secretary of State had established that the difference in treatment between Ms Smith and a widow in her position is justified applying the four-fold justification test described by Baroness Hale in *Tigere*. In that connection, he referred to the earlier paragraphs [30]–[34] in his judgment, in which he had explained the Secretary of State's position as he understood it.

29. At paragraph [30] he had pointed out that the Secretary of State had not sought to explain in evidence her opposition to the present claim. She had not said what policy considerations had caused her opposition. She had merely argued that the grant of either of the declarations sought would involve an error of law. In submissions on her behalf before the Judge, it was said that a function of the existing law is to express support for the institution of marriage.

30. At paragraph [30] the Judge had also observed (as pointed out above) that the reason for a distinction between dependency damages and bereavement damages, as regards 2 years + cohabitees, was not explained in Parliament in 1982 and has never been justified by anyone since then, so far as is shown in the material before the court.

31. At paragraph [32] the Judge had said that the difficulty in identifying any policy reason for denying bereavement damages to 2 years + cohabitees is further indicated by the Criminal Injuries Compensation Scheme ("the CICS"). The CICS requires the State to make payments after death or injury has been caused by the criminal (and almost invariably tortious) acts of third parties. The 1996 tariff scheme introduced a standard award in fatal cases for any qualifying relative which was £10,000 if there was one claimant or £5,000 each if more than one. The class of qualifying relatives included persons "living with the deceased as husband and wife in the same household immediately before the date of death and who, if not formally married to him, had been so living for two years before that date." The term "bereavement payments" to describe this standard award was introduced in the 2012 tariff scheme. The Judge said that one consequence of the absence of evidence from the Secretary of State was that he did not know what social policy requires the 2012 CICS to exist in this form, while section 1A of the FAA continues to exclude 2 years + cohabitees.

32. The Judge had observed in paragraph [33] that the Ministry of Justice Response to Consultation on the Law of Damages, of 1 July 2009 CP(R)9/07, recorded the fact that almost all respondents to the consultation, including the Association of British Insurers, supported the extension of bereavement damages under section 1A of the FAA to 2 years + cohabitees.

33. The Judge concluded (at [109]) that, having regard to those matters, the Secretary of State had failed to establish justification. He said as follows:

> "109. … I have explained her position as I understand it at [30]-[34] above. I described it at [34] as having a "degree of incoherence". Why should a parent be able to recover for the loss of a child, but not the other way round? Is their love not equal, or anyway of equal value? If 2 years + of cohabitation is a "bright line" rule adequate for s.1, why not for s.1A? If it is important to any degree to ensure that 2 year + cohabitees do not recover bereavement damages from tortfeasors, why does the Secretary of State preside over the 2012 Criminal Injuries Compensation Scheme whereby damages of the same kind are paid out of public funds after a death caused by a crime?
>
> 110. Why, in any event, does it serve any public interest to refuse to require insurers to make payments which, according to the Association of British Insurers response to the 2009 consultation, they are willing to make? If some such public interest can be found, what is the fair balance between it and the (assumed) rights of the 2 year + cohabitees to receive such payments?
>
> 111. I am unable to identify any legitimate aim which would justify the limitation of the availability of bereavement

> damages if the law required such a justification. It is therefore extremely difficult to apply the last three stages of the test which all assume that the aim of the provision under consideration can be identified. I do not consider that the provision supports the institution of marriage in any material way. The benefit is paid only after the marriage had been ended by death. It surely is fanciful to believe that couples may weigh in the balance when deciding how they wish to live the availability of bereavement damages should one of them die as a result of the actionable fault of someone who is good for the money or insured. In the modern United Kingdom such deaths are rare and not at the top of the list of factors to be considered when deciding whether to marry or not. A life insurance policy against such a risk with a benefit of £11,800 would cost next to nothing and would be the rational response to any worry of this kind, rather than marrying when otherwise that would not be the chosen course. If the support of marriage is the aim of the provision, why is it undermined by s.1 which makes dependency damages, which are much larger, available to those who have not married? …"

34. At paragraph [112] he said that he agreed with the Law Commission, which had recommended in its 1999 Report "Claims for Wrongful Death" (No. 263) that 2 years + cohabitees should be entitled to an award of bereavement damages, and with a predecessor of the Secretary of State who had published a draft Civil Law Reform Bill in December 2009 (Cm. 7773) (not subsequently proceeded with by the government) which would have given effect to that recommendation, that the current law is in need of reform.

35. Finally, the Judge addressed the issue of remedies had he found that section 1A of the FAA violated Ms Smith's Article 8 rights. He said (at [113]) that he would have made a declaration of incompatibility because, even having regard to the wide powers to "read down" an offending provision, he would not have been able to do so in view of the clear provisions in section 1A, subsequent consideration of them by Parliament, and the need for Parliament to consider (if cohabitees were included in the right to bereavement damages) how an award would be divided where there is a qualifying cohabitee and a spouse and also children.

The appeal

36. Permission to appeal was granted by Floyd LJ in light of the decision of the Court of Appeal in *Steinfeld*, which was handed down on 21 February 2017, and which considered the "ambit" test for the purposes of Article 14.

37. Ms Smith does not appeal the decision of the Judge that there has been no direct infringement of Article 8.

38. The heart of the appeal is that the Judge was wrong to hold that the scheme for bereavement damages under section 1A of the FAA, and specifically its failure to extend such damages to 2 years + cohabitees, does not fall within the ambit of Article 8 for the purposes of Article 14. It is said that the test which the Judge ought to have

applied, but failed correctly to apply, is whether the link with the rights protected by Article 8 is "more than tenuous"; and, were that test to be applied correctly, the link between the right claimed by Ms Smith and the rights protected by Article 8 is established.

39. On that footing, Ms Smith says that the Judge ought, pursuant to section 3 of the HRA, to have interpreted section 1A(2)(a) in such a way as to extend the right to bereavement damages to 2 years + cohabitees; or, if that cannot be done, the court should make a declaration of incompatibility pursuant to section 4 of the HRA and award Ms Smith damages of £11,800 pursuant to section 8 of the HRA (that being the amount which she would have received had she qualified for bereavement damages).

40. For his part, the Secretary of State does not challenge on this appeal the conclusions of the Judge on Ms Smith's status and on the absence of justification. The Secretary of State has, however, issued a respondent's notice seeking to uphold the Judge's judgment that Ms Smith's situation does not fall within the ambit of Article 8, on the different and additional ground that (contrary to the view of the Judge) Ms Smith is not in an analogous position to the survivor of a civil partnership or marriage.

Discussion and conclusions

The ambit test

41. It is well established and common ground that, in order to bring herself within Article 14, Ms Smith does not have to show that the State has infringed her rights under Article 8, but only that her complaint falls within the "ambit" of Article 8.

42. It is also well established and common ground that, even where the State is under no obligation to provide a particular measure in order to comply with its obligations under Article 8, if it does provide a particular measure which does fall within the ambit of Article 8, it must provide the measure without discrimination in compliance with Article 14. There are numerous Strasbourg authorities to that effect, in which the positive measure is described as a "modality" of the right conferred by the substantive provision of the Convention. The position was described in the following way in *Petrovic v Austria* (2001) 33 EHRR 14, in which the applicant complained that the refusal of the Austrian authorities to grant him parental leave allowance, on the ground that the allowance was only available to mothers, amounted to discrimination against him on grounds of sex in violation of Article 14, taken together with Article 8:

> "22. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.
>
> 23. The applicant submitted that any financial assistance enabling parents to stop working in order to look after their

> children affected family life and therefore came within the scope of Article 8 of the Convention.
>
> 24. The Government argued that, on the contrary, the parental leave allowance did not come within the scope of Article 8 since, firstly, that provision did not contain any general obligation to provide financial assistance to parents so that one of them could stay at home to look after their children and, secondly, the parental leave allowance was a matter of welfare policy which was not to be included within the concept of family life.
>
> 25. The Court therefore has to determine whether the facts of the present case come within the scope of Article 8 and, consequently, of Article 14 of the Convention.
>
> 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.
>
> 27. Nonetheless, this allowance paid by the State is intended to promote family life and necessarily affects the way in which the latter is organised as, in conjunction with parental leave, it enables one of the parents to stay at home to look after the children.
>
> 28. The Court has said on many occasions that Article 14 comes into play whenever "the subject-matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed" …
>
> 29. By granting parental leave allowance States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the allowance therefore comes within the scope of that provision. It follows that Article 14 – taken together with Article 8 – is applicable."

43. To the same effect, see in the domestic jurisprudence Lord Nicholls in *M* at [16] and Lord Wilson in *Mathieson* at [17].

44. As I have mentioned earlier, the Judge concluded that the ambit test was as set out by Lord Bingham in paragraph [13] of *Clift* where he purported to "distil the essence of the relevant principles" from the several speeches of the appellate committee of the House of Lords in *M*. Lord Bingham said that:

> "expressions such as "ambit", "scope" and "linked" used in the Strasbourg cases … denote a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a right is infringed."

45. That language is problematic in its reference to "the core of … a right" and to infringement. It is noteworthy that the approach described by Lord Bingham in paragraph [4] of *M* is different in significant respects. He said the following there:

> "4 It is not difficult, when considering any provision of the Convention, including article 8 and article 1 of the First Protocol …, to identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not. There is no sharp line of demarcation between the two. An exercise of judgment is called for … I cannot accept that even a tenuous link is enough. That would be a recipe for artificiality and legalistic ingenuity of an unacceptable kind."

46. I agree with Mr Vikram Sachdeva QC, for Ms Smith, that Lord Bingham's reference to a "core value" (in paragraph [4] of *M*) is more apposite than his reference to "the core of … a right" (in paragraph [13] of *Clift*) when considering whether the facts fall within the ambit of one of the substantive Convention provisions, for the purposes of Article 14. Infringement of the "core of a right" is more appropriate language in connection with an infringement of one of the provisions of the Convention conferring a substantive right rather than a positive modality which engages Article 14 because it is discriminatory. As Arden LJ said in *Steinfeld* at paragraph [61], in Strasbourg jurisprudence the core or very essence of a right represents the limits of the State's power to qualify or justify a departure from a right.

47. In a similar vein, I agree with Mr Sachdeva that, even though the expressions "ambit" and "scope" are frequently used as synonymous in many of the Strasbourg and domestic authorities, references to "scope" as an alternative to "ambit" are problematic and best avoided in the context of the ambit test for Article 14 purposes. Reference to the "scope" of a Convention right, like reference to "the core" of "a right", is more appropriate when considering the engagement and infringement of one of the Convention provisions conferring substantive rights but is apt to mislead in the context of a breach of Article 14 when read in conjunction with such a provision.

48. I also agree with Mr Sachdeva that the only sure common thread running through the various descriptions of the ambit test, for the purposes of Article 14, in the several speeches in *M* is that the connection or link between the facts and the provisions of the Convention conferring substantive rights must be more than merely tenuous.

49. The way in which Lord Bingham's language in *Clift* should be understood and the proper approach to the ambit test, for the purposes of Article 14, have now been explained by the Court of Appeal in *Steinfeld*, which is binding on us. As I have said, the Judge did not have the benefit of seeing the Court of Appeal's judgments, which were handed down subsequent to his decision. *Steinfeld* is being appealed to the Supreme Court but, as matters stand at the moment, the description of the ambit test by the Court of Appeal in *Steinfeld* is not being challenged.

50. In *Steinfeld* the claimants, an opposite-sex couple, issued proceedings for judicial review of the continuing decision of the Secretary of State not to put forward changes to the Civil Partnerships Act 2004 ("the 2004 Act") to enable opposite-sex couples to enter into civil partnerships. They claimed that the bar on opposite-sex couples entering into a civil partnership by virtue of section 3(1)(a) of the 2004 Act was incompatible with Article 14 read together with Article 8. Andrews J had refused the application for judicial review. She held that the bar did not fall within the scope or ambit of the limb of Article 8 relating to respect for family life because the claimants could marry and so enter into a legal relationship recognised by the State with all the rights, benefits and protections that follow from such recognition. She also held that any interference with the claimants' private life was even more tenuous as there was no evidence that they were subjected to humiliation, derogatory treatment or any other lack of respect for their private lives. Andrews J further held that, even if she was wrong about the ambit of Article 8, the Secretary of State was justified under Article 14 in maintaining the bar until more years' data was available on the formation and dissolution of civil partnerships. Such a "wait and see" policy did not disadvantage the claimants but it did avoid unnecessary disruption and wastage of resources and there was no consensus, either domestically or within the Convention States, as to the appropriate course to take.

51. The appeal to the Court of Appeal was dismissed by Beatson and Briggs LJJ, with Arden LJ dissenting in the result. All three judges agreed that the 2004 Act fell within the ambit of Article 8, for the purposes of Article 14, and that there was discrimination against opposite-sex couples. They disagreed, however, on the issue of justification, the majority taking the view that the Secretary of State was justified in taking time to evaluate the impact of the Marriage (Same Sex Couples) Act 2013 Act on civil partnerships before taking any further legislative steps to eliminate the difference of treatment between same-sex couples and opposite-sex couples.

52. The Court of Appeal rejected the submission of the Secretary of State that the effect of *M* and *Clift* was that the "ambit" requirement is not met unless the measure infringed (in a discriminatory way) some right or interest of the complainant which was close to the core values of the substantive right in question and the infringement had an adverse impact. That submission was said to follow from the references in *M* and *Clift* to "impairment", "intrusion" and "infringement", in particular in paragraph [13] of Lord Bingham's speech in *Clift*. Beatson LJ explained as follows:

> "149. There was no consensus in *M v Secretary of State for Work and Pensions* as to the approach to be taken to the "ambit" question. But in my judgment the fundamental explanation for the approach to "ambit" in *Clift's* case and *M v Secretary of State for Work and Pensions* is that, at the time of those decisions the European Court of Human Rights did not regard same-sex relationships as "family life". The judge (at [30]) considered that in *M's* case only Lord Mance (at [127]) regarded that to be the key factor. In fact, Lord Nicholls, a member of the majority and Baroness Hale, in her dissenting judgment, also considered that if the State chooses to legislate in support of or to promote family life that measure falls within the ambit of art.8: see Lord Nicholls at [27] and Baroness Hale

> at [109]-[110]. It is therefore only Lord Bingham and Lord Walker whose conclusions did not depend on same-sex relationships not at that time being recognised as family life.
>
> 150. It is true that Lord Bingham's language in *Clift's* case reflects the *ratio* in that case but, in my judgment, the language of impairment, intrusion and infringement were used to show how closely related to the values protected by art.8 a measure has to be in the context of a substantive breach of art.8 and whether the matter is sufficiently close to the core values protected by art.8. If there is only a tenuous link to those core values that does not suffice. But in this case the measures in the 2004 and 2013 Acts are undoubtedly related to the core values of private and family life as shown by the Strasbourg jurisprudence which I have discussed. Accordingly, I do not consider that the domestic authorities can be regarded as requiring an additional requirement of concrete adverse impact other than deprivation of one of the means by which the State makes provision to recognise and protect those core values."

53. Briggs LJ, giving a concurring judgment, did not disagree with Beatson LJ's analysis.

54. Arden LJ, commenting on what Lord Bingham had said in *M,* drew the distinction between negative and positive obligations under Article 8. Her analysis was that Lord Bingham's requirement of an adverse impact is relevant only to negative obligations and that, in the case of positive obligations, the issue is whether the link to the core values is too tenuous. She said as follows:

> "66. In my judgment, in [4] and [5] of his speech …, Lord Bingham was dealing only with the negative obligation in art.8 to desist from any lack of respect for family or private life. He identified certain core values falling within art.8 … He held that the further a situation was removed from "infringing" those core values, the weaker the connection becomes until a point is reached when there is no meaningful connection with art.8 at all. In *M*, there was no impairment with family life or the core values which were the essence of family life.
>
> 67 In my judgment, that is why Lord Bingham only required there to be an adverse impact in the context of the negative obligations in art.8. On the case of positive obligations, the test is whether the link was too tenuous...
>
> 68 … In my judgement, the only test with which this Court needs to be concerned is this case is the test of link and whether the appellants' claim was too tenuous."

55. The legal position may, therefore, be summarised as follows in a case where, as here, the claim is that there has been an infringement of Article 14, in conjunction with Article 8. The claim is capable of falling within Article 14 even though there has been no infringement of Article 8. If the State has brought into existence a positive

measure which, even though not required by Article 8, is a modality of the exercise of the rights guaranteed by Article 8, the State will be in breach of Article 14 if the measure has more than a tenuous connection with the core values protected by Article 8 and is discriminatory and not justified. It is not necessary that the measure has any adverse impact on the complainant in a positive modality case other than the fact that the complainant is not entitled to the benefit of the positive measure in question.

56. It follows that, without having had the benefit of the analysis in *Steinfeld*, the Judge's approach in paragraphs [93] and [94] of his judgment was incorrect. First, it was incorrect to say that the bereavement damages scheme is not within the ambit of Article 8, so as to engage Article 14, unless the link is both real rather than tenuous "and the suggested infringement sufficiently serious". There is no additional requirement of a sufficiently serious infringement. Second, there is no authority for the proposition that "if a measure does not engage Article 8, it will often fall outside its ambit for the same reasons". There is no reason to suppose that is true in the case of a positive modality which the State has decided to introduce but which (like the bereavement damages in the present case) was never required by Article 8. Third, it follows that it was wrong for the Judge to hold that since "the bereavement damages regime does not indicate any disapproval by the State of the way that she and the deceased chose to live, the complaint does not achieve the level of serious impact required to put it within the ambit of Article 8". Fourth, it was incorrect to suggest that a requirement that "something so closely connected with [a Convention right] will be involved that it should be accorded the same degree of protection [as direct engagement of a Convention right]" is the same as the "not too tenuous" ambit test.

57. That, then, leaves as the only potentially legitimate ground for the Judge's decision his alternative ground that:

> "… the absence of a right to compensation for [the claimant's] grief from the [NHS Trusts] is only tenuously linked to respect for the family life which she enjoyed with the deceased and not linked at all to her private life."

58. I consider that the Judge, who did not have the benefit of seeing the Court of Appeal judgments in *Steinfeld*, was wrong to reach that conclusion. He must have either misunderstood the nature of the test or reached a conclusion which was not open to him on the facts.

59. The sole reason given by the Judge in paragraph [93] for his conclusion that the link is only tenuous is that it was "in line with the principles set out in" paragraphs [82] to [84] of Lord Walker's speech in *M*, which the Judge had set out in paragraph [53] of his judgment. It is not necessary to set out here those passages in Lord Walker's speech. It is sufficient to say that in paragraph [82] Lord Walker rejected a submission that, in considering a complaint under Article 14, any alleged act of discrimination is within the ambit of Article 8; in paragraph [83] he referred to a number of Strasbourg cases which showed "a more nuanced approach", reflecting the "unique feature" of Article 8 "that it is concerned with the failure to accord *respect*", and he stated that "Less serious interference would not merely have been a breach of Article 8; it would not have fallen within the ambit of the article at all"; and in paragraph [84] he said that "the cases in which Article 14 has been considered in conjunction with the family life limb of Article 8 were all (whichever way they were

decided) concerned with measures very closely connected with family life" and he cited a number of cases.

60. Those passages in Lord Walker's speech in *M* do not justify the Judge's conclusion that the link between the scheme for bereavement damages and Article 8 is too tenuous to satisfy the Article 14 ambit test. As a general point, it is to be noted that, having lost in the House of Lords on whether the facts fell within the ambit of Article 8 or Article 1 of the First Protocol to the Convention ("A1P1"), the claimant in *M* was successful in her subsequent appeal to the European Court of Human Rights ("ECrtHR") (see *JM v. United Kingdom* (2011) 53 EHRR 6) which held (at [46]) that the House of Lords had taken too narrow a view of the ambit of A1P1 for the purposes of Article 14 and that it was not necessary therefore to consider whether the facts also fell within the ambit of Article 8.

61. So far as concerns the specific passages in Lord Walker's speech in *M*, on which the Judge relied, I would make the following observations as to why the Judge was wrong to do so. In the first place, as was held by the Court of Appeal in *Steinfeld*, *M* and *Clift* have to be understood as authority for the "not tenuous" Article 14 ambit test in the case of a positive modality. There is no different or additional test which turns on the seriousness of an interference. Secondly, all the cases cited by Lord Walker in paragraph [83] of his speech are cases of negative breaches of Article 8, not positive modalities. Thirdly, insofar as Lord Walker was suggesting in paragraph [84] that a case can only fall within Article 14, in conjunction with the family life limb of Article 8, if the positive measures are "very closely connected with family life", that is neither part of the ratio of *M* nor consistent with Strasbourg authority.

62. On the contrary, the authorities have emphasised the width and flexibility of the ambit test: for example, *Zarb Adami v Malta* (2007) 44 EHRR 3 at O-17; *R (A) v. Secretary of State for Health* [2015] EWCA Civ 771, [2016] 1 WLR 331 at [31].

63. There are parts of the Judge's judgment outside paragraphs [93] and [94] which give some insight into the reasons for the Judge's conclusion that the absence of a right to bereavement compensation is only tenuously linked to respect for family life. In paragraph [79] the Judge said that the payment of bereavement damages:

> "… is not an award intended to mark society's respect for the relationship which the tortfeasor has destroyed but to require the tortfeasor to compensate the indivdual for its loss. It is a personal payment to the individual to compensate for loss and not a payment designed to promote any continuing family life. It is not related to private life at all."

64. He said in paragraph [80] that the logical consequence of Mr Sachdeva's argument was that bereavement damages should be available to all surviving partners whether their loss was caused by the fault of a third party or not.

65. In paragraph [81] the Judge said that he did not accept that denial of the award of bereavement damages implies that the grief felt by Ms Smith is less valued by the State than would have been the case had she been married.

66. In paragraph [111] the Judge said that he did not consider that the provision of bereavement damages supports the institution of marriage in any material way. He said that the benefit is paid only after the marriage has been ended by death, and it is fanciful to believe that couples may weigh in the balance the potential receipt of these damages when deciding how they wish to live.

67. Mr David Blundell, counsel for the Secretary of State, reinforced and supplemented those observations of the Judge with further submissions as to why the connection between the scheme for bereavement damages, and their unavailability for 2 years + cohabitees, is too tenuous to fall within the ambit of Article 8 in conjunction with Article 14. His overriding contention was that bereavement damages under section 1A of the FAA are not intended to promote family life, and are not related at all to private life, and are not one of the ways in which the State chooses to give effect to Article 8. He said that they are not one of the positive modalities of the exercise of Article 8 rights.

68. In support of that contention, he referred to various statements made by the Lord Chancellor, Lord Hailsham, and others in the House of Lords during the passage through Parliament of the 1982 Act, which amended the FAA by the insertion of section 1A. He particularly emphasised Lord Scarman's statement that a bereavement damages award is compensation for grief and not for loss of society; and that it amounts only to a recognition by the State that the fact of bereavement in the situation should qualify for some sympathetic recognition. It does not try to reflect and repair through a monetary award the true loss caused by the death, which would require an intrusive investigation of the precise nature of the relationship between the claimant and the deceased and the extent of the grief actually suffered.

69. Like the Judge, Mr Blundell emphasised that an award of bereavement damages is a fixed sum payable only after death, that is to say once the family relationship has come to an end, and so cannot be said in any meaningful way to promote family life: rather, he submitted, it is applicable in only a small category of cases and is symbolic.

70. Mr Blundell distinguished *Steinfeld* as a case concerned with the recognition of relationships, which, he said, the present case is not.

71. I do not accept that any of those points of the Judge or of Mr Blundell are valid grounds for the conclusion that the link between the scheme for bereavement damages under section 1A of the FAA and Article 8 is too tenuous for that scheme to be within the ambit of Article 8 for the purposes of Article 14.

72. The emphasis in both the Judge's judgment and the submissions of the Secretary of State on the "promotion" of family life, as distinct from promotion of "respect for … family life" as specified in Article 8, is misplaced. 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. It inevitably follows that the scheme for bereavement damages is properly regarded as a positive measure, or modality, by which the State has shown respect for family life, a core value of Article 8.

73. I do not understand the observation of the Judge, repeated in written submissions on behalf of the Secretary of State, that the logical consequence of Ms Smith's case is that bereavement damages should be available to all surviving partners whether their loss was caused by the fault of a third party or not. That might be relevant to justification for a discriminatory limitation, but it is not the issue on this appeal, which is concerned with the ambit of Article 8 in the context of the particular bereavement scheme in section 1A of the FAA. Nor do I understand why the Judge thought it relevant to consider whether or not the denial of the award of bereavement damages implies that the grief felt by Ms Smith is less valued by the State than would have been the case had she been married to the deceased. The State having provided the particular modality of the bereavement scheme in section 1A of the FAA, the only question is whether the State has unlawfully discriminated against persons in the position of Ms Smith contrary to Article 14. Adverse impact is irrelevant.

74. Neither the fact that bereavement damages are a limited fixed amount nor the fact that they are payable only after the death of the spouse or civil partner, and so do not promote an ongoing familial relationship, is inconsistent with the scheme being a State sponsored measure which promotes "respect for … family life" within the meaning of Article 8. There are several authorities where the treatment by state authorities of a surviving spouse or an individual following the death of the person with whom they lived as a couple has been held to be a breach of Article 8 rights or of Article 14 in conjunction with Article 8. *Aldeguer Tomas v Spain* (2017) 65 EHRR 224 and *Ploski* are examples.

75. *Aldeguer Tomas v Spain* concerned a claim by the applicant, who had cohabited with another man in a homosexual relationship for many years, for a pension under Spanish legislation as a surviving spouse following his partner's death. Spanish legislation expressly provided for a survivor's pension for spouses and the surviving partners of unmarried heterosexual couples who had been legally unable to marry. The ECrtHR held that the State, which had gone beyond its obligations under Article 8 in creating such a right, could not, in the application of that right, take discriminatory measures within the meaning of Article 14. Accordingly the facts fell within the ambit of Article 8, as promoting respect for family life, and Article 14 was applicable.

76. In *Ploski* the applicant was remanded in custody pending the determination of a charge of theft. During that time the applicant's mother and then his father died. Following each death, the applicant requested leave to attend the funeral. Each request was supported by a prison officer. Each request was refused by the court on the ground that he was an habitual offender. He was subsequently convicted of theft and was given a custodial sentence. The ECrtHR held that there had been a violation of Article 8. Although it was not in dispute that the refusal to allow the applicant to attend the funerals of his parents constituted an interference with his right to respect for his private and family life, the ECrtHR expressly stated (at paragraph 32) that it found no reason to reach a different conclusion on that point.

77. Nor is it significant that *Steinfeld* can be distinguished on its facts. *Steinfeld* is relevant, not because of its outcome, but because of the analysis of the ambit test, on which all three members of the Court of Appeal agreed.

78. The Judge appears to have placed considerable weight on a passage in paragraph [30] of the judgment of Lord Dyson MR in the Court of Appeal in *Swift v. Secretary of State for Justice* [2013] EWCA Civ 193, [2014] QB 373. The case concerned the question whether the claimant, who had lived with her partner for six months before his death due to the negligence of his employer, was entitled to a declaration that section 1(3)(b) of the FAA as amended was incompatible with her rights under Article 8 or under Article 14 in conjunction with Article 8 as she was unable to bring a claim for dependency damages since she had not been living with the deceased for 2 years prior to his death. Lord Dyson said (at [30]) that:

> "the Article 8 issues raised here do not affect an important or indeed any aspect of the claimant's identity or an intimate aspect of family or private life"

79. That case and the statement of Lord Dyson did not feature significantly in the submissions before us. I do not consider it is of any assistance in resolving the present appeal because it concerned the issue of dependency damages under section 1 of the FAA, and not bereavement damages under section 1A; and, moreover, the claimant's appeal was dismissed on the ground of objective justification, and it was in that context, rather than specifically the ambit test, that Lord Dyson made his comment in paragraph [30].

80. For all those reasons, I conclude that the current scheme for bereavement damages in section 1A of the FAA, with its exclusion of unmarried cohabitees like Ms Smith, falls within the ambit of Article 8. I do so on the ground of the link with the core value of respect for family life in Article 8.

81. As I understood Mr Sachdeva's submissions, Ms Smith advances an additional argument that the facts fall within the ambit of Article 8 because her autonomous decision not to marry was an important part of her private life, which the modality of the bereavement damages scheme does not respect. It is not necessary in the circumstances to address that alternative argument.

Analogous position

82. In *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 Baroness Hale, with whom Lord Steyn and Lord Rodger agreed, set out (at [133]) five questions which arise in an Article 14 enquiry. The third question was whether the complainant and others put forward for comparison were in an analogous situation.

83. No doubt in some cases this issue will be swept up within the issue of justification. As Baroness Hale said in *Ghaidan* (at [134]), there is a considerable overlap between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification; and a rigidly formulaic approach is to be avoided. In a similar vein, she suggested in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 (at [26]) 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. That approach supports the Judge's observation (at [104]) that "some

differences are permitted between comparable positions which may remain analogous".

84. In the present case the issue of "analogous position" was addressed separately in submissions to the Judge, in his judgment, and as a result of the respondent's notice, in the submissions before us.

85. Mr Blundell, on behalf of the Secretary of State, contended before the Judge, and has contended before us, that Ms Smith is not in an analogous position to a widow because it is a well-established and consistent feature of the Strasbourg case law that unmarried partners are not in an analogous position to married persons. The Judge rejected that argument. He was right to do so.

86. The Secretary of State places particular reliance on *Lindsay v. United Kingdom* (1987) 9 EHRR 203, *Shackell v. United Kingdom* (appn no. 45851/99, unreported, decision of 27 April 2000), *Burden v. United Kingdom* (2008) 47 EHRR 38 and *Van der Heijden v. The Netherlands* (2013) 57 EHRR 13. The distinction made in those authorities between spouses and civil or registered partners, on the one hand, and other couples, on the other hand, is well illustrated by the following statement of the ECrtHR in *Van der Heijden* at [69]:

> "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."

87. Mr Blundell also relied on the recent decisions of the High Court and then the Court of Appeal of Northern Ireland in *Re McLaughlin's Application for Judicial Review* [2016] NIQB 11 (Treacy J), [2016] NICA 53 (NICA), holding that, for the purposes of Article 14 in conjunction with Article 8, a cohabiting partner is not in an analogous position with that of a spouse or civil partner regarding bereavement benefit and widowed parents' allowance under Northern Ireland legislation. That case is currently on appeal to the Supreme Court.

88. Whether or not a co-habiting couple who are neither married nor civil partnered or the survivor of such a couple are in analogous position to spouses and civil partners for the purposes of Article 14 depends on the precise context in which the issues arises. That is obvious in view of the many cases, both Strasbourg and domestic, in which it has been held or agreed by the parties that unmarried couples are, in the particular context, in an analogous position to a married couple: for example, *Re G* [2008] UKHL 38, [2009] 1 AC 173 especially at [132]-[133], *Sahin v Germany* (2003) 36

EHRR 765, *PM v United Kingdom* (2006) 42 EHRR 45 and *Re Brewster* [2017] UKSC 8, [2017] 1 WLR 519.

89. It was clearly so held in *Ratcliffe v Secretary of State for Defence* [2009] EWCA Civ 39, [2009] ICR 762, in which the Court of Appeal decided that the claimant unmarried partner of a deceased Royal Navy officer was (subject to justification) in an analogous position to a spouse for the purposes of Article 14 in conjunction with A1P1 in the context of a war pension. As Hooper LJ said in his judgment, with which the other members of the court agreed:

> " … 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's* case 47 EHRR 857. 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 article 14 …"

90. I agree with the Judge that, in the context of bereavement damages under section 1A of the FAA, the situation of someone like Ms Smith, who was in a stable and long term relationship in every respect equal to a marriage in terms of love, loyalty and commitment, is sufficiently analogous to that of a surviving spouse or civil partner to require discrimination to be justified in order to avoid infringement of Article 14 in conjunction with Article 8. 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*, in which the ECrtHR 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.

91. In making that analogy, it is plainly material that Parliament has treated 2 years + cohabitees as being in a stable and long term relationship comparable to that of spouses and civil partners for the purposes of dependency damages, and that neither in Parliament nor in any evidence before the court has any member of the Government provided any justification for the different treatment of 2 years + cohabitees under section 1A. As the Judge said (at [34] and [109]), the Secretary of State's position has a degree of incoherence.

92. Those matters set the present case apart from the Northern Ireland case of *McLaughlin*.

93. Finally, on this aspect of the appeal it is relevant to note the decline in popularity of the institution of marriage and the increase in the number of cohabiting couples, as recorded by the Judge in paragraph [29] of his judgment. He pointed out that, in its report on "Families and Households" published in 2015, the Office of National Statistics found that the cohabiting couple continues to be the fastest growing family type in the UK, reaching 3.2 million cohabiting couple families. The number of cohabiting couple families grew by 29.7% between 2005 and 2015. Marriage (same and opposite sex) and civil partnership also increased but less sharply. In 1996 cohabiting couples comprised 9% of all families. In 2015 the proportion was 17%. These figures indicate that, for a significant and increasing proportion of the population of the United Kingdom, there is, in terms of social acceptance, no material difference between marriage and civil partnership, on the one hand, and living together as an unmarried and non-civil partnered couple, on the other hand.

Reading down/incompatibility

94. Ms Smith contends that, in order to make section 1A of the FAA compliant with the Convention, the court should declare, pursuant to section 3 of the HRA, that section 1A(2)(a) is to be interpreted as though it extends to 2 years + cohabitees.

95. The Judge did not accept that section 1AA can be interpreted in that way. I agree with him.

96. It is not in dispute that, in accordance with the guidance in the speeches of the majority in *Ghaidan*, a declaration of incompatibility under section 4 of the HRA is a last resort and should only be made when it is impossible to interpret the provision in question in such a way as to make it Convention compliant. It is also clear from *Ghaidan* and other cases that the interpretive power under section 3 is very wide and can require a court to read in words which change the meaning of the enacted legislation. The only limitations are that the court cannot adopt a meaning which goes against the grain of the legislation, that is to say which is inconsistent with a fundamental feature of the legislation, and the court cannot make decisions for which they are not equipped: *Ghaidan* at [33].

97. Both those limitations apply in the present case. The difference between section 1 and section 1A of the FAA as to the treatment of 2 years + cohabitees is clear, express and intentional and is an ingrained feature of the legislation.

98. Furthermore, as the Judge rightly observed, an extension of section 1A to 2 years + cohabitees would give rise to policy decisions which the court cannot make. It would be necessary to decide whether, where a deceased leaves a spouse or civil partner and a 2 years + cohabitee, each of them would be entitled to the statutory sum or they would share the sum or one of them would have priority over the other: cf. section 1A(4) where the deceased is a child who is survived by both parents.

99. A further policy issue that would arise would be as to the length of the qualifying period of cohabitation. On the facts of the present case, Ms Smith's period of cohabitation exceeded the two years mentioned in section 1. If, however, section 1A was to be looked at afresh in the light of Article 8 in conjunction with Article 14, Parliament might determine a different length of qualifying period on policy grounds.

100. For those reasons I consider that a declaration of incompatibility, in accordance with section 4 of the HRA, is the appropriate relief in the present case.

Damages

101. As I have said earlier, the claim form includes a claim for damages of £11,800 pursuant to section 8 of the HRA. That amount is equivalent to the statutory amount of bereavement damages applicable at the date of the deceased's death.

102. The Secretary of State has always maintained that damages are not recoverable under section 8 in the present case if the court makes a declaration of incompatibility. The reasoning of the Secretary of State is that damages under section 8 may only be made if the public authority has acted unlawfully. Section 6(1) of the HRA provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. That is qualified by section 6(2), which provides that subsection (1) does not apply to an act if, as the result of one or more provisions of primary legislation, the authority could not have acted differently.

103. At the hearing of the appeal, Mr Sachdeva, on behalf of Ms Smith, abandoned the claim to damages in the light of section 6 but reserved the right to attack the validity of section 6 in any subsequent proceedings before the ECrtHR.

Resolution of the appeal

104. For all those reasons, I would allow the appeal, dismiss the respondent's notice, set aside the order of the Judge and make a declaration of incompatibility with Article 14 in conjunction with Article 8 in respect of section 1A of the FAA in that it excludes 2 years + cohabitees.

Lord Justice McCombe :

105. I agree.

Sir Patrick Elias :

106. I also agree.