Case No: HQ16C01318

Neutral Citation Number: [2016] EWHC 2208 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/09/2016

Before:

MR JUSTICE EDIS

- -

Between:

JACQUELINE ANN SMITH	**Claimant**
- and -	
(1) LANCASHIRE TEACHING HOSPITALS NHS TRUST	
(2) LANCASHIRE CARE NHS FOUNDATION TRUST	
(3) THE SECRETARY OF STATE FOR JUSTICE	**Defendants**

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- -

Vikram Sachdeva QC, Stephen McNamara, and Catherine Dobson (instructed by **Slater & Gordon (UK) LLP**) for the **Claimant**
David Blundell (instructed by **The Government Legal Department**) for the **Third Defendant**

Hearing dates: 27th and 28th July 2016

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Judgmen

t**Mr. Justice Edis:**

The Claim

1. The claimant seeks a declaration in one of two alternative forms:-

i) Pursuant to s.3 of the Human Rights Act 1998 ("the HRA") that s.1A(2)(a) of the Fatal Accidents Act 1976 ("FAA") is to be read as including cohabitees who were living with the deceased in the same household immediately before the date of the death, where they had been living with the deceased in the same household for at least two years before that date, and where they were living during the whole of that period as the husband or wife or civil partner of the deceased; or

ii) Pursuant to s.4 of the HRA that s.1A(2)(a) of the FAA is incompatible with her rights under the European Convention of Human Rights and Fundamental Freedoms either under Article 8 or under Articles 8 and 14 taken together.

2. The FAA requires a tortfeasor who is liable for causing a death to pay dependency damages under s.1 to a person within certain categories of relationship with the deceased to compensate such a person for the financial losses caused by the death. By s.1A it also requires the tortfeasor to pay bereavement damages to the spouse or civil partner of the deceased or, where the deceased was a child who had not reached the age of 18, to the parents of that child. Dependency damages may be claimed by a person who had lived with the deceased as spouse or civil partner for at least two years at the date of death ("2 year + cohabitee"). The claimant contends in this action that the denial of bereavement damages to her, as a 2 year + cohabitee, after the death of her partner of many years violates her right to respect for her family or private life, or discriminates against her unlawfully on the ground of her status as an unmarried person.

3. The declarations which the claimant seeks are intended to express the result of "reading down" and "incompatibility" respectively which are the remedies provided by the HRA where a statutory provision is, on its face, incompatible with Convention rights. The HRA requires them to be addressed in the order in which the declarations are expressed. The claimant seeks primarily the reading down declaration set out at [1(i)] above under s.3 of the HRA. This involves taking the 2 year + cohabitee provision (but not any of the other categories which can claim under s.1 but not s.1A) from s.1 and inserting it into s.1A. It is said that this is consistent with the wide ranging power to construe legislation conferred by s.3, which includes a power to read in words which change the meaning of the provision so as to make it ECHR compliant. In this submission she relies on the approach required by *Ghaidan v. Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557. In the alternative, the claimant seeks the incompatibility declaration; and in any event she seeks damages under the HRA amounting to £11,800 being the bereavement award as at the date of death.

The issues

4. After considering the rival submissions and for reasons I will explain, it seems to me that the questions I have to decide are these, and in this order:-

iii) Does the exclusion of 2 year + cohabitees from bereavement damages engage Article 8 rights;

iv) If not, is the exclusion within the ambit of Article 8 so that Article 14 is engaged;

v) If so, does the measure treat the claimant differently from others who are in an analogous situation;

vi) If so, is this different treatment on the ground of status;

vii) If the measure interferes with the claimant's Article 8 rights, or discriminates against the claimant on the ground of her status, is there objective justification for it: if so, is the measure proportionate to the justified aim. I have decided that the justification issue in relation to Article 8 and Articles 14 and 8 may be taken together;

viii) If the claimant succeeds on either limb of her claim can s.1A of the FAA be read down so that she can bring her claim for bereavement damages;

ix) If not should a declaration of incompatibility be made.

The legislation

5. The relevant provisions were introduced into the FAA by the Administration of Justice Act 1982. This Act did two things of relevance. First, it introduced an entirely new type of claim for bereavement damages by s.1A. Secondly, it extended the availability of a claim for dependency under s.1 so that a 2 year + cohabitee could claim dependency damages. Subsequent amendments have extended both types of claim to civil partners. As amended the FAA provides as follows:-

> "**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) In deducing any relationship for the purposes of subsection (3) above—

(a) any relationship by marriage or civil partnership shall be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the

whole blood, and the stepchild of any person as his child, and

(b) an illegitimate person shall be treated as—

(i) the legitimate child of his mother and reputed father, or

(ii) in the case of a person who has a female parent by virtue of section 43 of the Human Fertilisation and Embryology Act 2008, the legitimate child of his mother and that female parent.

(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)."

The Convention and the Human Rights Act

6. The HRA provides

"**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) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

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."

7. The ECHR contains Articles 8 and 14 which 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 Facts

8. It is not necessary to set out the facts in any detail. They are undisputed. The claimant and the deceased had lived in the same household as man and wife between March 2000 and the date of the death of the deceased which was 12 October 2011. They never married. The deceased died as a result of the admitted negligence of the first and second defendants. The proceedings against them under s.1 of the FAA have been compromised and they now play no part in the litigation. The claimant as a 2 year + cohabitee was entitled to bring the dependency claim. No claim for bereavement damages was made against those defendants, although if the claimant is right about the reading down declaration it could have been. I am told on behalf of the claimant that a decision to make no such claim was taken in view of the express terms of s.1A(2)(a) of the FAA. The Secretary of State for Justice was then joined as third defendant so that the present claim could be pursued. Damages are claimed against her under the HRA as just satisfaction although this would have been the liability of the other defendants if s.1A should be read down as is argued.

9. The claimant asserts, and this is accepted, that her relationship with the deceased was equal in every respect to a marriage in terms of love, loyalty and commitment. This is the factual basis on which she says that her exclusion from the class of persons entitled to claim bereavement damages infringes her right to respect for her private and family life under Article 8, or that it involves discrimination against her on the ground of her "other status" as an unmarried 2 year + cohabitee under Article 14. She contends that because the rights conferred by the FAA are <u>within the ambit</u> of Article 8 this discrimination is therefore a violation of Article 14. "Within the ambit" is a term of art to which I will have to return.

10. It is not disputed that the claimant has the status of a victim for the purposes of s.7(7) of the HRA and Article 34 of the ECHR. If she is right that the denial of bereavement damages to 2 year + cohabitees violates Article 8 directly or Article 14 in combination

with Article 8 then she has the necessary interest to enable her to bring this claim to vindicate her rights.

The legislative history

11. It is necessary to examine the history of ss.1 and 1A of the FAA with some care. In doing so, it is necessary to avoid contravention of Article IX of the Bill of Rights. In conferring the limited power to scrutinise legislation for compliance with the ECHR Parliament altered the constitutional position and the exercise which the Act requires involves evaluating decisions made by Parliament in 1982 and decisions made by Ministers more recently and announced in Parliament. This evaluation is for a very limited purpose namely to determine compatibility with the ECHR. I gratefully accept and follow the illuminating statements of principle of Stanley Burnton J as he then was in *Office of Government Commerce v. Information Commissioner (Attorney General intervening)* [2010] QB 98, especially at [36], [46] and [49]. In considering what the social policy of the provisions was it is legitimate also to consider the proceedings in Parliament, see *Wilson v. First County Trust Ltd.* [2004] 1 AC [2003] UKHL 40; [2004] 1 AC 816, at [61]-[67] per Lord Nicholls. Lords Scott and Rodger agreed with Lord Nicholls in that passage, see [173] and [178]. Lord Hope said something to a similar effect at [116]-[118] and Lord Hobhouse at [145-146] did likewise.

12. When considering the compatibility of primary legislation the court is required by the HRA to evaluate it. Lord Nicholls in *Wilson* said this:-

> "61. The Human Rights Act 1998 requires the court to exercise a new role in respect of primary legislation. This new role is fundamentally different from interpreting and applying legislation. The courts are now required to evaluate the effect of primary legislation in terms of Convention rights and, where appropriate, make a formal declaration of incompatibility. In carrying out this evaluation the court has to compare the effect of the legislation with the Convention right. If the legislation impinges upon a Convention right the court must then compare the policy objective of the legislation with the policy objective which under the Convention may justify a prima facie infringement of the Convention right. When making these two comparisons the court will look primarily at the legislation, but not exclusively so. Convention rights are concerned with practicalities. When identifying the practical effect of an impugned statutory provision the court may need to look outside the statute in order to see the complete picture, as already instanced in the present case regarding the possible availability of a restitutionary remedy. As to the objective of the statute, at one level this will be coincident with its effect. At this level, the object of section 127(3) is to prevent an enforcement order being made when the circumstances specified in that provision apply. But that is not the relevant level for Convention purposes. What is relevant is the underlying social purpose sought to be achieved by the

statutory provision. Frequently that purpose will be self-evident, but this will not always be so.

62. The legislation must not only have a legitimate policy objective. It must also satisfy a "proportionality" test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a "value judgment" by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force. (I interpose that in the present case no suggestion was made that there has been any relevant change of circumstances since the Consumer Credit Act 1974 was enacted.)

63. When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the "proportionality" of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the "mischief") at which the legislation is aimed. This may throw light on the rationale underlying the legislation.

64. This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be "questioning" proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation."

13. The claimant had previously sought to rely on the House of Commons Justice Committee, Sixth Report of 2009-2010 which concerned the pre-legislative scrutiny

of the Draft Civil Law Reform Bill HC 300-1 of 2009/10. After intervention by the Office of Speaker's Counsel who wrote to me on 26th July 2016 the claimant no longer sought to do so and I understand that discussions resulted in an agreed way forward. In the event, I was referred only to the debates about the Administration of Justice Act 1982 in the House of Lords and to one ministerial written answer in the House of Commons. The rest of the material is extra-parliamentary although some of it was published by the Ministry of Justice in its consultation about the Draft Civil Law Reform Bill which I will deal with below. The material from the debate was within the last part of the citation from Lord Nicholls, above, and the ministerial statement was drawn to my attention simply to show that there is no material within it which explains a change in government policy which led to a reform of the FAA being abandoned. I am sure that it is appropriate to have regard to this material and note that it was all (including the Justice Committee's Report) judicially considered by Eady J and the Court of Appeal in *Swift v. Secretary of State* to which I shall return below: see [2014] QB 373 at [34] for a reference to the work of the Justice Committee by the Court of Appeal, and [35] for a reference to the Ministerial written answer.

14. The FAA was enacted in 1976. It followed a review by the Law Commission in 1973 which recommended that damages for bereavement should be made available to spouses of deceased people, LC Report No. 56, HC 373. That recommendation was not adopted. In 1978 a further review by the Pearson Commission made the same recommendation in preference to an award of damages for "loss of society" which would be measured according to the degree of the loss which could be proved. The Government did not adopt that recommendation in its entirety either, but did enact s.1A of the 1976 Act, introduced by the Administration of Justice Act 1982.

15. The first observation I make is that the FAA is not a general statement of policy which applies to all those who suffer bereavement. It concerns only damages actions where death is caused by an actionable tort, generally negligence or breach of an actionable statutory duty. It is not about what bereaved people generally should receive, but about what tortfeasors should pay to those affected by the tort. Those who die as a result of the fault of another where a civil action is brought for damages under the FAA represent a very small proportion of the population. Almost everyone who suffers bereavement receives no compensation of any kind. Secondly, although some of these awards may be paid out of public funds because the state employs people who may accidentally cause death for which the state is liable as employer, bereavement damages are not a form of state benefit. State liability, where it arises, is an unintended consequence of the carrying out of other activities and not the result of any decision to confer a benefit. A tort claim is a private law claim and not a public law claim.

16. Bereavement damages are designed to compensate for the pain and grief caused by the death of a person whom the law treats as having been loved by the claimant. The effect of the measure is to require the tortfeasor who has caused the death of the deceased to compensate that loss by the payment of a sum fixed by Parliament in addition to paying any financial losses caused by the death to any person who is a dependant within s.1. The common law also allows a claim for compensatory damages for psychiatric injury caused by the death to any secondary victim who can satisfy the common law control mechanisms one of which is a test of relationship

proximity. The law in 1982 had by then recognized such claims only when brought by a parent or spouse of the deceased (leaving rescuers aside), see *Mcloughlin v. O'Brien* [1983] 1 A.C. 410, per Lord Wilberforce at 417F. That case was argued in February and decided in May of 1982 while the 1982 Act was proceeding through Parliament. It is not likely to be coincidental that Parliament reflected the common law relationship criterion as it was then understood, when allowing a new a claim for damages for grief, or bereavement, which the common law did not. The common law had moved on by the time of *Alcock v. Chief Constable of South Yorkshire* [1992] 1 AC 310, decided in 1991, which stated the position as it then stood as follows:-

> "The class of persons to whom a duty of care was owed as being sufficiently proximate was not limited by reference to particular relationships such as husband and wife or parent and child, but was based on ties of love and affection, the closeness of which would need to be proved in each case; that remoter relationships would require careful scrutiny; and that a plaintiff also had to show propinquity in time and space to the accident or its immediate aftermath."

17. The Civil Partnership Act 2004 extended both dependency and bereavement claims to civil partners. In 2013 Parliament passed the Marriage (Same Sex Couples) Act 2013. This had the effect that the range of people who could claim bereavement damages was increased because same-sex marriages were now accorded equal status as opposite-sex marriages. This removed the discrimination which had been found to exist by the High Court in *Wilkinson v. Kitzinger and others* [2006] EWHC 2022 (Fam), although the Court then held that it was justifiable. This development shows that the state has attached considerable importance to the need to recognize relationships by enabling everyone who wishes to live together as a couple to be accorded the same ability to acquire a public acknowledgement of their commitment.

18. A dependency claim under s.1 requires proof of both a prescribed type of relationship with the deceased and of a dependency. It has been said that the existence of the relationship creates a presumption of dependency and Eady J in *Swift v. Secretary of State for Justice* [2012] EWHC 2000 (QB) at [12] said that actual dependency did not have to be proved under s.1 of the FAA. That is right as a matter of construction of s.1, but the qualifying dependant will only recover the proved value of the dependency or other benefit which s/he actually expected to receive from the deceased. If there is no actual dependency or lost benefit there will be no loss and the claim will fail even if brought by an eligible claimant. A claim for bereavement damages requires only proof of the existence of a much more limited class of relationship subsisting between the claimant and the deceased at the date of death. No proof of loss is required. Thus a husband who is in acrimonious divorce proceedings with his wife at the date of her death and who has come to hate her will be entitled to claim damages for bereavement. He will recover the statutory sum which will be the same as that recovered by a loving husband whose life has been torn apart by the loss of his wife. Some of those who are distressed by a death will be undercompensated by the modest sum of money payable under s.1A, others, who are not so greatly distressed by it, may be overcompensated. None of them will have to prove the actual quality of their love for the deceased, as they would if bringing a common law damages action for psychiatric injury as a secondary victim.

19. The 1982 Act extended the availability of the dependency claim to 2 year + cohabitees but not the bereavement claim. The reading down declaration seeks to re-write the statutory scheme by construing s.1A as if it had included 2 year + cohabitees when it did not then, and did not in 2004 and 2013 when Parliament included civil partners and the surviving partner in a same sex marriage respectively.

20. The 1982 Act was debated in the House of Lords on 30th March 1982. Lord Hailsham LC said this:-

> "After all, bereavement is a very definite fact about human life. Loss of society, the society one gets from one's nearest and dearest, is very much a matter of degree, kind and arguability. Bereavement is a fact. It is caused by death. You can say what it is and when it happens. You can describe it, therefore, by the name which it has. I believe that the Law Commission was right – on the assumption that you accept the philosophy of what I am going to argue about on subsequent amendments – to keep the name as it is."

21. Lord Scarman, who was that the time participating in the preparation of the judgments in *McLoughlin v. O'Brien,* spoke not on behalf of the Government but as a serving Judge. He said this:-

> "I hope that the Committee will stick with the word "bereavement". It illustrates exactly what this conventional award, which is now introduced, is intended to deal with. It is compensation for grief. It is not loss of society. It is loss of a person by death. It is very limited. It is very conventional. It amounts only to a recognition by the state that in such a situation as this, the fact of bereavement should qualify for some sympathetic recognition."

22. It appears to me that Lord Scarman accurately and succinctly expressed the policy of the new provision and confirms what a court would deduce in any event from the plain words of the 1982 Act. It is apparent from the choice of a standard sum and the very limited class of persons who may claim it that the policy of the Act was not to engage in any exercise of assessing the extent of the loss which any individual claimant had actually suffered. This is for good reasons. It is an act of cruelty in the aftermath of a death to require the widow or widower to give evidence to explain (perhaps under challenge) how important the deceased was to him or her. In some cases the court may conclude that the claimant did not miss the deceased as much as was claimed and award a low sum. In others the opposite conclusion will justify a higher sum. Parliament clearly concluded that this exercise would exacerbate grief rather than compensating it and adopted a provision which prevents it. The policy also addresses the impossibility of evaluating the loss of a loved one in money terms. It is not an appropriate judicial exercise to attempt to measure and put a price on the love which two people shared. The corollary of this approach is that the conventional sum is fixed at a modest level. To require tortfeasors to pay very large sums without proof of loss would also be unsatisfactory. Psychiatric harm cases by secondary victims do require proof of the extent of the lost relationship but that is because they may be very much more substantial and justice requires proof of loss before payment

of very large damages. A 2 year + cohabitee would be able to maintain a claim of this kind if proof of this kind of harm could be adduced, as well as a dependency claim under s.1.

23. The extension of the dependency claim under s.1 to 2 year + cohabitees was achieved by an amendment during the second reading of the Bill. No such amendment was made or proposed to the draft s.1A. The distinction thus created (now said to be discriminatory) was not discussed in Parliament at all. Therefore, for reasons which were not explained, a 2 year + cohabitee was treated equally with a spouse in s.1 but not in s.1A. On ordinary principles of statutory construction the court looks for the intention of Parliament in creating this distinction when construing s.1A. While it may be the historical fact that no-one thought about it, it may equally be the fact that the justification of the different treatment struck the proposers of the Bill as so obvious it did not need explanation. The state of the common law on psychiatric harm to secondary victims may have played a part. I would infer that the reason for the distinction is to be found in the perceived need to confine bereavement damages far more narrowly than dependency damages. This is consistent with the policy to award the bereavement damages on proof of an easily and objectively verifiable status to avoid an intrusive enquiry. The claimant either was or was not married to the deceased at the date of death and either was or was not the parent of a child who died as a minor without marrying (it is not necessary for the purposes of this analysis to consider the consequences of the illegitimacy of a deceased child, but they tend to confirm it). The adoption of a 2 year qualifying period of cohabitation was a somewhat rough and ready attempt to replicate a similarly objective criterion in the case of unmarried couples. This may have been thought acceptable where the claim is for financial loss, but perhaps not in the case of bereavement damages. At all events, it appears to me that it is not open to the court to conclude that Parliament simply made a mistake. Whatever the reason for the distinction, it was deliberately made.

24. The Law Commission in its Report "Claims for Wrongful Death" (No. 263, 1999) recommended a substantial broadening of the classes of claimant who could recover bereavement damages. This included a recommendation that 2 year + cohabitees should be entitled to an award. The Report acknowledged the need to avoid inquiries into the quality of relationships and expressed the view that a fixed qualifying period of relationship would have this effect. Although s.1A was visited by Parliament by the Civil Partnership Act 2004 to equiparate civil partnerships with marriages, the recommendation in the Report was not adopted at that time. However, in 2007 the Government published a Consultation Paper "The Law of Damages" CP(R) 9/07 which recommended that the extension to include 2 year + cohabitees should be made. After consultation this became policy and a Draft Bill was published called "Civil Law Reform: a Draft Bill" (Cm. 7773, December 2009). The Draft Bill would have added these two classes of persons who could benefit from an award of bereavement damages:

> "(aa) …a person who had been living with the deceased as the deceased's husband or wife or civil partner for a period of at least 2 years ending with the date of the death;
>
> (ab) ….a child of the deceased who was aged under 18 at the date of the death;"

25. The incoming government in May 2010 decided not to proceed with the Draft Bill. No detailed reason was given. Jonathan Djanogly MP Parliamentary Under-Secretary of State for Justice in a written statement 10th January 2011, HC Deb. Col.8WS said:-

> "In the present financial situation we need to focus our resources on delivering our key priorities."

26. The Draft Bill contained other provisions concerning damages under the FAA, and damages more generally as well as others concerning interest and the regulation of barristers. Mr. Djanogly's observation does not provide any articulated reason for not introducing the amendment to bereavement damages because his observation relates to the whole Bill which was quite wide ranging. The reference to financial conditions does not assist greatly because the majority of the additional outlay would fall on insurers of other tortfeasors, rather than on the state. We do not know why the Government decided not to make this reform.

27. There is no indication in any of the material that anyone ever addressed the implications of maintaining the exclusion of 2 year + cohabitees under the ECHR at any stage in the exercise. That applies to the debate in 1982 but also to all subsequent reform suggestions.

28. Social attitudes and conditions in the United Kingdom in 2016

29. The change in the types of relationship which are recognised by the state from opposite sex marriage alone to include civil partnership and then same-sex marriage is an acknowledgement that same-sex relationships are equally deserving of state recognition. Parliament has thus expanded the types of relationship which may give rise to a claim for bereavement damages so that they are equally available to same and opposite sex marriages. The end result is that any couple may put themselves in a position where bereavement damages may be recovered by the survivor in an action under the FAA, but they must first marry or form a civil partnership. In an exercise of this kind, as the cases I am about to review establish, the domestic courts allow the legislature a margin of discretion in taking such policy decisions and the ECtHR allows the domestic courts a margin of appreciation when they do so. These legislative changes reflect the importance which society attaches to marriage: otherwise extending it to same sex couples would not matter. Although they reflect a liberalisation of the law in one way, they do not suggest that marriage is any less valued by the state or the law than it was. Perhaps the reverse is true.

30. Alongside the apparent importance of marriage which has led to its extension to same-sex couples there is evidence that it is not as popular as it was, and that no stigma now attaches to couples who live as if married but who do not marry. The Office of National Statistics in 2015 published a bulletin concerning trends in living arrangements, *Families and Households 2015*. This found that the cohabiting couple continues to be the fastest growing family type in the UK in 2015, 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%. Official recognition of relationships was very important to some, which is why civil partnerships and same

sex marriages were recognised, but a smaller proportion of the population than formerly actually wanted any such thing.

31. The Secretary of State has not sought to explain in evidence her opposition to this claim. She advances legal submissions designed to prevent it from succeeding, but has not said what policy considerations have caused her to take this approach. In submissions it is said that a function of the existing law is to express support for the institution of marriage. The reason for a distinction between dependency damages and bereavement damages so far as 2 year + cohabitees was not explained in Parliament in 1982, and has never been justified by anyone since, so far as the material before me shows. The Secretary of State does not justify it in evidence now: she argues that granting either of the declarations would involve an error of law.

32. Further, I have no evidence about the approach taken in other Convention states to bereavement damages. I do not know whether the United Kingdom is presently out of line with some general norm or not. Either side could have presented comparative material, but neither has.

33. The difficulty in identifying any policy reason for denying bereavement damages to 2 year + cohabitees is further indicated by the 2001 Criminal Injuries Compensation Scheme. One page from this appeared in the Trial Bundle. As far as I recall no reference was made to it in submissions. It is referred to only in a footnote to the Claimant's Skeleton as some support for the wording of the proposed reading down declaration which proved viable in other areas. Since that wording has operated well in s.1 of the very Act which I am considering for over 30 years, I do not need much persuasion of this from other sources. However, the Criminal Injuries Scheme does offer another insight into the Secretary of State's current position. The Tariff Scheme was introduced in 1996, and was replaced by schemes in 2001, 2008 and 2012 which are modelled on their predecessors. The Criminal Injuries Compensation Authority is an executive agency sponsored by the Secretary of State for Justice. The scheme 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 scheme exists because criminals are not generally insured and rarely have the means to compensate their victims. The state does not act as a quasi-insurer in these cases because the scheme calculates the award differently from a common law damages action, and in many cases less generously. However, it would be surprising on the face of it if the Third Defendant as sponsor of the Criminal Injuries Compensation Scheme tolerated a level of liability on the state which ought not to be imposed on insured tortfeasors for some sound policy reason. 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." It also included children of deceased parents. Further claims for dependency and other expenses could be made but all qualifying relatives were treated equally. The term "bereavement payments" to describe this standard award was introduced in the 2012 scheme, see paragraphs 61 and 62. Again, 2 year + cohabitees are qualifying relatives and there is no distinction in this respect between qualifying relatives. Bereavement payments are not made to any person who is estranged from the deceased at the time of their death. One consequence of the

absence of evidence from the Secretary of State is that I do not know what social policy requires the 2012 CICA scheme to exist in this form, while s.1A of the FAA continues to exclude 2 year + cohabitees. Certainly Mr. Djanogly's observation in 2011 does not assist. Why should the state's resources be expended on providing a form of compensation for victims of crime which insurers of tortfeasors are not required to provide, in these times of austerity?

34. The Ministry of Justice Response to Consultation on the Law of Damages, 1 July 2009 CP(R)9/07 recorded the fact that almost all respondents to the consultation supported the extension of the bereavement damages to 2 year + cohabitees, including insurers. In its formal response the Association of British Insurers said:-

> "We agree that the statutory list of people eligible to claim bereavement damages is currently too restrictive and should be extended to include children under 18 (including adoptive children) for the death of a parent; cohabitants of at least two years' duration for the death of a partner; unmarried fathers with parental responsibility for the death of a child under 18. This list should be kept under periodic review."

35. The annual cost to the insurance industry of the extension to 2 year + cohabitees was estimated at £1.43m for motor claims, employers' liability claims, and public liability claims. The cost to the NHS was estimated as a little over £1m per year. The total annual outlay is the cost of meeting 206 claims at the 2009 rate for bereavement damages and would now amount to £2.67m. I think that it is fair to observe that the cost of the reform rejected by Mr. Djanogly is very modest and that there is a degree of incoherence in the Secretary of State's current position. I am not, of course, being asked to say that her position is incoherent but that s.1A of the FAA is incompatible with the ECHR, which is an entirely different thing.

36. My attention was drawn to other statutory provisions to show a recognition of cohabitation as bestowing rights akin to that of marriage. These were also designed to show that recognition of cohabitation in other areas is not problematic.

x) Schedule 1 Part 1 to the Rent Act 1977 was amended by the Housing Act 1980 so that a surviving spouse who resided in the dwellinghouse immediately before the death of the original tenant became a statutory tenant. The Housing Act 1988 extended this to a person living with the original tenant as his or her wife or husband at the time of death. There is no minimum duration of the required relationship. There is a provision which determines which person will become the statutory tenant if more than one person qualifies by virtue of these two provisions. It is not necessary to go into the circumstances where that might arise, but it may be pointed out that in the present context it is quite easy to envisage a person who dies while married to one person and cohabiting with another.

xi) The Social Security Contributions and Benefits Act 1992 by s.137(1) defines "couple" as including two people who are not married to, or civil partners of, each other but are living together as a married couple "otherwise than in prescribed circumstances". Further, the Family Law Act 1996 by s.62 defines the terms cohabit and cohabitants for the purposes of the Family Homes and

Domestic Violence part of the Act. "Cohabitants" are "two persons who are neither married to each other nor civil partners of each other but are living together as husband and wife or as if they were civil partners." The provision gives cohabitants some protections in respect of the family home which are similar to those of spouses and civil partners. They may equally be made subject to non-molestation orders or entitled to the protection of the court by the making of such an order against a partner.

The law: three recent decisions

37. Before turning to the issues it will be useful to consider three recent decisions. In general I propose to concentrate on decisions of the House of Lords and Supreme Court about the proper approach to the HRA 1998. It appears to me that this is the prime source of principle in this area for a domestic first instance court and the territory is well covered by decisions at that level. These three decisions at lower levels are a valuable introduction to the battleground, and also to the current state of the law. Two High Court judges and the Court of Appeal on appeal from one of them in recent cases have attempted to identify and apply some of the principles expressed by the House of Lords and Supreme Court after having regard to the Strasbourg jurisprudence.

38. In *Swift v. Secretary of State for Justice* [2012] EWHC 2000 (QB); [2012] PIQR P21 Eady J considered a dependency claim by a person who had cohabited with the deceased for 6 months prior to death. The claim was for a declaration of incompatibility in relation to the 2 year + cohabitee provision in s.1 of the FAA which, the claimant said, discriminated against her and violated her rights under Article 8 and, alternatively, her right not to be discriminated against under Article 14 where rights within the ambit of Article 8 were engaged. The claim failed. The court held

xii) That the claimaint had to show a direct and immediate link between the restriction on dependency claims to 2 year + cohabitees and the private or family life of the claimant. This may be shown where domestic law was in conflict with an important aspect of personal identity, or where the claim involved a most intimate aspect of private life. Family life was not involved because the claimant's family life with the deceased was at an end. The circumstances did not show such a link with private life to enable Article 8 to be engaged.

xiii) The case did not fall within the ambit of Article 8 either, for broadly the same reasons. Therefore Article 14 was not engaged.

xiv) Article 14 would not have availed the claimant anyway because the fact that she fell outside the categories of permitted claimants for dependency under s.1 of the Act did not amount to a status, and Article 14 only prevents discrimination on the grounds of status (whether a status specified in Article 14 or amounting to "other status").

xv) Finally, even if Articles 8 and 14 were engaged then exercising the value judgment described in *Wilson* referred to at [12] above, it was legitimate for

> Parliament to confine the liability of tortfeasors in respect of loss caused to individuals who were not the primary victims of the wrongdoing in question.

39. Eady J set out the legislative history in relation to the provision with which he was concerned (s.1 of the FAA) at [15]-[22]. The Draft Civil Law Reform Bill referred to above had proposed extending the right to claim under s.1 for dependency damages to "any person not falling within any of paragraphs (a)-(g) who was being maintained by the deceased immediately before the death". Maintenance was defined as a substantial contribution in money or money's worth towards the claimant's reasonable needs. If that reform had been made the claimant in *Swift* would have been able to claim.

40. A submission was made to Eady J, as it was to me, that Article 8 imposed a negative obligation on the state which required it to compensate the claimant for the loss of her dependency. The judge rejected this at [32] saying that it was inherent in the claim that it contended for the imposition of a positive obligation. Mr. Sachdeva QC, on behalf of the claimant, contends that Eady J was wrong in this respect, and relies on *Vallianatos v. Greece* (2014) 59 EHRR 12 which was decided after the conclusion of the *Swift* litigation.

41. Eady J proceeded on the basis that the obligation contended for was a positive obligation and therefore set a high test for the engagement of Article 8. This is because of the cautious approach taken by the European Courts to any claim that Article 8 imposes a positive obligation on states to take particular measures. *Mosley v. United Kingdom* (2011) 53 EHRR 30 at [107]:-

> "The choice of measures designed to secure compliance with that obligation in the sphere of the relations of individuals between themselves in principle falls within the Contracting States' margin of appreciation."

42. Eady J applied *Draon v. France* (2006) 42 EHRR 40 at [106] and *R (McDonald) v. Kensington and Chelsea RLBC* [2011] UKSC 33; [2011] PTSR 1266 at [15] per Lord Brown and held that a positive obligation could only fall within the scope of Article 8 if it involved a direct and immediate link between the measure sought and the applicant's private or family life and a special link between the situation complained of and the particular needs of the applicant's private or family life. He found that no such link existed. The relationship involved was that between the claimant on the one hand and the tortfeasor on the other, see [30].

43. In relation to the Article 14 claim, Eady J held that the circumstances did not fall within the ambit of Article 8. He here considered family life only (not private life) and held that the provisions of s.1 of the FAA do not fall within the ambit of Article 8 for these reasons:-

> "First, the family relationship giving rise to the statutory cause of action will inevitably have come to an end before the question arises. Secondly, the claimant has a continuing family life, involving her son and also her daughter from a previous relationship, but sadly that no longer involves Mr Winters. The fact that a claim under the FAA might have improved the

> current family's finances does not of itself bring the case within art.8 , as the authorities clearly show. The non sequitur would perhaps be even clearer in the case of a claimant who had cohabited with the relevant deceased prior to death but had no children (and might, or might not, have acquired a new partner). Her claim would arise (on the claimant's argument) from the previous relationship, but it could hardly be said to relate to any current family or private life for the purposes of art.8"

44. Eady J relied on a passage from Lord Bingham in *M v. Secretary of State for Work and Pensions* [2006] UKHL 11; [2006] 2 AC 91 at [5]. Ms. M was required to pay more in child support for the children of her former marriage as a non-resident parent now in a same sex relationship than she would have paid if she had been living with a man. Lord Bingham said that this provision did not impair in any material way her family life with either of her two families. She had less money than she might have done to spend on her new family, because she had to spend it on her old one:-

> "But this does not impair the love, trust, confidence, mutual dependence and unconstrained intercourse which are the essence of family life, nor does it invade the sphere of personal and sexual autonomy which are the essence of private life."

45. Mr. Sachdeva says that Eady J was wrong in so far as he assumed that Article 8 rights could not be engaged after death because a number of cases not cited to him show that this was not so. One case which shows this was cited to him and is analysed and distinguished by him at [35] is *Serife Yigit v. Turkey* (2011) 53 EHRR 25. I shall return to this question.

46. Eady J then held that the claimant in *Swift* was not being discriminated against on the ground of status since being unmarried and cohabiting for less than 2 years did not amount to a status. He dealt with this question largely by reference to the decision of the House of Lords in *R (Clift) v. SSHD* [2006] UKHL 54; [2007] 1 AC 484. The decision of the European Court of Human Rights in that case - 13th July 2010 unreported, application no. 7205/07 - is not to the same effect as that of the House of Lords on the issue of status, see [62] and [63]. Eady J dealt with that at [47] on the basis that a status must be capable of being "clearly defined". *Clift* was an Article 5 case and it is accepted before me that it is not possible to read across directly to Article 8 because of the fundamental importance of the Article 5 right in a democratic state acknowledged by the European Court at [62] which is contrasted with the cautious approach to the creation of positive obligations under Article 8 to which I have already referred.

47. Finally, Eady J determined that in any event any discrimination on the ground of status which could be shown was objectively justified. As appears at [56] this was significantly because of the need to "ensure that the scope of the FAA was limited to such relationships as involved a sufficient degree of permanence or dependence to justify the survivor's right to claim damages against the tortfeasor." This was a rational aim.

48. In the Court of Appeal in *Swift v. Secretary of State for Justice* [2014] QB 373 the court did not address the "ambit issue" or the "other status issue" because it found that any difference in treatment was justified. In other words, only the final part of the judgment of Eady J was reviewed and upheld. Nothing was said, one way or the other, about whether he was right about the earlier issues. It was necessary to consider whether a difference in treatment had an objective and reasonable justification in that it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised, see [22]. The first part of the test was agreed to be met, and the issue was proportionality on which the burden lay on the Secretary of State. The court identified what it called a "margin of discretion" which the court allows to the legislature. The difference in treatment was not founded on a "suspect" ground, see *R* (*Carson) v. Secretary of State for Work and Pensions* [2006] 1 AC 173, and not all grounds of discrimination are equally potent. This is not the same as the margin of appreciation which the European Court of Human Rights accords to domestic courts, but the same approach should be taken by the domestic court to its own legislature as the European Court described in *Draon v. France* [108]:-

> "At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society can reasonably differ, the role of the domestic policy-maker should be given special weight."

49. This was reinforced by a citation from *Mosley v. UK* to which I have referred at [40] above. The terms of the FAA are connected to social and economic policy as Lord Hailsham's careful analysis in 1982 showed. Parliament could have chosen a requirement that the deceased and the claimant should have been living together as a married couple (in that case as husband and wife) immediately before the death, or could have chosen an arbitrary "bright line" qualifying period. In choosing the latter Parliament had made a choice which was open to it and there was no obviously right answer. At [35] Lord Dyson MR put it this way:-

> "The decision not to amend the FAA was not taken because of a late change of mind as to the merits of the proposed amendments. It was taken simply because the Government had to focus its resources on other matters. But the question is not whether the existing law is unfair and could be made fairer. Nor is it whether the existing law is the fairest means of pursuing the legitimate aim referred to at para 23 above. Rather, the question is whether the existing law pursues that aim in a proportionate manner. The Strasbourg jurisprudence does not insist that a state pursues a legitimate aim in the fairest or most proportionate way. It requires no more than that it does so in a way which is proportionate. There may be a number of ways in which a legitimate aim can be pursued. Provided that the state

> has chosen one which is proportionate, Strasbourg demands no more."

50. The third recent case is the decision of Andrews J in *R (Steinfeld and Keidan) v. Secretary of State for Education* [2016] EWHC 128 (Admin). The claimants were an unmarried opposite sex couple. They did not wish to marry, but they did wish for state recognition of their relationship by civil partnership. S.3(1) of the Civil Partnership Act 2004 provides that civil partnership is only available to same sex couples. This was because it was enacted at a time when same sex couples could not marry, and was designed to afford them a degree of official recognition. It was not amended to make civil partnership available to opposite sex couples when the Marriage (Same Sex Couples) Act 2013 was enacted. Its future as a status was to be reconsidered in the light of the universal availability of marriage. The claimants did not want to marry because they had deep rooted and genuine ideological objections to what they consider to be the historically patriarchal nature of that institution. They could marry if they wished and did not rely on any difference between marriage and civil partnership which would make the latter status any different from the former. They had a conscientious objection to marriage. The claimants did not rely on a positive obligation to create an institution which recognises their relationship to which they had no conscientious objection. They relied instead upon the argument that having created such an institution they could not be denied access to it on the ground of their sexual orientation. Same sex couples could choose which name they required the state to give to their union, whereas opposite sex couples could only marry. There was no legitimate aim to be served by maintaining the difference. They therefore applied for a declaration of incompatibility in respect of the 2004 Act which, they said, had become unlawful when the 2013 Act came into force.

51. The judge dismissed the claim and gave permission to appeal. She held there was some other compelling reason why the Court of Appeal should consider the case because it raised issues of wider public importance. She said that she had applied decisions of the House of Lords and the Supreme Court in deciding what the threshold test is for the application of Article 14 read with Article 8. She held that there was a realistic prospect of success in arguing that the approach of the English court in *Wilkinson v. Kitzinger* [2006] EWHC 2022 (Fam) should be reconsidered in the light of developments in Strasbourg (particularly *Vallianatos,* a decision which is at the forefront of Mr. Sachdeva's submissions).

52. Andrews J's treatment of the test for the "ambit issue" was subjected to close scrutiny in argument by Mr. Sachdeva and Mr. Blundell who appeared for the Secretary of State. I have received written submissions in reply from the claimant's team on the same question. I do not propose to decide whether she accurately derived the test from the decisions of the House of Lords and Supreme Court but to attempt to state the test myself. Particular criticism of Andrews J's formulation is made by Mr. Sachdeva in relation to her paragraphs [25] and [39] where she refers to the "core values" of Article 8 which she said were stated by Lord Bingham in the passage from *M.v SSWP* quoted above at [43]. She said:-

> "25. In order to invoke Article 14, a person does not have to go as far as to show that a substantive Convention right has been violated, but they must establish that a personal interest close to

the core of such a right is infringed by the different treatment complained of.

"39. ….The denial of a further means of formal recognition which is open to same-sex couples does not amount to unlawful state interference with the claimants' right to a family life or private life, any more than the denial of marriage to same-sex couples did prior to the enactment of the 2013 Act. There is no lack of respect afforded to any specific aspect of the claimants' private or family life on account of their orientation as a heterosexual couple. Thus the statutory restrictions complained of do not impinge upon the core values under either limb of article 8 to the degree necessary to entitle the claimants to rely on article 14. The link between the measures complained of an their right to enjoy their family and private life is a tenuous one.

"53. [Having explained the *Ullah* principle] There is no decision of the ECtHR which comes anywhere near suggesting that where a couple is able to enter into a legal relationship according full protection to all the values falling within or close to article 8 (such as marriage) there is nevertheless state interference with the core values protected by their rights to family and/or private life under that article because they cannot enter a different form of legal relationship which would afford them the same rights as marriage."

53. Andrews J at [25] cited Lord Bingham in *Clift*, cited above, at [12]-[13] who explained what the House had decided in *M v. SSWP* also cited above about the applicability of Article 14. He said:-

"Although different members of the House used different language, and the outcome vividly illustrated the difficulty which may arise in applying the principles to a concrete case, none of these opinions was criticised as inaccurate or incomplete, and I do not think any purpose will be served by repeating those opinions or citing passages from them. 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."

54. As to what the core values Article 8 exists to protect, Andrews J correctly in my judgment cited Lord Walker of Gestingthorpe in *M v. SSWP.* I consider that this passage is of key importance in deciding the engagement/ambit issue in the present case. I shall return to a fuller consideration of *M* but set this out now because it is

central to understanding the role of Article 8, and the role of Article 8 in conjunction with Article 14:-

> "82 Ms Monaghan submitted that since the concept of respect for private and family life is so wide and multifaceted, your Lordships should be ready to conclude, in considering a complaint under article 14, that any alleged act of discrimination is within the ambit of article 8. But if that were right virtually every act of discrimination on grounds of personal status (gender, sexual orientation, race, religion, and so on) would amount to a breach of article 14, since these are all important elements in an individual's private life. There would be little or no need for the wider prohibition in article 1 of the Twelfth Protocol on discrimination in the enjoyment of any legal right.
>
> "83 My Lords, in my opinion that is not the effect of the Strasbourg case law which I have attempted to summarise. The European Court of Human Rights has taken a more nuanced approach, reflecting the unique feature of article 8 to which I have already drawn attention: that it is concerned with the failure to accord *respect*. To criminalise any manifestation of an individual's sexual orientation plainly fails to respect his or her private life, even if in practice the criminal law is not enforced (*Dudgeon v United Kingdom 4 EHRR 149* and *Norris v Ireland 13 EHRR 186*); so does intrusive interrogation and humiliating discharge from the armed forces (*Smith v United Kingdom 29 EHRR 493* and *Lustig-Prean v United Kingdom 29 EHRR 548*). Banning a former KGB officer from all public sector posts, and from a wide range of responsible private-sector posts, is so draconian as to threaten his leading a normal personal life (*Sidabras v Lithuania* 42 EHRR 104). Less serious interference would merely not have been a breach of article 8; it would not have fallen within the ambit of the article at all.
>
> 84 Similarly 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 ultimately decided) concerned with measures very closely connected with family life: *Petrovic v Austria* 33 EHRR 307 (parental leave), *Mata Estevez v Spain* (social security benefit for surviving spouse) and *Fretté v France* 38 EHRR 438 (adoption). By contrast *Logan v United Kingdom* 22 EHRR CD 178 (the CSA case) is an example of unsuccessful reliance on a much more remote link (financial resources to visit absent children)."

The Issues: engagement of Article 8

Submissions

55. The claimant first submits that Article 8 is directly engaged and makes 5 points.

xvi) Article 8 exists to protect private life which includes the right to establish and develop personal relationships, and family life which is concerned with the existence of family ties and does not require links by marriage or sanguinity. The claimant's relationship with the deceased and her grief at its loss falls within both private and family life. Their decision not to marry falls within the personal sphere protected by Article 8 as an expression of autonomy and self-determination.

xvii) The purpose of bereavement damages is to acknowledge and recognise the grief caused by the loss of a close family member. It is not simply a matter of money. The claimant's exclusion from this means of vindicating her loss deprives her of society's acknowledgement of it, implies that it is less than that experienced by survivors of marriages, and interferes with her personal autonomy in a way for which there is no justification.

xviii) The fact that her claim relates to a relationship which is ended because of the death is immaterial. *Pannullo and Forte v. France* [2001] ECHR 741 (2003) 36 EHRR 42, *Ploski v. Poland* [2002] ECHR 735, *Znamenskaya v. Russia* (2007) 44 EHRR 15 and *Dodsbo v. Sweden* (2007) 45 EHRR 22 are relied on in addition to *Yigit v. Turkey* (2011) 53 EHRR 25 as cases supporting this in the Strasbourg case law. *V v. Associated Newspapers and others* [2016] EWCOP 21, a decision on reporting restrictions in domestic law, was also cited.

xix) The obligation asserted is not a positive obligation. There was no positive obligation to allow bereavement damages, but having done so the state ought not to be allowed to exclude unmarried couples from the ability to recover them. This contention relies on *Vallianatos v. Greece* at [75]. It is a similar contention to that rejected by Andrews J in *Steinfeld*.

xx) There is a positive obligation on the state, when it makes law, to do so in a way which respects the relationships encompassed by the private and family lives of those affected. This relies heavily on *A, B, and C v. Ireland* (2011) 53 EHRR 13, although other articulations of the same concept were cited to me. This was the case where the applicants complained that the unavailability of abortion in Ireland violated their Convention rights. There was discussion of the scope of negative and positive obligations under Article 8. The court said:-

> **"(b) General principles applicable to assessing a state's positive obligations**
>
> 247 The principles applicable to assessing a state's positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of art.8 being of a certain relevance.
>
> 248 The notion of "respect" is not clear cut especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining

> in the contracting states, the notion's requirements will vary considerably from case to case.
>
> Nonetheless, certain factors have been considered relevant for the assessment of the content of those positive obligations on states. Some factors concern the applicant: the importance of the interest at stake and whether "fundamental values" or "essential aspects" of private life are in issue; and the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under art.8. Some factors concern the position of the state: whether the alleged obligation is narrow and defined or broad and indeterminate; and the extent of any burden the obligation would impose on the state.
>
> 249 As in the negative obligation context, the state enjoys a certain margin of appreciation. While a broad margin of appreciation is accorded to the state as to the decision about the circumstances in which an abortion will be permitted in a state, once that decision is taken the legal framework devised for this purpose should be:
>
> "[S]haped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention."

56. The Defence denies that the claim falls within the ambit of Article 8; that the 2 year + cohabitee has "other status" within Article 14 and that the 2 year + cohabitee is in an analogous position with a person who is married or in a civil partnership.

57. Mr. Blundell on behalf of the Secretary of State contended primarily that the bereavement award is not within Article 8 and the provision which denies it to 2 year + cohabitees is not within the ambit of Article 8.

58. Everything else is in issue as well, but I think I detected correctly that the prime focus of the Secretary of State's submissions is as at [56] above. It is additionally submitted that the limitation which precludes her from recovering bereavement damages

xxi) Does not interfere with her Article 8 rights if they are engaged;

xxii) Is a justified interference if it is an interference;

xxiii) Does not amount to unlawful discrimination under Article 14 if it is within the ambit of Article 14 because

a) The claimant lacks status.

b) The claimant is not in an analogous position to a widow.

c) Any difference in treatment is justified.

59. In support of his primary contention, as I have understood it to be, Mr. Blundell submits that the obligation to require a third party tortfeasor to pay bereavement damages to the claimant is plainly a positive obligation and not a negative one. This therefore involves the cautious approach identified at [40] above and the wide margin of discretion which the court extends to the legislature in matters of social and economic policy. This is particularly apparent in state benefit cases, but not confined to them.

60. The need for a direct and immediate link between the extension of the availability of bereavement damages and the private or family life, and the special link between the absence of this remedy and the particular needs of the claimant's family and private life is emphasised.

61. The Secretary of State relies on those parts of the judgment of Eady J in *Swift* which were not considered by the Court of Appeal and also on the decision in *Steinfeld* of Andrews J and submits that I should follow them. The submissions are not quite identical to the reasoning of Eady J. It is submitted that

xxiv) The provisions of s.1A of the FAA do not engage or conflict with an important aspect of personal identity nor does it involve a most intimate aspect of private life.

xxv) The provisions instead limit the categories of person who may make such a claim following a tort of which they were not primary victims. This is a question which can only be decided by Parliament because it involves competing interests and social policy.

xxvi) The relationship which s.1A affects is not a family relationship but a relationship between the partner of a deceased and the tortfeasor which caused the death and ended the family relationship between the claimant and the deceased.

62. The bereavement award is a symbolic award to compensate in money terms for the grief caused by death. It does not seek to reflect the emotional loss or the economic loss caused by the death. That is the point of the standardised award which is the solution Parliament adopted to avoid inappropriate litigation about the value or existence of love in individual cases. Both sides rely on this observation as supporting with their respective cases. The claimant responds that it is precisely because it is about the recognition of loss by the state and not about money that the bereavement award engages Article 8.

63. The family life is ended by the death and the claim cannot therefore be said to attach to the claimant's current family life at the date of claim.

64. The fact that a provision may impact on the financial situation of the claimant's family is not enough to bring the claim with Article 8, see again Lord Bingham in *M v. SSWP* at [5] cited above at [43].

65. The Secretary of State relies in particular on one part of the judgment of Lord Dyson MR in *Swift* at [30]. It will be recalled that the Court of Appeal did not consider the ambit or status issues but it did have to characterise the claim in order to decide what

margin of discretion to accord to Parliament in relation to the legislative choices that it made in enacting s.1(3) of the FAA (the requirement that a cohabitation must have subsisted for 2 years before the survivor could claim dependency damages). Lord Dyson said:-

> "30 All of these factors are in play in the present case. First, the claim raises issues as to the extent of the positive obligations of the United Kingdom to provide legal remedies between individuals. Secondly, the article 8 issues raised here do not affect an important (or indeed any) aspect of the claimant's personal identity or an intimate aspect of family or private life. We are in territory which is far removed from that of the "suspect" discrimination on grounds such as sex or race and the legislature is entitled to a generous margin of discretion. Thirdly, there is no consensus across the member states as to the importance of the right of action with which we are concerned or as to the nature and duration of the relationship of dependency that it requires."

66. The margin of discretion was, therefore, "generous". Unless there is a sufficient distinction between those factors in the present context of bereavement damages, that characterisation of the claim is binding on me. The Secretary of State submits that a purpose of the provision is to protect and promote the institution of marriage. Mr. Sachdeva objects to this being said because it is not pleaded and therefore verified by a statement of truth.

67. The Secretary of State relies on *Yigit v. Turkey* (2011) 53 EHRR 25. In that case the Grand Chamber held that a scheme which restricted death benefits from public funds to survivors of civil marriage and not to a survivor of a religious marriage only did engage Article 8 but was not breached. This was because death benefits and testamentary dispositions are planned during life as an aspect of family life. At paragraph [102] the ECtHR held that Article 8 does not require the state to establish a special regime for a particular category of unmarried couples (those who chose a religious but not also a civil form of marriage).

68. Article 14: the proper approach in principle

69. In the event that reliance on Article 8 directly fails, the claimant seeks to rely on Articles 8 and 14 in conjunction. I have introduced this submission in my examination of *Swift* and *Steinfeld* above at paragraphs [37]-[46] and [49]-[53]. The structure of the analysis of Article 14 claims is found in three judgments of Baroness Hale: *Ghaidan v. Ghodin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 at [133] and [134], *AL (Serbia)(FC) v. SSHD* [2008] UKHL 42; [2008] 1 WLR 1434 at [25] and *Tigere* at [33]. These can perhaps be synthesised as follows. The following questions must be addressed:-

xxvii) Do the facts fall within the ambit of one or more Convention rights?

xxviii) Was the claimant treated differently from others in analogous situations? Unless there are very obvious relevant differences between the claimant and those others it is best to move directly on to consider (iii) and (iv).

xxix) Whether the difference in treatment was based on one of the grounds proscribed either expressly or by inference in Article 14.

xxx) Was the difference in treatment objectively justifiable? This means

d) Does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right;

e) Is the measure rationally connected to that aim;

f) Could a less intrusive measure have been used;

g) 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?

70. The test for justification, at [67(iv)] above, is taken directly from *Tigere* at [33] per Lady Hale. *Tigere* was a case about the right to education and was an Article 14 case, and so concerned with the "ambit" of that right. I have described at [53] above a passage from *M v. SSWP* as "key" and I consider that the justification test explained by Lady Hale is also of importance in deciding what "ambit" actually means. The dissenting minority (Lords Sumption and Reed JJSC) did not express disagreement with this formulation, but expressed themselves in rather different terms.

The ambit issue: submissions

71. The claimant's submissions.

xxxi) I have rehearsed Andrews J and Eady J's approach to ambit in *Swift* and *Steinfeld* above and to Mr. Sachdeva's criticisms of those judgments. I will not repeat that in summarising his submissions.

xxxii) The prohibition of discrimination applies to additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decide to provide, see *PB and JS v. Austria* (2012) 55 EHRR 31 at [32].

xxxiii) Lord Wilson JSC in *Mathieson v. Work and Pensions Secretary* [2015] 1 WLR 3250 at [16]-[17] said this:-

> "16. [The provisions of Article 14 are set out] It is enjoyment only of the rights and freedoms set out in the Convention which the article requires to be secured without discrimination on any of the identified grounds. The framers of the article did not wish the prohibition of discrimination to extend beyond the four corners of the other articles. A free-standing prohibition of discrimination in the enjoyment "of any right set forth by law" and indeed generally, on any of the identified grounds, was introduced much later in the Twelfth Protocol; but the UK has not signed it.
>
> (a) Scope

> 17. In his invocation of article 14, Mr Mathieson therefore needs first to establish a link with one or more of the Convention's other articles. He alleges a link with either or both of Cameron's rights to "the peaceful enjoyment of his possessions" under article 1 of Protocol 1 ("A1P1") and to "respect for his … family life" under article 8. For the purposes of article 14, Mr Mathieson does not need to establish that the suspension of DLA amounted to a violation of Cameron's rights under either of those articles: otherwise article 14 would be redundant. He does not even need to establish that it amounted to an interference with his rights under either of them. He needs to establish only that the suspension is linked to, or (as it is usually described) within the scope or ambit of, one or other of them. How can a public authority's action be within the scope of an article without amounting to an interference with rights under it? *Carson v United Kingdom* (2010) 51 EHRR 369 provides an example. There the Grand Chamber of the European Court of Human Rights explained at paras 63-65 that A1P1 did not require a contracting state to establish a retirement pension scheme but that, if it did so, the scheme fell within the scope of A1P1 and so had to be administered without discrimination on any of the grounds identified in article 14. *Hode and Abdi v United Kingdom* (2012) 56 EHRR 960 provides another example. There the Court of Human Rights explained at para 43 that article 8 did not require the state to grant admission to a refugee's non-national spouse but that, if it introduced a scheme for doing so, it fell within the scope of article 8 and so had to be administered without discrimination on any of the identified grounds."

xxxiv) Mr. Sachdeva points out that this decision post-dates *M v. SSWP* and *Clift* and that both decisions were cited to the Supreme Court. Andrews J, he says, appears to have followed those two decisions without regard to *Mathieson*. It is not clear that it was cited to her. He says that it shows that it is enough to show that the exclusion of the claimant from bereavement damages is linked to her rights protected by Article 8.

72. The Secretary of State submits that for the same reasons relied on in relation to the engagement of Article 8 the case does not fall within the ambit of Article 8. Her submissions treat these questions as essentially the same.

xxxv) Decision on engagement of Article 8 and the ambit issue

73. These two questions are closely associated and I will take them together. They depend on an understanding of Article 8 and of the nature of bereavement damages.

74. Article 8 guarantees respect for private and family life. This is a far more open textured provision than, for example, Article 5 which concerns arbitrary detention, or A1P1 concerning the right to enjoy possessions or A2P1 concerning education. Unless defined Article 8 could cover more or less every important aspect of life. If a person has a family life, and most do, any important event which adversely impacts

on that person is likely to have some effect on family life. The same is true of private life. Definition is the key to making Article 8 effective. This involves identifying the core values of Article 8, and recalling that its prime function is to prevent intrusion by the state into family and private life unless such intrusion is justified. This is the effect of what Lord Walker said in *M* at [83] quoted at [53] above.

75. The test for engagement of Article 8

76. I have referred at [37] to the approach of Eady J in *Swift* to engagement of Article 8 and now set out the passage of Lord Brown in *McDonald* (a private life claim) on which the Secretary of State relied:-

> "15. Article 8 is too well known to require citation again here. There is no dispute that in principle it can impose a positive obligation on a state to take measures to provide support and no dispute either that the provision of home-based community care falls within the scope of the article provided the applicant can establish both (i) "a direct and immediate link between the measures sought by an applicant and the latter's private life" – *Botta v Italy (1998) 26 EHRR 241* , paras 34 and 35 – and (ii) "a special link between the situation complained of and the particular needs of [the applicant's] private life": *Sentges v The Netherlands* (2003) 7 CCLR 400 , 405."

77. In my judgment the claimant's case plainly involves a claim that Article 8 imposes a positive obligation to extend bereavement damages to 2 year + cohabitees. The cautious approach to such claims is therefore applicable. I agree with Eady J on this issue and summarise his conclusion above at [36]-[37]. I do not regard *Vallianatos v. Greece* (20140 59 EHRR 12 as being capable of affecting this decision. In that case the state had introduced a form of registered civil partnership which was available only to different sex couples and not same sex couples. Same sex couples could not marry either. The claimants did not complain that there was a positive obligation to provide for an official means of recognition of same sex relationships. They alleged instead that the state had introduced a new form of recognition of relationships of unmarried couples but had denied it to same sex couples. This meant that Article 14 and Article 8 were together engaged. It was not a case about the engagement of Article 8 directly. The court summarised this, and the law which it applied, at [70]-[76]. If the decision is analysed as an Article 14/8 decision it is easy to see how Article 14 was engaged. The availability of a form of official recognition for a relationship which is a family is within the ambit of the right to respect for family life, and the respect for the sexual orientation of the claimants is within the ambit of their private lives. The court expresses the matter in exactly that way at [73]. Further, the issue was conceded, see [71]. I do not see this decision as being relevant to the positive/negative obligation issue in relation to Article 8 in the absence of an Article 14 claim. I would follow the agreed analysis adopted in that decision expressed at [71], noting that the approach was not only agreed between the parties but also the court. In a case of this kind, where a measure which there is no Article 8 obligation to enact is said to be discriminatory the proper analysis is not to contort a positive obligation into a negative one, but to consider the case under Article 14. In Article 8 cases the outcome will often be the same because the ambit test as I will explain is not likely to produce different results from the direct engagement test in most cases.

78. If the Claimant's case involves a positive obligation then in my judgment it does not directly engage Article 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 Article 8. This is a measure which the state could choose to enact, or not, without consideration of the direct engagement of Article 8. The question therefore is whether the measure is within the ambit of Article 8.

79. 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 Article 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 Article 8 or even within its ambit. In *Pannullo v. France* the issue was conceded. However, there was in that case a continuing family which wished to do something which is at the essence of family life, namely bury a member of the family within a reasonable time. A family funeral is absolutely part of the family life of those members of the family who attend it. *Ploski v. Poland* concerned a prisoner who wished to attend the funerals of his parents who died, one after the other, while he was in prison. He was refused permission to do this. The interference in private and family life was conceded. The court found no reason to reach a different conclusion. *Znamenskaya v. Russia* involved the refusal of the state to recognise the paternity of a stillborn child. Both the father and the child were dead. The government conceded that the domestic courts had erred by treating the matter as dependent on the civil rights of the dead child without regard to those of the mother. She wanted her child to be recorded as having been the child of her family with the father, and although that family no longer existed her right to recognition of it continued. *V v. Associated Newspapers* involved the Article 8 rights of the children of a family whose private and family life had been invaded by the Court of Protection when determining the capacity of a family member who had since died. In other words it affected the private and family life of persons who were still alive. The family life had not come to an end because of the death of one member.

80. *Yigit v. Turkey* (2011) concerned payments from a pension retirement fund to which the deceased would have been entitled had he lived. This is perhaps the strongest case for the claimant on this issue because it concerned a claim by the widow of a religious marriage that she had been deprived of some benefits following the death of her partner because they had not chosen to contract a civil marriage in addition to the religious marriage. The claimant claimed to be subrogated to the rights of the deceased in respect of a survivor's pension and health insurance. As the survivor of a religious marriage she was entitled to compensation for the death of her partner when caused by the fault of another under Articles 43, 44 and 45 of the Code of Obligations. She was not entitled, however, to a survivor's pension and health insurance under the Social Security Act and the General Health and Social Security Act. The claim failed on Article 1 Protocol 1 and Article 14 grounds because the different treatment was justified. That same justification would have prevailed if a claim had been made under Articles 8 and 14 in combination, but no such claim was discussed. The claim

also failed on Article 8 grounds. Article 8 was engaged because the subject matter of the dispute concerned financial consequences of death which are a part of family life because they are often settled prior to death. There was no appearance of interference by the state with the applicant's family life. The court noted at [100] that the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities. Eady J distinguished the case in *Swift* at [35] on the ground that inheritance rights arise for consideration before death, whereas the FAA only comes into operation following a death and thus inevitably after any relevant family relationship has come to an end. *Yigit* may also be distinguished on the ground that it did not concern the obligation of a tortfeasor to compensate the survivor for a loss personal to him or her. The case was about financial benefits which had been earned by the deceased during his life with the claimant. Whereas the operation of a state benefits scheme is a subject in which Convention rights may readily be engaged, the substantive law of tort (which in this area defines the financial obligations of wrong doers) is, on the whole, not. Further, and in any event, the finding of the Grand Chamber on Article 8 on which the claimant can rely was only that there was a family life in existence and that "questions of inheritance and voluntary dispositions between near relatives appear to be intimately connected with family life", see [95]. It therefore considered whether there was any interference with any right by conferring a particular status on civil, as opposed to religious, marriage. It held that there was not because there was no obligation on the state to recognise religious marriage under Article 8, see [102]. Article 8 may broadly be said to be engaged, but no Article 8 right existed which had been infringed. On this analysis, this decision is unhelpful to the claimant in the present case and affords no support to her claim.

The nature of bereavement damages

81. Bereavement damages are (whatever the outcome of this case) payable only to the survivor of a marriage or a civil partnership, or a parent of a child. They are payable as compensation for a loss. The loss is a special kind of loss but the end result of the provision is the payment of a sum of money. The Secretary of State argues partly in reliance on *M* that the absence of a payment cannot engage Article 8. That goes too far. As I will seek to demonstrate, *M* turned, at least so far as Lords Nicholls, Walker and Bingham were concerned, on the severity of the impact of the measure. If the Child Support regime had deprived *M* of any means of supporting her second family at all, then the outcome may have been different, in that the measure might have engaged Article 8, or been within its ambit. The Secretary of State in this case submits that the family or private life of the claimant continue with or without the bereavement payment in exactly the same way as they otherwise would, except that the financial situation of the claimant is either improved to the extent of the payment or not. Her financial position has been addressed by her rights under s.1 of the FAA to claim dependency damages and she has been fully compensated for the pecuniary losses caused by the death. Because the bereavement damages are paid in respect of non-pecuniary loss (grief) her financial position is the same as it would have been had there been no death. There is therefore no impact at all on the claimant's continuing family life, or private life. The Secretary of State submits that the case is just about money.

82. Mr. Sachdeva counters that the award of bereavement damages is not about money, but about recognition by society of the value of the loss of a relationship. He submits

that Lord Hailsham made this clear when introducing the measure by saying that it was not compensation for "loss of society" or monetary compensation for bereavement. He did not actually say this. "Loss of society" is a phrase which had been introduced into the debate from Scots Law. He said that he did not propose to enact the law of Scotland as to loss of society which he found wanting because it did not purport to compensate for grief but for "loss of society which is even more difficult to estimate". It involved a "repulsive enquiry" into how much a child was loved and "whether the parties sometimes got drunk at nights." He said that where damages for loss were concerned there should either be a fixed sum or nothing at all. He preferred the latter but was following a consensus which preferred the former. The need for a fixed or conventional sum was because "no monetary sum can adequately compensate a person for bereavement". The fact that the award was nevertheless intended to be compensatory is made clear, in my judgment, by the use in the FAA of the word "damages". As the quotation from Lord Scarman at [21] above shows, the payment is compensation for a head of loss not otherwise available at common law, namely grief. These "damages" may be claimed in an action under the FAA which is an action in tort which may be brought by dependants if liability could have been established had the victim survived. In tort claims the word "damages" has a meaning. It is a sum of money designed, so far as money can, to compensate the claimant for loss. The payment is monetary compensation for bereavement which is a fixed sum for the policy reasons explained by Lord Hailsham. In that sense only is the award a "token" or "symbolic" award. 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.

83. More generally, the logical consequence of Mr. Sachdeva's argument is that the s.1A payment should be available to all surviving partners whether their loss was caused by the fault of a third party or not. Why should the state distinguish between those whose grief is caused by the fault of a third party and those whose grief is not? The loss of a loved one is not more grievous, or more deserving of society's consoling memorial, because it was caused by the negligence of an insured, affluent or public defendant who can be sued than it is if caused by pure accident, war or disease. 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, as explained at [15] above. In my judgment this is a further important difference between the present case and *Yigit v. Turkey*.

84. I do not accept that denial of the award implies that the grief felt by the claimant is less valued by the state than would have been the case had she been married. The whole point of the scheme is to avoid any such judgments being made. If withholding the payment did express disapproval for her choice not to marry then it might have the humiliating effect which might engage the right to respect for private or family life. Since I do not believe that this is the case, I do not think it does. I accept that the claimant genuinely feels this way, but in assessing the applicability of Article 8 and its ambit her subjective assessment is not a reliable guide. I do not believe therefore that the scheme as it is violates the claimant's right to respect for her family or private life.

85. It does seem to me that in order to succeed in showing that Article 8 is directly engaged the claimant would have to show that the United Kingdom would be in breach of Article 8 if it had adopted Lord Hailsham's preferred solution and decided that no bereavement damages would be allowed at all. If there were a right protected by Article 8 to bereavement damages in the event of a death caused by fault, then the failure to afford such a remedy to the claimant might violate that right. I do not believe that Mr. Sachdeva's submissions went as far as to suggest that this could be shown. Further, I consider that the level of interference involved in refusing the availability of a relatively modest payment is below the threshold of seriousness where Article 8 could in any event be engaged. For these reasons I reject the claimant's case on direct violation of a Convention right.

What is the correct legal test of "ambit"?

86. It appears to me that the key principles are to be derived from a close understanding of *M*, *Clift,* and *Mathieson*.

Analysis of *M v. SSWP*

87. *M* is a striking decision. M was treated less generously than she would have been if she were in exactly the same position but living with a man rather than a woman. It is a case decided under Article 8/14 and the issue of the ambit of Article 8 arose directly for decision. It was not suggested that the scheme in question violated any substantive Article 8 right because the level of interference was not so severe as to infringe any substantive right, see Baroness Hale at [105]. Lord Bingham identified the core values of Article 8 at [5] quoted at [43] above. He said that the fact that she had £33.97 per week less than if she were living with a male partner did not impair these and therefore no Article 8 right was violated and the different treatment was not within the ambit of Article 8 either. He also expressed agreement with Lord Walker and his short speech was an explanation of the reasons why he agreed with him. I have cited Lord Walker at [53] above for his conclusion on the state of the Strasbourg cases on Article 8 and its ambit. At [60]-[61] he had pointed out that Article 8 is not the same as other Convention provisions "because of its much wider and much less well defined ambit".

88. It is harder to envisage a measure which does not breach Article 8 directly but is within its ambit than is the case, for example, in respect of Article 2 of the First Protocol (right to education) as Lord Walker explains. At [84] he identifies family life cases where a direct Article 8 claim failed and Article 14 was nevertheless found to be engaged. He explained that these cases "concerned measures very closely connected with family life". These are also the cases relied upon by Baroness Hale in her dissenting judgment at [109]. At [111] she dissented on the basis that a measure whose impact was not severe enough to violate Article 8 directly, may nevertheless be within its ambit so as to engage Article 14 if it is discriminatory. The last sentence of Lord Walker's paragraph [83] is to the opposite effect and expresses the decision of the majority on this issue (I have respectfully interpolated the word [not] in square brackets which appears to me to have been omitted from the Report):-

> "Less serious interference [with the former KGB officer's ability to find work] would not merely [not] have been a breach

of article 8; it would not have fallen within the ambit of the article at all."

89. Unlike Lord Nicholls, Lord Walker at [87] was prepared to assume that the same sex partnership in which Ms. M was now living was a family for Convention purposes, and held that the child support legislation was intended to promote family life by limiting the damage caused by the breakdown of relationships between couples who have children. He said that the fact that the legislation had this aim did not involve more than a tenuous link with respect for family life. There was no link at all between the measure and the family unit involving the children, because paying child support at a higher rate did not impact adversely on that relationship. It has nothing to do with respect for her relationship with her children. Equally, the link with private life was "very tenuous indeed" see [88]. There had been no improper intrusion into private life and she had not been criminalised, threatened or humiliated. The assessment of ambit by the seriousness of the interference with family and private life, and by the extent to which the link between the measure and the family and private life was tenuous, militates against the submission, based on *Mathieson*, that any link at all will suffice.

90. Lord Mance and Lord Nicholls both held that the new family of Ms M was not a family protected by Article 8 because of the state of Strasbourg jurisprudence at the time about same sex relationships. However, they both held that but for this question the Child Support Act 1991 was one of the modalities of one of the rights guaranteed by Article 8 (respect for family life) and thus within the ambit of Article 8, see Lord Nicholls at [19] and Lord Mance at [127]. Neither held that the measure was within the ambit of the right to respect for private life, see Lord Nicholls at [31]-[32] and Lord Mance at [157]. Lord Nicholls used the "seriousness" test at [32] to reject the private life claim, and Lord Mance at [157] evaluated the link between the measure and the right in order to determine whether it was tenuous. Lady Hale dissented in the result and held that the scheme was within the ambit of Article 8. Therefore on this issue the majority of opinions disagreed with the reasoning of Lord Bingham and Lord Walker and held that the child support scheme fell within the ambit of the right to respect for family life. This presents a difficulty in simply following *M v. SSWP*. Nevertheless, the majority of judges considered that it was necessary to test the link between the claimed Article 8 right and the measure either by reference (a) to the seriousness of the impact on the right, or (b) by whether the link was, or was not, tenuous, or (c) both. No judge in the majority held that any link at all will suffice.

91. *Clift v. SSHD*

92. *Clift* involved Article 5 and is not directly on point for that reason. However, at [13] Lord Bingham was attempting to state the law on the "ambit issue" as it had been left in *M*. I have cited that paragraph at [52] above in the context of explaining why Andrews J considered that she was simply applying decisions of the House of Lords when she explained the threshold for the application of Article 14 in Article 8 cases. Mr. Sachdeva criticises paragraph [13] of Lord Bingham in his submissions in reply. He says

xxxvi) That it plainly does not reflect the ratio of *M*. He says that there is nothing to suggest that Lord Bingham intended to narrow the test for ambit or to change previous jurisprudence.

xxxvii) That it was not part of the reasoning because Lord Bingham held that there was a sufficient link between the early release scheme and the core value protected by Article 5.

xxxviii) That the Bingham test would only catch facts close to the core of the substantive right and that "appears to exclude facts on the periphery of the substantive right, and certainly excludes facts outside the periphery of the substantive right. As a test for the involvement of Article 14 it simply cannot be correct."

93. Lord Bingham approached *Clift* by deciding three issues. The passage under discussion is part of his reasoning on the first issue which was whether the appellants' applications for early release came within the ambit of Article 5. Paragraph [13] identifies the test to be applied in principle in deciding that question. Lord Bingham decided it in principle and on authority, see [19]. In my judgment it plainly is part of the reasoning. Lord Hope agreed with Lord Bingham and added some observations only on the second issue, as did Lady Hale. Lord Carswell agreed with Lord Bingham. Lord Brown was also in complete agreement with him and added one observation on the first issue, at [66]. He pointed out some unacceptable consequences of the submissions of the Home Secretary in that case and concluded

> "It cannot be so and it is not so because the core value protected by Article 5 is liberty and, where the penal system includes a parole scheme, liberty is dependent no less upon the non-discriminatory operation of that than on a fair sentencing process in the first place."

94. In these circumstances, it is simply not open to me to say that the unanimously agreed approach to the "ambit test" set out in *Clift* at [13] is wrong. It is plainly part of the reasoning of the House on the first issue in that case. As I have said, the decision in *M v. SSWP* was not altogether easy to analyse and the House in *Clift* was required to extract its meaning and then apply it. Paragraph [13] performed that exercise. I do not accept either that it is inconsistent with Article 14 because it excludes consideration of matters which are peripheral to Convention rights. Lord Walker in *M* rejected a submission very similar to this when made by Ms Monaghan QC in the passage at [83] quoted at [53] above. The distinction he makes is between serious interference with private life and less serious interference and between measures closely connected with family life and those which are "much more remote" or less "tenuous". Lord Mance in *M,* as I have pointed out, rejected the suggestion that the child support scheme was within the ambit of the claimant's private life because the link between it and that right was "tenuous in the extreme" [157].

Mathieson v. SSWP

95. I therefore turn to *Mathieson v. SSWP* to see whether it supports Mr. Scahdeva's submission that reliance on *M* and *Clift* without consideration of this later case is an error made by Andrews J in *Steinfeld* which I should not repeat. The passage relied on is Lord Wilson JSC at [16] and [17] quoted at [69(iii)] above. In *Mathieson* the claimant succeeded in establishing that the discrimination was within the ambit of Article 1 of Protocol 1 of the Convention (enjoyment of possessions). This was conceded. The Supreme Court did not decide whether it also fell within the ambit of

Article 8 which was disputed. Lord Wilson JSC proceeded on the basis of the concession and did not decide any issue relating to scope. His summary of the proper approach to scope, or ambit, cannot in these circumstances be regarded as changing the law. In particular, it cannot be taken to change the law in relation to Article 8 where no decision was made. It was not necessary for the Supreme Court to decide this issue: see [48(b)] per Lord Wilson JSC in *Mathieson.* Article 8, as I have attempted to explain, presents particular problems in defining its ambit and I consider that following a case in which the issue did not arise for decision would be a recipe for error.

96. Conclusion on ambit test

97. For these reasons I conclude that the law on ambit for Article 8 purposes is that stated in *M* as explained by Lord Bingham in *Clift*. Had Lord Wilson JSC intended to disagree with that he would have made that explicit. It is common ground that there must be a link to a Convention right. The question is what the nature of the link should be (will a tenuous one suffice) and, particularly in Article 8 cases, what is the value to which the link must relate.

98. Decision on ambit issue

99. Is the scheme within the ambit of Article 8 so as to engage Article 14? The argument here is that the scheme is one of the modalities by which the state respects family and private life and having introduced it there is an obligation to apply it without discrimination. In the context of Article 8 whose rights have a very wide ambit it does not seem to make much difference whether the scheme must be "close to its core values" or "linked to a substantive right", as long as any such link must be real rather than tenuous, and the suggested infringement sufficiently serious. For the reasons given above I do not consider that Andrews J fell into error in following *M* and *Clift* without modifying the result of those decisions to take *Mathieson* into account. As I have explained, if a measure does not engage Article 8 it will often fall outside its ambit for the same reasons. In my judgment this is the case here. I accept the submissions of the Secretary of State on this issue. 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 Article 8. Alternatively, the absence of a right to compensation for her grief from the Trust 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. This conclusion appears to be in line with the principles set out in the key passage of Lord Walker's speech in *M* at [53] above.

100. This decision is also consistent with the 4 stage test for justification of discrimination for the purposes of Article 14 which I have extracted from Lady Hale's judgment in *Tigere*, see [67 (iv)] and [68] above where I comment that it is important for determining the meaning of "ambit" as well as deciding whether any infringement is justified. The test involves assessing the "legitimate aim" of a measure on the premise that a "fundamental right" is limited by it. That is the effect of the first stage of the test. This will obviously be the case where Article 8 is directly engaged, because the right to respect for family and private life is a fundamental right. This

test was enunciated in an Article 14 case, *Tigere*, and 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.

101. For these reasons I have concluded that this claim does not engage or fall within the ambit of Article 8. That requires me to dismiss it. Because of the possibility that the case be the subject of an appeal I will briefly set out my conclusions on the other issues identified at [4] above.

Analogous position/ status

102. The claimant relies on *In Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173. Two passages are relied upon:-

> **xxxix)** LORD HOFFMANN:-
>
> "7 It is clear that being married is a status. In *Salvesen or von Lorang v Administrator of Austrian Property [1927] AC 641* , 653 Viscount Haldane said: "the marriage gives the husband and wife a new legal position from which flow both rights and obligations with regard to the rest of the public. The status so acquired may vary according to the laws of different communities."
>
> 8 If being married is a status, it must follow that not being married is a status. If you claim that you are no longer or never have been married to someone, you may apply for a "declaration as to marital status" under article 31 of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989 (SI 1989/677). It is true that in respect of everything except not being married, unmarried people are a somewhat formless group. But, then, so are people who are not of noble birth, and yet birth is one of the grounds upon which article 14 expressly forbids discrimination. I therefore have no difficulty with the concept of being unmarried as a status within the meaning of article 14.
>
> 9 The European Court of Human Rights does not seem to have had any difficulty either. In *PM v United Kingdom* (2005) 18 BHRC 668 the applicant complained that he was not allowed to deduct from his taxable income the payments he made for the maintenance of his daughter solely because he had not been married to the mother. The court said, at paras 27–29:
>
> > "27. … This applicant differs from a married father only as regards the issue of marital status and may, for the

purposes of this application, claim to be in an relevantly similar position.

"28. The justification for the difference in treatment relied on by the Government is the special regime of marriage which confers specific rights and obligations on those who choose to join it. The court recalls that it has in some cases found that differences in treatment on the basis of marital status has had objective and reasonable justification … It may be noted however that as a general rule unmarried fathers, who have established family life with their children, can claim equal rights of contact and custody with married fathers … In the present case, the applicant has been acknowledged as the father and has acted in that role. Given that he has financial obligations towards his daughter, which he has duly fulfilled, the court perceives no reason for treating him differently from a married father, now divorced and separated from the mother, as regards the tax deductibility of those payments. 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.

"29. The court concludes therefore that there has been a violation of article 14 of the Convention in conjunction with article 1 of the First Protocol in this case."

103. LADY HALE

"107 I share the view that lack of marital status is as much a "status" for the purpose of article 14 as is the status of marriage itself. It is understandable that family lawyers might think otherwise, as did the Court of Appeal in this case. In family law, marriage is not just a contract; it is also a status, bringing with it rights and responsibilities, not only as between the parties, but also as against third parties and the state. There is no comparable status of being an unmarried couple. But for article 14 purposes, the absence of a particular status is just as much a prohibited ground of distinction as is its presence. To family lawyers, legitimacy was also a status, in the same way that marriage was a status, whereas illegitimacy was not. But the European Court of Human Rights long ago recognised that unjustified discrimination between the children of married and unmarried parents fell within article 14: see *Marckx v Belgium* (1979) 2 EHRR 330. The same applies to discrimination between married and unmarried fathers: see *Sahin v Germany* (2001) 36 EHRR 765. It cannot seriously be argued that a difference in treatment between married and unmarried

couples, in relation to the right to respect for their family life, is not covered by article 14."

104. *R (RJM) v. SSWP* [2009] AC 311 per Lord Neuberger decided that homelessness was, for the purposes of Article 14 "other status". Eady J in *Swift* cited this decision as authority for the proposition that status or personal characteristics would generally be more concerned with who a person is rather than with what he or she does, relying on [5] and [45]. This appears to me to condense somewhat the effect of a very subtle decision. Paragraph [5] per Lord Walker does indeed refer to what people do as being less likely to amount to a "personal characteristic" capable of being "other status" but the paragraph [5] as a whole (with which Lord Neuberger agreed at [41]) reads as follows:-

> ""Personal characteristics" is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify."

105. Lord Neuberger at [47] said:-

> "47 In reaching the contrary conclusion, the *Court of Appeal at [2007] 1 WLR 3067*, para 45 was influenced by the fact that being homeless was a voluntary choice. Ignoring the point that in some cases it may not be voluntary, I do not accept that the fact that a condition has been adopted by choice is of much, if any, significance in determining whether that condition is a status for the purposes of article 14. Of the specified grounds in the article, "language, religion, political or other opinion, … association with a national minority [or] property" are all

> frequently a matter of choice, and even "sex" can be. (And it is noteworthy that in the recent case *AL (Serbia) [2008] 1 WLR 1434*, being parentless was unhesitatingly accepted as being an "other status" under article 14.) In para 42, the Court of Appeal also considered that the fact that homelessness was not a legal status was a "significant but not conclusive point" against it being a "status" for article 14 purposes, but I do not consider that it is a telling point. After all, "political or other opinion" involves no legal status, and I doubt whether some of the other statuses specified in article 14 do so either."

106. The status test was further explained by Lord Wilson JSC in *Mathieson* at [21]-[23] and [60]. This decision follows *Clift* in the ECtHR which held that Mr. Clift did have status, contrary to the view of the House of Lords on that issue:-

> "It is clear that, if the alleged discrimination falls within the scope of a Convention right the Court of Human Rights is reluctant to conclude that nevertheless the applicant has no relevant status, with the result that the inquiry into discrimination cannot proceed."

107. Mr. Blundell submits that the claimant has no relevant status: this relies on Eady J in *Swift*.

108. **My conclusion on status:** It appears to me that it is clearly established by decisions binding on me that the claimant does have "other status" for the purposes of Article 14. Adopting a condition by choice is "behaviour", or "what one does" which may become a personal characteristic depending on where within Lord Walker's concentric circles around the personality it lies, see [97] above. Living in a relationship which is a status for the purposes of s.1 of the FAA and other legislation I have identified above and which Lord Hoffmann and Lady Hale have decided is a status appears to me to be a status for the purposes of s.1A of the FAA. This conclusion is reinforced by the discussion of "status" in *Mathieson v. SSWP* [2015] UKSC 47; [2015] 1 WLR 3250 which it is not necessary to set out in full. Any argument relying on the Strasbourg cases is excluded by *Yigit v. Turkey* at [78]-[80]. I do not think that Eady J had the benefit of the full citation of authority on this question which I have had and I do not think that it is open to me to follow his decision in *Swift* on this issue, which was not essential to his decision. I respectfully suggest that my analysis of *RJM* at [97]-[98] above shows that it does not support his conclusion to the extent that he suggested.

Analogous Position

109. The claimant contends that she is an analogous position to a widow for the purposes of the scheme overall because she does qualify as analogous for the purposes of s.1 as a claimant for dependency damages.

110. The Secretary of State submits that the claimant is not in an analogous position to a widow: this submission relies on Strasbourg case law which consistently permits distinctions to be drawn between those who are married and those who are not. *Lindsay v. United Kingdom* (1987) 9 EHRR CD 555, *Shackell v. United Kingdom*

(Unreported, application no. 45851/99, 27th April 2000), *Burden* v. *United Kingdom* (2008) 47 EHRR 38,and *Van der Heijden v. the Netherlands* (2013) 57 EHRR 13 all support this submission. I add *Ghaidan v. Godin Mendoza* cited above at [138] per Lady Hale, and *Vallianatos v. Greece* (2014) 59 EHRR 12 at [83]-[84]. I also note the reliance on *Van der Heijden* recently by the Court of Appeal (Criminal Division) in the UK in *R v. Suski (Dariusz Tonmasz)* [2016] EWCA Crim 24. I have noted the commentary at [2016] Crim LR 558 which suggests that *Suski* (a leave decision) was wrongly decided and that *Van der Heijden* may be ripe for reconsideration in the ECHR.

111. **Conclusion on analogous position:** It is apparent from paragraphs [40]-[41] of *R (RJM) v. SSWP* (citation above) that the question of "other status" and "analogous position" are closely linked. In my judgment the claimant is clearly in an analogous position to the survivor of a civil partnership or marriage. 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. Having regard to Lady Hale's injunction to move swiftly on to the next question if no obviously relevant differences are immediately apparent, that is what I will do: see *AL (Serbia) v. SSHD* [2008] 1 WLR 1434 at [24]-[25]. The situations are sufficiently similar to require discrimination to be justified if any rights within the ambit of Article 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.

Justification

112. The claimant then submits that the interference with Article 8(1) is not objectively justified within the Article 8(2) qualification. On this issue the claimant contends correctly that it is for the Secretary of State to justify the interference. The claimant submits that the Secretary of State's pleaded case is unsupported by evidence and contradicted by such evidence as there is (see the statistics I set out above) and the legislative history which I have also summarised. The claimant relies as well on the lack of any rational connection between any of the goals identified and the means used to achieve them and relies on *R (Tigere) v. Secretary of State for Business Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820. This is also further authority for the proposition that any interference must strike a fair balance which is for the court to assess without a margin of appreciation. *R (Quila) v. SSHD* [2011] UKSC 45; [2012] 1 AC 621[58] is authority for the proposition that if the state chooses to take a sledgehammer it must at least try and identify the size of the nut so that it can show that the measure is no more than necessary to accomplish the objective.

113. The claimant then submits that if there is a positive obligation the Third Defendant must show that the state has taken such steps as are reasonable in all the circumstances to discharge it. I shall not discuss this further because it seems to me to

be obvious that if there is a positive obligation to extend bereavement damages to 2 year + cohabitees, the state has failed to comply with it despite many opportunities to do so and much encouragement from the Law Commission, the Association of British Insurers, the editors of Kemp & Kemp and a draft bill ready to be passed which was abandoned. In 2012 the Criminal Injuries Compensation Scheme allowed bereavement damages to 2 year + cohabitees whose partners had been killed by criminals. The difference between that approach and that announced by Mr. Djanogly in 2011 in this sphere has not been explained and no rational explanation has occurred to me.

114. As is apparent, the arguments on justification of discrimination under Articles 14 and 8 are much the same as they are to those advanced about whether a breach of Article 8 is justified under Article 8(2). The burden is on the Secretary of State to justify the different treatment and this requires an exacting analysis of the factual case advanced in defence of the measure, *Bank Mellat (No 2) v. HM Treasury* [2013] UKSC; [2014] AC 700. The claimant submits that this requirement, derived from Lord Sumption JSC at [20], means that the Secretary of State cannot succeed without serving evidence. In my judgment the position is not so clear. In the later case of *R (Tigere) v. Business Innovation and Skills Secretary* [2015] 1 WLR 3820 [81 B-D] per Lords Sumption and Reed JJSC discuss the relevance of evidence in cases of this kind in terms which make it clear that it is not always necessary. Although in the minority in the result, they do not seem to be stating anything controversial at that point in their judgment.

115. Justification of any interference with any Article 8 right is claimed by the Secretary of State in line with the Defence. It is submitted that there is an objective justification for any discrimination for the same reasons that any interference with an Article 8 right would be justified applying Article 8(2). The Secretary of State submits that Lord Dyson in *Swift* at [42] in the Court of Appeal reached the same conclusion on Article 8(2) justification as he had done for Article 14 justification and for the same reasons. This is relied upon in support of the contention that the two questions are essentially the same particularly where the discrimination is not on one of the "suspect grounds".

116. **Conclusion on justification.** If I am wrong about the engagement of Articles 8 and 14, I do not believe that the Secretary of State has established that the difference in treatment between the claimant and a widow in her position is justified applying the four stage test set out in [67] above, derived from *Tigere.* 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?

117. 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?

118. 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? It may also be observed that the status quo which the Secretary of State seeks to support appears to undervalue the love which children have for their parents. It means that a child who loses her parents recovers nothing although her bereavement will almost inevitably be very damaging. This was justified by Lord Hailsham when proposing the 1982 Act on the basis that children would always recover under s.1 and the bereavement claim would therefore add nothing of any real value to them. This is a scarcely adequate justification given that experience has shown that many of those who claim bereavement damages also claim dependency damages. No rational policy objective has been established which is served by denying the claim to an orphan.

119. In short I agree with the Law Commission, and the predecessor of the Secretary of State who sought to introduce the Draft Bill. The current law is in need of reform. This does not mean, however, that I have any power to bring about that reform. My power to grant a remedy is contingent upon a finding that the provision is incompatible with a Convention right and I have not felt able to make such a finding.

Remedies

120. If I had found that s.1A of the FAA violates the claimant's Article 8 rights I would have made a declaration of incompatibility because even having regard to the wide power to "read down" an offending provision I would not have been able to do so. As the claimant accepted when deciding not to pursue this claim against the first and second defendants the terms of the provision are very clear. They were considered by Parliament in 1982 and 2004. The importance of marriage was underlined by the 2013 Act and it is likely that the impact of that provision was considered in relation to s.1A of the FAA. Legislation was thought necessary by the Law Commission and the government in 2009 to achieve this reform and I agree with them. Further there is a need to decide how the award is divided when there is a qualifying cohabitee and a spouse (or whether it is made at all to the spouse in those circumstances) and this involves choices to be made by Parliament and not the court. S.1A(4) of the FAA provides for the damages to be shared equally where a minor child dies and both parents claim bereavement damages. The draft Civil Law Reform Bill (Cm. 7773) in

2009 provided for equal division of the damages where there was a claim by both a surviving spouse and a cohabitee. That provision, if enacted, would have significantly emphasised the extent to which Parliament was determined to look away from the quality of individual relationships in awarding damages in this area. There may be cases where the surviving spouse and the surviving cohabitee are equally distressed by the death, but perhaps this will not invariably be the case. I would therefore not only have to read down the terms of s.1A but write some new ones which attempt to solve quite difficult issues of policy which Parliament has not addressed. I would not be construing a provision, so much as enacting one. This problem increases if children are also included so that they can claim for bereavement on the loss of a parent. Any rational law reform of this area would include consideration of this aspect. The number of claimants in the case may then be quite high, especially if the deceased had children in more than one family. Equal division may mean that no-one gets anything of any value. It appears to me that the denial of damages to the children is just as much of an anomaly as the denial to the claimant, and I could not, I think, read down the FAA on this application so as to cure all the problems with it. For these reasons a declaration of incompatibility appears to be the right remedy. Unhappily, for the reasons given above, I do not feel able to grant it in this case. The powers of the court under the HRA are broad and important, but they must be exercised with restraint and according to the law. They do not give the court power to seek to reform the law except in very particular circumstances which I have decided do not exist here.

121. It is to be hoped that the outcome of this litigation may provoke some further discussion in Parliament for further legislation which might improve the current state of the law. The necessary provision would be short, probably uncontroversial, and would involve very limited additional expenditure.