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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

UPON A REFERRAL BY THE APPEAL TRIBUNAL OF NORTHERN IRELAND
UNDER SCHEDULE 10 TO THE NORTHERN IRELAND ACT 1998

Between:

AD and LELIA JOANNE ARMSTRONG

Appellants

and

DEPARTMENT FOR COMMUNITIES

Respondent

and

DEPARTMENT FOR WORK AND PENSIONS

Interested Party

Karen Quinlivan KC and Aidan McGowan (instructed by The Law Centre (NI)) for the
Appellants

Tony McGleenan KC and Laura Curran (instructed by The Departmental Solicitor's
Office) for the Respondent

Julian Milford KC and Terence McCleave (instructed by The Crown Solicitor's Office) for
the Interested Party

Before McCloskey LJ, Horner LJ and Huddleston J

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GLOSSARY

BSP: Bereavement Support Payment

DfC: the Department for Communities

DOI: Declaration of incompatibility

DWP: the Department for Work and Pensions

ECHR: The European Convention on Human Rights and Fundamental Freedoms

HRA 1998: The Human Rights Act 1998

JCHR: the Joint Committee on Human Rights

NICA: The Northern Ireland Court of Appeal

The Remedial Order: the Bereavement Benefits (Remedial) Order 2023

The Tribunal: the Appeal Tribunal

UKSC: the United Kingdom Supreme Court

The “1992 Act”: the Social Security Contributions and Benefits Act (NI) 1992

The “2015 Act”: the Pensions Act (NI) 2015

The “2019 Act”: the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019

WPA: Widowed Parents Allowance

McCLOSKEY LJ (*delivering the judgment of the court*)

The Human Rights Act and Parliamentary Sovereignty

[1] The advent of the Human Rights Act 1998 (“HRA 1998”) to the United Kingdom (“UK”) legal order on 2 October 2000 signalled what enthusiasts of English literature might, in the language of Aldous Huxley, describe a brave new world. Jurists, among them judges at the highest level, were quick to acknowledge this seismic change in the constitutional arrangements to which the UK legal system belongs. To take but one example, drawn from one of the earliest landmark HRA 1998 decisions of the House of Lords in 2001:

“The issue in these three appeals is whether it is compatible with the Human Rights Act 1998 for Parliament to confer upon the Secretary of State the power to make decisions

which affect people's rights to the ownership, use or enjoyment of land."

(*Re Alconbury Developments* [2001] UKHL 23, para [65] per Lord Hoffman). This formulation would have been constitutionally heretical prior to 2 October 2000.

[2] One of the scenarios made possible by HRA 1998 is something which distinguished legal scholars such as Professor Dicey and occupants of the highest judicial posts would have viewed as a mixture of the inconceivable, the heretical and the purely theoretical. It entails the following scenario.

[3] HRA 1998, an instrument of primary legislation in the UK legal system, protects certain of the rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms ("ECHR"), an international treaty. It confronts the dualist principle foursquare, by giving effect in municipal law to certain provisions of an international treaty. It enables the citizen, in certain well-defined circumstances, to require a UK court to give effect to one of the protected ECHR rights. HRA 1998 has inter alia devised the following discrete mechanism. Where a citizen complains that a provision of primary UK legislation is incompatible with one of the protected ECHR rights to which that person can lay claim, one of the possible outcomes in proceedings before the High Court is the provision of a remedy declaring that the relevant provision of domestic legislation is incompatible with one or more of the protected ECHR rights.

[4] In opting for the scheme of HRA 1998, the legislature made the following choice. In contrast with the intrinsic characteristics and limitations of the remedy of a declaration (or declaratory order), Parliament clearly decided that something more efficacious, more intrusive, was required. In this way the High Court was endowed with the capacity, previously unheralded, of declaring that a specified provision of primary legislation is incompatible with one of the protected ECHR rights.

[5] Crucially, however, this newly acquired judicial power does not extend to annulling, or amending, legislation. The arrangements which have been adopted in certain other jurisdictions around the globe were not copied. The briefest of reflections on the doctrine of the separation of powers illuminates the rationale. It is fully reflected in the discrete regime within HRA 1998 which is triggered by a judicial declaration of incompatibility. In a sentence, there is, constitutionally, a fundamental distinction between Parliament enacting "statute X" and a court declaring it Convention incompatible. The judicial function is thereby exhausted and next step, if any, is for Parliament. This distinction is fully reflected in the scheme of HRA 1998. In this way, there is no trespass by the judicial arm on the exclusive domain of the elected legislature, with the result that parliamentary sovereignty and democratic accountability are preserved intact.

[6] The foregoing was a stand-out feature of the various legislative stages in both Houses of Parliament culminating in the enactment of HRA 1998. To take but one

example, at the Committee stage in the House of Commons, the Parliamentary Secretary of the Lord Chancellor's department described the court's power to make a declaration of incompatibility as "... a compromise between parliamentary sovereignty and the need to give proper effect to the European Convention." He continued:

"... A declaration does not affect the validity, continuing operation or enforcement of the relevant legislative provision. This is because we think that any decision to change primary legislation should be reserved for the consideration of Parliament. Again, the Government are upholding the sovereignty of Parliament and are not in any way breaching that principle."

[7] Elaborating and summarising, the following scenario is possible under the scheme of HRA 1998. In any proceedings in which the High Court, or a higher court, is determining whether a provision of primary legislation is compatible with one of the protected Convention rights and concludes that there is incompatibility, it may make a declaration to this effect (a "DOI"). A DOI does not affect the validity, continuing operation or enforcement of the statutory provision concerned. Nor is it binding on the parties to the proceedings in which it is made. (See sections 4 - 5 of and Schedule 1 HRA 1998.) In the wake of a DOI, a Minister of the Crown where satisfied that there are "compelling reasons" for doing so, may amend the legislation "... as he considers necessary to remove the incompatibility": per section 10(2). Notably, the mechanism for doing so is by order, via a statutory instrument (section 20(1)). This mechanism is commonly described as a "Remedial Order." HRA 1998 does not oblige the relevant Minister to opt for this course in the wake of a DOI. Rather, there is an opinion to be formed and a discretion to be exercised. Nor does HRA 1998 preclude a purely legislative response involving the two chambers of Parliament. Crucially, the scheme of HRA 1998 enables the executive and the legislature of the United Kingdom to react to a judicial condemnation of legislative ECHR incompatibility by perpetuating the judicially diagnosed aberration in full or in part.

The Referrals

[8] The two cases giving rise to this judgment come before this court in the following way. Both appellants pursued appeals relating to certain statutory benefits in the Appeal Tribunal (the "Tribunal"). The Tribunal has not yet finally determined their appeals. It has, rather, referred both cases to this court by exercising its power under Schedule 10 to the Northern Ireland Act 1998. In the combined knowledge of the parties and the court this step is unprecedented, with one exception (para [44] *infra*). That said, its validity is unquestioned.

[9] It is appropriate to rehearse the relevant provisions of Schedule 10:

“SCHEDULE 10 Devolution Issues

PART I PRELIMINARY

1. In this Schedule “devolution issue” means –
 - (a) a question whether any provision of an Act of the Assembly is within the legislative competence of the Assembly;
 - (b) a question whether a purported or proposed exercise of a function by a Minister or Northern Ireland department is, or would be, invalid by reason of section 24;
 - (c) a question whether a Minister or Northern Ireland department has failed to comply with any of the Convention rights...; or
 - (d) any question arising under this Act about excepted or reserved matters.

...

Notice of devolution issue

5. A court or tribunal shall order notice of any devolution issue which arises in any proceedings before it to be given to the Advocate General for Northern Ireland and the Attorney General for Northern Ireland (unless the person to whom the notice would be given is a party to the proceedings).

...

6. A person to whom notice is given in pursuance of paragraph 5 may take part as a party in the proceedings, so far as they relate to a devolution issue.

...

Reference of devolution issue to Court of Appeal

7. A court, other than the Supreme Court or the Court of Appeal in Northern Ireland, may refer any devolution issue which arises in any proceedings before it to the Court of Appeal in Northern Ireland.

8. A tribunal from which there is no appeal shall refer any devolution issue which arises in any proceedings before it to the Court of Appeal in Northern Ireland; and any other tribunal may make such a reference.

9. The Court of Appeal in Northern Ireland may refer any devolution issue which arises in proceedings before it (otherwise than on a reference under paragraph 7 or 8) to the Supreme Court.

10. An appeal against a determination of a devolution issue by the Court of Appeal in Northern Ireland on a reference under paragraph 7 or 8 shall lie to the Supreme Court, but only with permission of the Court of Appeal in Northern Ireland or, failing such permission, with permission of the Supreme Court.”

These two referrals engage para 1(a) and (c) – and, possibly, (b) of Schedule 10.

[10] Ms AD and Ms Armstrong, whom we shall describe collectively as the “appellants”, are the persons involved in these referrals. Also before this court are the two Government Departments concerned, the Department for Communities (“DfC”) and the Department for Work and Pensions (“DWP”). Each has participated actively in the proceedings. The Tribunal has referred to this court the following single question:

“In light of the judgments of the Supreme Court in *In Re McLaughlin* [2018] UKSC 48 and the High Court of England and Wales in *R(Jackson) v Secretary of State for Work and Pensions* [2020] 1 WLR 1441, if either appellant establishes a breach of their rights under Art 8 ECHR in conjunction with Art 14 ECHR what remedy, if any, arising out of the refusal of the Department for Communities to grant them Widowed Parents Allowance or Bereavement Support Payment for any period prior to 30 August 2018, in accordance with The Bereavement Benefits (Remedial) Order 2023, on the basis that they were cohabiting partners rather than spouses or civil partners of the deceased, should follow?”

The referred question was settled by this court following the referrals and having invited and received submissions, as the initial text was considered unsatisfactory.

The context in brief

[11] The relevant factual matrix of each case is both uncomplicated and uncontested. Furthermore, there are strong parallels between the two. In each case the appellant unsuccessfully pursued a claim for different bereavement statutory benefits, namely Bereavement Support Payment (“BSP” – Ms AD) and Widowed Parents Allowance (“WPA” – Ms Armstrong). At a stage when their appeals to the Tribunal were pending certain provisions of primary legislation bearing on the refusal decisions were declared Convention incompatible by the courts. While a remedial order (*infra*) followed, due to its limited retrospective effect this entitled the appellants to some restricted benefits payments only. This stimulated their statutory appeals to the Tribunal and generated the Tribunal’s ensuing referrals to this court.

The AD case

[12] In the case of Ms AD the material facts are these:

- (i) She had an unmarried, cohabitation relationship with a male partner who died on 8 June 2017. Ms AD’s subsequent application for BSP was refused on the ground that she and her deceased partner were not married. The first stages of the Appeal Tribunal proceedings followed.
- (ii) On 7 February 2020, the English High Court, in *R(Jackson) v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin), declared that section 30(4)(a) of the Pensions Act 2014, read with section 30(1), is incompatible with article 14 ECHR read with article 8 ECHR in so far as it empowered the Secretary of State to order by Regulations that BSP be paid at a higher rate in the case of a person who is pregnant or entitled to child benefit only if they are a spouse or civil partner of the deceased.
- (iii) The Northern Irish (“NI”) equivalent statutory provision is section 29 of the Pensions Act (NI) 2015 (the “2015 Act”).
- (iv) On 9 February 2023 the Bereavement Benefits (Remedial) Order 2023 (“the Remedial Order”) came into operation. Article 7 of the Remedial Order amends section 29 of the 2015 Act to make surviving cohabiting partners eligible for BSP. Article 1(3) of the Remedial Order provides, *inter alia*, that the amendment in Article 7 is to be treated as having had effect from 30 August 2018 (the crucial provision in these proceedings).
- (v) Ms AD then made a further claim for BSP, giving rise to a decision by DfC that the claim would be allowed to the extent of being backdated to 30 August 2018.
- (vi) In this way Ms AD’s claim in respect of the period 8 June 2017 to 29 August 2018 was refused, thereby denying her BSP payments totalling £8400.

- (vii) Following an unsuccessful reconsideration application Ms AD's further appeal to the Tribunal is pending, these referrals having materialised.

[13] Ms AD contends that the Tribunal is required by section 6 of the Human Rights Act 1998 and/or section 24(1)(a) of the Northern Ireland Act 1998 to allow her appeal against the refusal of BSP in respect of the period between her partner's death on 8 June 2017 and 30 August 2018. This contention is advanced on the basis that the offending provision of legislation, namely section 29 of the 2015 Act, has in substance been found to be incompatible with her Article 8/Article 14 ECHR rights by virtue of the decision in *Jackson*.

[14] Ms AD contends that this court should confirm to the Tribunal that, applying section 6 of the Human Rights Act 1998 and/or section 24(1)(a) of the Northern Ireland Act 1998, the Tribunal must allow her appeals against the DfC's decisions dated 26 September 2017 and 20 March 2023 insofar as they refused her application for BSP for the period prior to 30 August 2018. (In argument, the mechanism for this "confirmation", a question raised by the court, was not specified, while s 24(1)(a) did not feature)

[15] DfC accepts that following *Jackson* section 29 of the 2015 Act as framed at the date of this appellant's partner's death is incompatible with Article 14 ECHR when read with Article 8. Thus, it is uncontested that the refusal of BSP to Ms AD in respect of the period 8 June 2017 to 30 August 2018, on the basis that this appellant and the deceased were cohabiting partners rather than spouses or civil partners, is incompatible with this appellant's aforementioned Convention rights.

[16] DfC contends that this court should confirm to the Tribunal that it should dismiss Ms AD's appeal, in light of the following: Parliament has responded to the incompatibility in the 2015 Act by making the Remedial Order; a finding by this court that DfC has acted unlawfully in such circumstances would undermine the constitutional balance created by sections 6, 10 and 21 HRA 1998, whereby this appellant cannot challenge a failure to make a Remedial Order by virtue of section 6(6); these proceedings in substance constitute a challenge to the temporal provisions of the Remedial Order; but in the event of the court disagreeing with DfC's primary submission no relief should be granted save a declaration that this appellant has suffered discrimination contrary to article 8 read with article 14 ECHR arising from the failure to provide her with BSP from 8 June 2017 to 30 August 2018.

The Armstrong case

[17] In the case of Ms Armstrong:

- (i) This appellant also had an unmarried cohabiting relationship with a male partner, who died on 21 September 2014.

- (ii) Ms Armstrong's subsequent claims for Widowed Parents Allowance ("WPA") were disallowed by DfC on the ground that she and her deceased partner had not been married.
- (iii) On 30 August 2018, the United Kingdom Supreme Court ("UKSC"), in *Re McLaughlin* [2018] 1 WLR 4250, declared that section 39A of the Social Security Contributions and Benefits (NI) Act 1992 was incompatible with article 14 ECHR, read with article 8, insofar as it precluded any entitlement to widowed parent's allowance by a surviving unmarried partner of the deceased.
- (iv) The Remedial Order followed.
- (v) On 10 February 2023, Ms Armstrong made a further claim for WPA, giving rise to a decision by DfC that the claim would be allowed to the extent of backdating to 30 August 2018. In this way, Ms Armstrong's claim in respect of the period of 21 September 2014 to 29 August 2018 was refused.
- (vi) Following an unsuccessful reconsideration application Ms Armstrong's further appeal to the Tribunal is pending, these referrals having materialised.

[18] Ms Armstrong acknowledges that the Tribunal is required to dismiss her appeal on the basis that, notwithstanding that the refusal of WPA for the period prior to 30 August 2018 on the ground that she and her partner were not married is incompatible with her Convention rights under Article 14 in conjunction with Article 8, the Tribunal is bound by primary legislation, namely, section 39A of the 1992 Act, as amended by the Remedial Order as it applies prior to 30 August 2018 – the "1992 Act"), to dismiss her appeal.

[19] Ms Armstrong contends that this court should make a DOI pursuant to section 4 of HRA 1998 in the following terms: insofar as section 39A of the 1992 Act, as amended by the Remedial Order, precludes the award of WPA to her for the period prior to 30 August 2018 on the ground that she and her partner were not married, it is incompatible with her rights under Article 14 ECHR in conjunction with Article 8.

[20] DfC accepts that, in light of the decision in *McLaughlin*, the refusal of WPA for the period prior to 30 August 2018 on the basis that the appellant and her partner were cohabiting partners rather than spouses or civil partners is incompatible with the appellant's Article 8/Article 14 rights.

[21] DfC submits that this court should grant no remedy to Ms Armstrong, given that the 1992 Act is primary legislation and the Supreme Court has already made a DOI in *Re McLaughlin* to which Parliament has chosen to respond by enacting the Remedial Order (noted above) under section 10 HRA 1998; and any further DOI would be inappropriate in light of the statutory scheme of the HRA 1998 and the decision in *Kelly v SSWP* [2024] EWCA Civ 613.

The Remedial Order and its context

[22] The Bereavement Benefits (Remedial) Order 2023 (the “Remedial Order”) came into operation on 9 February 2023. The Remedial Order is nothing if not an elaborate measure of subordinate legislation. It operates as follows. In Articles 4 and 5 it makes a series of amendments to three English measures of primary legislation, namely the Pension Act 2014, the Social Security Contributions and Benefits Act 1992 and the Social Security Contributions and Benefits (NI) Act 1992. In addition, the Remedial Order makes related amendments to various instruments of subordinate legislation, beginning with the Bereavement Support Payment Regulations 2017 and the Bereavement Support Payment (No 2) Regulations (NI) 2019. The Remedial Order also amends the Pensions Act 2014 (England and Wales) and the Pensions Act (NI) 2015. Articles 6 and 9, in tandem with Article 10 and the Schedule, make extensive amendments to a series of instruments of subordinate legislation. The amendments made to Articles 4–9 have retrospective effect, dating from 30 August 2018, per Article 1(3). These are the key provisions for the purposes of these referrals from the Appeal Tribunal.

[23] The Remedial Order, and in particular its retrospective effect provision, must be evaluated in the context to which they belong. This is explained in some detail in the affidavit of Helen Walker of the DWP, which contains material uncontested evidence.

[24] It is appropriate to highlight, firstly, the principle of parity, which Ms Walker addresses in her affidavit. This principle has mixed statutory and policy ingredients. It has been firmly embedded in the state of Northern Ireland since its creation over one century ago. As of today, it is expressed in section 87(1) of the Northern Ireland Act 1998. One particular element of its policy dimension, drawn to the attention of the court, is the HM Treasury “Statement of Funding Policy”, dated October 2021. The following three paragraphs, self-explanatory, are of note:

“The majority of responsibilities relating to welfare are devolved matters in Northern Ireland. However, the Northern Ireland Act 1998 commits the relevant UK Government and Northern Ireland Executive ministers to seek to secure, to the extent agreed between them, single systems of social security, child support and pensions.

The UK Government is therefore committed to ensuring that the Northern Ireland Executive has sufficient funding available to maintain welfare payments to recipients in Northern Ireland to the same level as those funded by the equivalent UK Government departments and agencies in Great Britain. This is achieved by the UK Government funding the relevant welfare payments in AME, consistent

with the general arrangements set out above for funding AME programmes.

Therefore, if the Northern Ireland Executive's welfare programmes mirror the equivalent programmes in Great Britain, the UK Government will fund the costs. If the Northern Ireland Executive opts to make these programmes more generous than they will need to meet these additional costs in line with the principle outlined at paragraph 2.5, subparagraph 10."

[25] As Ms Walker explains, the parity principle recognises that the working population of Northern Ireland pay the same rate of income tax and National Insurance contributions as their Great Britain counterparts, with the result that all should enjoy the advantage of social security benefits paid at the same rates and subject to the same conditions. Given the operation of the transferred matters mechanism in the Northern Ireland Act, it is possible for the devolved institutions to depart from the parity principle. This, where appropriate, requires local funding and a commensurate reduction in HMT funding. Thus, the parity principle is not absolute, albeit its importance is undeniable.

[26] The next important policy consideration is that of retrospectivity in social security legislation. In short, the retrospective effect of social security legislation is a rare occurrence. Ms Walker explains in her affidavit:

"This is because of the inter-connected nature of the social security system, where the receipt of one benefit can affect the receipt of other benefits and have tax implications for the recipients of the benefits as well as their partners."

This long-established policy has a noteworthy discrete statutory dimension. By virtue of successive statutory provisions in the two jurisdictions during at least the last three decades in any case where an Upper Tribunal or a superior court decides that a benefit decision on behalf of the Secretary of State was erroneous in law, this has prospective effect only, subject to limited exceptions: see sections 27-28 of the Social Security Act 1998 and Article 27 of the Social Security (NI) Order 1998. These provisions have operated so as to ensure parity between the two jurisdictions.

[27] The affidavit of Ms Walker also explains, in some detail, the aetiology of the Remedial Order, commencing with the initial responses of Ministers and DWP officials to the two judicial decisions concerned, *McLaughlin* and *Jackson*. From an early stage, the issue of possible retrospective effect was the subject of active deliberations. The issue of cost, inevitably, also featured. Thus, in August 2019 Ministers were advised that retrospectivity to the date when WPA was introduced was estimated at £960 million, whereas the corresponding cost for retrospectivity dating from the date of the *McLaughlin* judgment was over 80% less, £170 million.

Another candidate commencement date was the date of commencement of the Remedial Order. At one stage, it was estimated that this would entail the considerably reduced cost of £80 million. With the passage of time the commencement date of 30 August 2018, being the date when *McLaughlin* was promulgated, emerged as the favoured course of action.

[28] A policy decision to this effect having been made, the next stage entailed the formulation of a draft remedial order. This was followed by the parliamentary process, which had a duration of 18 months approximately. During this period there were debates in both Parliamentary chambers and substantial contributions from the Joint Committee on Human Rights (“JCHR”). Their contributions included drawing attention to possible earlier commencement dates, including the date when WPA was first introduced (2001) and the date when the Northern Ireland High Court made its DOI (9 February 2016). Ultimately, the JCHR espoused the latter commencement date. Notwithstanding, their final position was, as stated in their second report, the following:

“Our overall conclusion is that the draft Remedial Order adequately addresses the incompatibilities with Article 14 ECHR (the prohibition on discrimination) identified in the cases of *McLaughlin* and *Jackson*. We recommend that the draft Remedial Order is approved.”

Linked to this is the following averment of Ms Walker:

“The Department considered that backdating to the date of death and including death since the start of the benefit, would considerably increase not only costs but complexity in terms of having to draft and verify very large numbers of appellants. As a result, no changes were made to the proposed date of retrospective effect.”

[29] The Remedial Order came into operation on 9 February 2023. Ms Walker explains its operation in the following passages (paras 73–74):

“As the Remedial Order had retrospective effect from 30 August 2018, this meant that anyone with entitlement to WPA or BSP on or after 30 August 2018, regardless of the date of death, could be awarded benefit. Where the death occurred before 9 February 2023, appellants had up to and including 8 February 2024 to make a claim for the benefit and get the full amount that was due to them. If they claimed after this date, backdated WPA was not payable and backdated BSP would be reduced over time, with no entitlement at all for BSP where it is claimed on or after 9 November 2024.

Where a person was refused entitlement to WPA or BSP (either by the Secretary of State or by a Tribunal) because they made a claim before the Remedial Order came into force, it was open to them to make a new claim for benefit. The change in the eligibility rules created by the Remedial Order created a different set of circumstances to that considered by either the original decision maker or the Tribunal. Officials did not consider that allowing new claims in such a scenario would be incompatible with or prevented by Section 17 of the Social Security Act 1998, which provides for the finality of social security decisions. The new claims in this situation would be made under a different set of eligibility rules in the context of the Remedial Order which is legislation expressly intended to confer eligibility on those appellants. Similarly, those who never made a claim on the basis that they were not previously entitled could now make a first claim. The Remedial Order deliberately extends the time period for making such claims.”

The relevant provisions of HRA 1998

[30] These are contained in section 1(1), sections 4 and 5, section 6, section 8, section 10, section 21 and Schedule 2. These provisions, insofar as material, are arranged in the Schedule to this judgment.

[31] As the foregoing outline indicates, the status of the statutory provisions arising for consideration in the two referrals differs. In the case of AD, the offending statutory provision – section 29 of the 2015 Act – has the status of subordinate legislation under HRA 1998 by virtue of its exclusion from the definition in section 21 of “primary legislation” and its inclusion in the definition of “subordinate legislation”, the specific provision being “Act of the Parliament of Northern Ireland.” In contrast, in the case of Ms Armstrong, the offending statutory provision, section 39A of the 1992 Act, in tandem with its NI counterpart, has the status of primary legislation under HRA 1998, being a “public general Act” as defined by section 21(1). We refer also to the summary in para [7] above.

The central issue

[32] The headline feature of these referrals is that they arise in circumstances where certain provisions of primary legislation have been declared incompatible by the courts and a reactive remedial order has followed. The latter has subsequently been reflected in amendments to the relevant NI measure of subordinate legislation. These are the standout elements of the juridical framework within which this court is required to adjudicate. Reduced to its bare essentials, the question which this raises

is whether any remedy should be granted to either appellant by the Tribunal and/or by this court and, if 'yes', in what terms.

[33] The parties' positive engagement with the court in its case management activity has resulted in a notable narrowing of the contentious issues. As appears from the preceding outline, DfC accepts that the limited refusal of BSP to Ms AD and the limited refusal of WPA to Ms Armstrong, in both cases in respect of the period prior to 30 August 2018, are incompatible with each of the appellant's' rights under Articles 8/14 ECHR. Each of the impugned refusals is, therefore, an unlawful act under section 6 of HRA 1998 (or would be in Ms Armstrong's case, but for the application of section 6(2)). The adjudication required of the court arises by reason of the contest among the parties regarding the consequences which this generates and, more specifically, whether this court should determine these referrals by granting either of the appellants a remedy - and, if "yes", in what terms?

Guidance from the decided cases

[34] Certain decisions of the United Kingdom Supreme Court (the "UKSC") and the Courts of Appeal on each side of the Irish Sea featured in the arguments of the parties. The chronological sequence of these decisions is of some significance and we shall, therefore, address them in that order. As the following review will demonstrate, there is no "on all fours" decision, whether binding on this court or otherwise.

[35] There can in our view be little serious debate about the main significance of the first of the UKSC decisions debated in argument, *R (Chester) v Secretary of State for Justice* [2013] UKSC 63. Its obvious significance is that it entailed a refusal by the Supreme Court to make a second DOI. This is directly relevant to the case of Ms Armstrong and indirectly relevant in the case of Ms AD. Both cases raise the question of the kind of considerations which this court should properly take into account in her quest for precisely the same remedy. The reasoning of the seven judge chamber of the Supreme Court had certain nuanced differences. The majority reasoning is contained in the judgment of Lord Mance. His first reason for declining the invitation to make a second DOI is expressed in para [39] thus:

"The incompatibility of RPA section 3 with A3P1 was recognised by the Registration Appeal Court in *Smith v Scott* 2007 SC 345, which made a declaration of incompatibility."

Lord Mance added at para [42]:

"Within the domestic legal context, it is now therefore for Parliament as the democratically elected legislature to complete its consideration of the position in relation to both RPA section 3 and EPEA section 8. There is no further current role for this court, and there is no further claim, for

a declaration or, in the light of the incompatibility, for damages which the appellant Chester can bring.”

[36] At para [40], Lord Mance added a second reason why a DOI should not be made, namely his strong and confident predication that the extant statutory exclusion of the appellant Chester from voting would be maintained in any new or revised legislation. The appellant’s argument, at the reply stage of the hearing, emphasised the following passage in the headnote:

“Per Baroness Hale of Richmond DPSC, Lord Kerr of Tonaghmore, Lord Clarke of Stone-cum-Ebony, Lord Sumption, Lord Hughes JJSC and Lord Hope of Craighead
...

The court should be extremely slow to make a declaration of incompatibility at the instance of an individual litigant with whose own rights the provision in question is not incompatible. Any other approach is to invite a multitude of unmeritorious claims (post, paras 102, 111, 112).”

This, however, does not form part of the majority reasoning. One might add that this part of the headnote is a questionably faithful reflection of the judgment passages on which it claims to be based. In any event, we consider that it adds nothing of value to either appellant’s case.

[37] The decision of the UKSC in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, concerned the differential treatment accorded to the parents of a severely disabled child in hospital and the parents of a similarly disabled child at home in the matter of entitlement to payment of a social security benefit (DLA). The UKSC, finding against the Secretary of State for Work and Pensions, held that no objective and reasonable justification for the differential treatment had been established, giving rise to a finding of unlawful discrimination contrary to Article 14 ECHR in conjunction with Article 1 of The First Protocol.

[38] The offending statutory provision was one of subordinate legislation. The remedy for which the UKSC opted was to make the order which, in its judgement, the First-tier Tribunal should have made, namely allowing the appeal and deciding that there was an entitlement to payment of DLA during the contested period. The court declined to make a more general declaration on the main ground that the Secretary of State should have an opportunity to consider its judgment and, if so minded, to take action which would avert contravention of the Convention rights of other disabled children: see para [49] (per Lord Wilson) and para [61] (per Lord Mance). We consider the correct construction of these passages to be that the UKSC was motivated by one further consideration namely the lack of evidence about the possible repercussions of making the declaration requested. The spectrum of lecturing to the legislature was evidently not an influential factor.

[39] One of the occasionally troubling questions arising out of the scheme of HRA 1998 is how a court should deal with a provision of subordinate legislation which it considers incompatible with one or more of the protected Convention rights. In *Secretary of State for Work and Pensions v Carmichael* [2018] 1WLR 3429 the Court of Appeal, by a majority, held that it was not empowered to disapply subordinate legislation in circumstances where, in an Article 8/Article 14 context, the court was unable to identify with confidence any concrete provision/s of the subordinate measure concerned giving rise to the Convention incompatibility. The Court of Appeal further reasoned that to rectify the incompatibility would require the impermissible judicial exercise of reconfiguring the subordinate legislation, thereby trespassing on the domain of Parliament. Leggatt LJ dissented.

[40] In *JT v First-tier Tribunal* [2019] 1 WLR 1313 the English Court of Appeal declared, unanimously, that one specific provision of subordinate legislation was Convention incompatible, with the result that it did not preclude an award of compensation to the appellant under the relevant measure. The question of whether the appellant would in consequence secure such an award was left to be determined at the appropriate decision-making level: para [121]. Leggatt LJ, delivering the unanimous decision of the court, stated at para [122]:

“Where, as here, a provision of subordinate legislation cannot be given effect in a way which is compatible with a Convention right and there is no primary legislation which prevents removal of the incompatibility, the court’s duty under section 6(1) is to treat the provision as having no effect, as to give effect to it would be unlawful.”

Leggatt LJ observed, at para [128], that *JT* was not analogous to *Carmichael*.

[41] *JT* can have relevance, of course, only to the *AD* case. The primary argument on behalf of the appellant was confined to the single submission that *JT* predates the decision in *RR* (*infra*). At the stage of reply, counsel for the appellants drew attention to paras [122]–[128]. Para [122] does not address key features of the matrix before this court, fundamentally (a) the fact of a previous DOI of the UKSC which bites indirectly on the measure of subordinate legislation arising in the *AD* case and (b) the ensuing Remedial Order amending this measure. Second, the argument addressed to this court fails to engage with the key sentence in para [128], namely:

“There is no difficulty in the present case in identifying a particular provision of the relevant subordinate legislation which has a discriminatory effect.”

Third, para [122] gives no consideration to the judicial discretion in play in the matter of HRA 1998 remedies.

[42] Sequentially, the next contribution to the jurisprudence to be considered is *RR v Secretary of State for Work and Pensions* [2019] UKSC 52. The stand-out feature of this decision of the Supreme Court is its recognition that a public authority stands in the same shoes as a court or tribunal in the following respect:

“Although the majority of the Court of Appeal in *Carmichael* (CA) accepted the arguments of the Secretary of State, in my view Leggatt LJ was entirely right to accept the arguments of the appellant. There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear.”

(Per Baroness Hale, delivering the unanimous decision of the court, at para [27])

[43] In the passages which follow, Baroness Hale elaborates on the reasons why a measure of subordinate legislation differs from one of primary legislation and, thus, “must be disregarded” – para [30] – where Convention incompatibility is established. Referring to *Mathieson*, Baroness Hale continued:

“There is no legislative choice to be exercised. As Dan Squires QC, for the Equality and Human Rights Commission, put it, where discrimination has been found, a legislator may choose between levelling up and levelling down, but a decision-maker can only level up: if appellant A is entitled to housing benefit of £X and appellant B is only entitled to housing benefit of £X-Y, and the difference in treatment is unjustifiably discriminatory, the decision-maker must find that appellant B is also entitled to benefit of £X.”

At the reply stage, an argument was advanced on behalf of the appellant *AD* that her situation is equivalent to that of “Appellant B” in para [30] of *RR*. This bare argument overlooks the rather important circumstance that in the present context the legislature has chosen to “level down” in its exclusion of cases which cannot satisfy the retrospective effect choice reflected in the Remedial Order. In such circumstances it is not constitutionally open to a decision maker to ignore the prevailing legislation and “level up” as they think fit in contravention of the legislation. Such a startling consequence would require very specific provision which is nowhere to be found in HRA 1998 and would be manifestly contrary to the principle of parliamentary sovereignty outlined in paras [1]–[8] above. Furthermore, the *RR* matrix does not

include the elements of either a DOI or a remedial order. Thus, it does not speak to the main HRA 1998 provisions raised by these two referrals: in particular sections 4, 6(6), 8, 10 and Schedule 2. The conclusion that *RR* is distinguishable from these two cases, as submitted by Mr McGleenan, follows inexorably.

[44] Thereafter, the jurisprudence in this sphere continued to grow apace. Chronologically, the next contribution was made by a decision of this court, differently constituted, in *O'Donnell v Department for Communities* [2020] NICA 36. This court decided that certain provisions of Northern Irish subordinate legislation were incompatible with specified Convention rights. It then turned to the application of section 3 of HRA 1998 to the offending statutory provision, concluding in effect that this should be rephrased by the mechanism of “reading in” certain judicially supplied words. The referral to the Court of Appeal by the Tribunal concerned was determined accordingly. In this way the offending statutory provision was rendered compatible with the Convention provisions in play.

[45] The argument for the appellants fastens on to the following passage in para [98] of *O'Donnell*:

“The policy of parity may explain why in Northern Ireland the relevant provisions have been adopted given that they were adopted in England and Wales but **that policy does not serve to justify the impugned difference in treatment. Unjustified discrimination is not justified by parity.**”
[Emphasis added.]

We consider that the arguments on behalf of the Departments are entirely harmonious with this passage. Neither of the Departments has sought to argue that the admitted Convention incompatibility in these cases is justified by the parity principle. Rather, both have been careful to confine their arguments to the proposition that the parity principle is one of the factors which this court should take into account in determining whether a remedy is to be granted by this court to either appellant and, if “yes”, in what terms. As regards paras [81] and [98], in addition to our analysis in para [44] above we agree with Mr McGleenan KC that there is therein no discernible assistance to these two appellants. It must be emphasised: *O'Donnell* is fundamentally a section 3(1) HRA 1998 case.

[46] Mr McGleenan reminded this court of the significant reservations about the correctness of the decision in *O'Donnell* expressed by the English Court of Appeal in *R (Jwanczuk) v Secretary of State for Work and Pensions* [2023] EWCA Civ 1156. However, both are section 3 “reading down” cases and, for that reason, neither makes any material contribution to our determination of these two referrals.

[47] The decision in *R (Elan-Cane) v The Secretary of State for the Home Department* [2021] UKSC 56 is, given the context of these referrals, noteworthy mainly for its resounding reaffirmation of the importance of Parliamentary sovereignty in the

scheme of HRA 1998: see especially paras 90–91 and 108. There is a separate feature of this decision. At para 107 the Supreme Court addressed the topic of the wide margin of appreciation generally recognised in cases concerning discrimination in relation to social security benefits:

“A final illustration of the point, in a context where a wide margin of appreciation is generally permitted by the European court, is the line of domestic cases concerned with discrimination in relation to social security benefits, recently considered by this court in the case of SC. In *Humphreys v Revenue and Customs Commrs* [2012] UKSC 18; [2012] 1 WLR 1545, Lady Hale (with whom the other members of the court agreed) stated at para 15 that the proper approach to justification in cases involving discrimination in relation to state benefits was to be found in a judgment of the European court which allowed a wide margin of appreciation, according to which the court would generally respect the legislature’s policy choice unless it was “manifestly without reasonable foundation.” The same test, she explained, had been applied by the House of Lords in the earlier case of *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2008] UKHL 63; [2009] 1 AC 311, and Lady Hale went on to apply it in the case before the court. That approach, whereby the margin of appreciation permitted by the European court in that field is reflected in the domestic application of Convention rights, has been followed in numerous decisions of this court ever since, as was explained in SC at paras 143-156.”

[48] The specific question which arises is whether this latter passage applies to the two cases before this court and, if so, with what possible results. While none of the parties addressed this passage in their submissions, we confine ourselves to observing that it was not contested and it does not assist either appellant.

[49] There is one further decision of this court which featured in the arguments of the parties. Mr Milford KC drew to our attention the following passage in *Department for Justice v JR 123* [2023] NI 30, at para [81]:

“We consider that a declaration that a provision of legislation is incompatible with a Convention right, whether made within or outwith section 4 of the Human Rights Act, by its very nature reflects an assessment of a general nature applying to a broad panorama, clearly extending beyond the particular facts of the individual case in which the question of granting this discretionary remedy

arises. Such a remedy declares the relevant provision of the legislation generally to be incompatible with a Convention right. This is to be contrasted with a remedy personal to a successful appellant, such as an order of certiorari quashing an act or decision held to have infringed that person's Convention right/s or a suitably tailored mandatory order or an order declaring such violation. This contrast highlights the general nature and reach of a declaration of incompatibility."

Mr Milford submitted that this passage applies fully to the case of Ms Armstrong. There was no contrary submission. It is essential to consider this passage in conjunction with all that precedes it in paras [78]–[80]. There was no challenge on behalf of the appellants to these passages. We agree with Mr Milford's submission.¹

The decision in Steinfeld

[50] We preface our consideration of the most recent judicial decision of note by addressing another decision of the UKSC, *Steinfeld v Secretary of State for International Development* [2018] UKSC 32. There the relevant legislative framework had two components. The Civil Partnership Act 2004 permitted only two people of the same sex to enter into a civil partnership. The Marriage (Same Sex Couples) Act 2013 made marriage of same sex couples lawful. Thus, thereafter, same sex couples had a choice between a civil partnership and marriage. Different sex couples, however, did not. The appellants were a different sex couple with genuine ideological objections to marriage who desired to commit to a civil partnership. The UKSC found that the statutory provision contravened the appellant's rights under Article 8 ECHR (private life) in conjunction with Article 14. The remedy selected was a declaration of incompatibility, in these terms: sections 1 and 3 of the 2004 Act, to the extent that they precluded a different sex couple from entering into a civil partnership under the 2013 Act, were incompatible with the foregoing Convention provisions.

[51] The aftermath of the decision in *Steinfeld* entailed the following. Parliament responded by enacting a new measure of primary legislation, namely the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 (the "2019 Act"), together with an associated instrument of subordinate legislation, which cured the discriminatory treatment with effect from 31 December 2019, extending civil partnerships to heterosexual couples. This was in substance the equivalent of a remedial order under section 10(2) of HRA 1998.

¹ **Postscript:** this judgment was promulgated, albeit (as is normal) in draft prior to the formal final order of this court, before publication of the decision of the Supreme Court in *Re JR 123* [2025] UKSC 8, which considers section 4 declarations at para [88]ff. No party sought to make further submissions.

The Kelly case

[52] *Kelly v Secretary of State for Work and Pensions* [2024] EWCA Civ 613, in common with the two referrals before this court, concerned a claim for bereavement benefits. The cohabiting relationship between Ms Kelly and her deceased partner was neither a marriage nor a civil partnership. Following the partner's death her claim for bereavement benefit was refused (on 3 March 2017). Ms Kelly pursued first and second level appeals to the appropriate tribunals. The Upper Tribunal acknowledged that there was discriminatory treatment in essence the same as that found in *Steinfeld*: whereas same sex couples had a choice of mechanisms to have their relationship formally recognised, this choice was not open to heterosexual couples. This discrimination was not contested by the Secretary of State. The Upper Tribunal was not competent to make a declaration of incompatibility, by virtue of section 4(4) and (5) of HRA 1998. Presumably in the expectation that permission to appeal to the Court of Appeal would be granted, it nonetheless expressed the view that what it described as a "further" declaration of incompatibility, essentially mirroring the *Steinfeld* declaration, would be appropriate.

[53] On further appeal, the English Court of Appeal made a main conclusion and a subsidiary, or alternative, conclusion. Its primary conclusion was that the prevailing legislation was not incompatible with Ms Kelly's Convention rights. The appellant contended that the court should make a declaration of incompatibility in respect of two provisions of primary legislation which, though largely repealed, remained in force for limited purposes in accordance with transitional provisions. In concluding that discriminatory treatment had not been established, Elizabeth Laing LJ, delivering the main judgment of the court in which the other two members concurred, offered the following three reasons: Ms Kelly was not in a situation analogous to that of her two comparators, while there had been a difference in treatment this did not occur on account of her heterosexual status, rather it occurred because of her different circumstances and, finally, the difference in treatment was justified.

[54] The Court of Appeal's alternative conclusion, premised on the hypothesis that its primary conclusion was incorrect, was that it would be inappropriate to make a declaration of incompatibility in any event, for the following three reasons. First, at para [83]:

"To make a further declaration of incompatibility in relation to two statutory provisions which are clinging onto the statute book, if at all, by the slenderest of threads, would not be an appropriate use of the power when, in substance, Parliament and the Secretary of State are aware of the real past incompatibility which underlies this complaint and have remedied it.

The second reason proffered was based on the court's assessment of the foreseeably likely parliamentary reaction to a DOI, at para [84]:

“... Parliament has already considered, in broadly analogous circumstances, whether or not and, if so, to what extent, to give a retrospective remedy for discrimination which is similar to the past discrimination suffered by Ms Kelly. It was prepared to go no further back, for payment purposes, than the date of the declaration of incompatibility. That being so, I do not consider it remotely likely that if a declaration of incompatibility were made in this case the government or parliament would respond with a legislative remedy which would have retrospective effect of the kind which Ms Kelly seeks.”

On this issue, Laing LJ expressly agreed with the somewhat different formulation in the short concurring judgment of Underhill LJ, at para [95]:

“I do not believe that it would be appropriate for this court to make a declaration the only purpose of which could be to encourage the Government and Parliament to reconsider (its post-Steinfeld legislative response).”

[55] The third reason proffered by Laing LJ was, as she observed, not unconnected with the second, at paras [86]-[87]:

“The third point is connected with the second. A premise of ground 1 is that Ms Kelly is entitled to what she describes as an 'effective remedy' for the past discrimination which she has suffered. In substance, the discrimination for which she wants a remedy is the real, past, discrimination in this case, rather than the ghostly theoretical discrimination on which she now relies as the basis of her application for a declaration of incompatibility. I do not consider that there is any support in the HRA for the contention that Ms Kelly is entitled to 'an effective remedy', in the sense in which she uses that phrase, whether for that past discrimination, or for the faint current version on which she now relies. That being so, I do not consider it likely that a declaration of incompatibility would prompt a legislative response of the kind which Ms Kelly seeks. It follows that there would be no purpose in making one. I repeat the last sentence of paragraph 84, above.

...

There are two reasons.

- (i) Article 13, the right to an effective remedy, is not one of the 'Convention rights' for the purposes of the HRA.
- (ii) The HRA is itself a carefully crafted remedial scheme, as I will now explain. Its unifying theme is that even where a court finds that primary legislation is incompatible with Convention rights, the ultimate arbiter of the extent to which any statutory incompatibility should be remedied is Parliament or the executive (section 10). Parliament may even decide to enact legislation which is or may be incompatible with Convention rights (section 19(1)). Section 6, significantly, does not apply to either House of Parliament or to any person exercising a function in connection with proceedings in Parliament (section 6(3)(b))."

[56] In the passages which follow Laing LJ reasoned why, in the unanimous view of the court, if Ms Kelly had claimed compensation as "just satisfaction" (under section 8 HRA 1998) such claim would (at least probably) have failed. This is preceded by the following, at paras [90]-[91]:

"The HRA does not give appellants a general right to compensation for past unlawful acts. Instead, a court which otherwise has power to award damages may award damages for an act which it has found to be unlawful. But the purpose of such an award is not straightforwardly compensatory. The award must be necessary to 'afford just satisfaction' to the appellant (section 7(3)(b)). That phrase is based on the test used by the ECtHR, and section 7(4) requires the court to take into account the principles applied by the ECtHR in that context. The ECtHR does not routinely award compensatory damages and will often decide that a declaration is sufficient just satisfaction. Moreover, section 7(11) clearly leaves it to the body which makes rules for courts and tribunals to decide whether and if so to what extent to remedy acts made unlawful by section 6.

An important feature of this case is that Ms Kelly is entitled to the remedies conferred by the HRA, but only to those remedies. She did not claim HRA damages in her appeal, and it is by no means clear that, even if she had, damages would have been necessary to give her 'just satisfaction'

beyond that provided by a declaration, or that they would have been available, even if they had been necessary.”

We have drawn attention to the preceding passages for two reasons. First, because they align so closely with our analysis in paras [1]-[8] above. Second, because the appellants, in argument, do not challenge them.

[57] We consider that the only argument of substance developed on behalf of the two appellants, namely that the “second” part of the decision in *Kelly* is *obiter*, is an arid one, for the following reasons. As a matter of precedence *Kelly* is not binding on this court. *Obiter* or not, the only question for this court is whether we find the reasoning and conclusions in the relevant passages persuasive. Taking into account the lack of any argument to the contrary, in particular the absence of any suggestion of error of law, disregard of material principle or misconstruction of any provision of HRA 1998, the answer is affirmative. We would add that in any event the Court of Appeal’s recourse to the familiar judicial technique of formulating a primary conclusion, followed by a secondary conclusion in the alternative, does not result in the analysis of *obiter dictum* in this specific instance.

Our conclusions

[58] These proceedings have been conducted by the parties on the unspoken premise that section 8 of HRA 1998 is engaged and, further, provides the only channel available for granting the remedies pursued by the appellants. Having regard to the singular genesis of these proceedings (*viz* referrals under Schedule 10 to the Northern Ireland Act) and the scheme of HRA 1998 and as there was no argument on this issue, we leave open for another day the question of whether this assumption is correct. In any event, this issue is to an extent moot given the outcome which this court has determined (*infra*).

[59] Throughout these proceedings this court has been exacting in requiring all parties to formulate their respective cases with maximum precision. This has entailed *inter alia* a consistent insistence upon the formulation of the remedy sought by each of the appellants with full specificity. Arising out of the substantive hearing conducted on 3 February 2025 the court permitted the appellant *AD* to reformulate para 10 of the Devolution/Order 120 Notice. As a result, the remedy ultimately sought by this appellant is the following:

“A declaration that this appellant, having established a breach of Article 8 ECHR in conjunction with Article 14 ECHR on the part of DfC, is entitled to an award of BSP in respect of the period 8 June 2017 to 30 August 2018 and that the Tribunal should determine her appeal accordingly.”

As regards Ms Armstrong, there has been no alteration of the corresponding passage in the Devolution/Order 120 Notice, with the result that the remedy which she asks this court to grant is:

“A declaration pursuant to section 4 of HRA 1998 that the post-Remedial Order version of section 39A of the Social Security Contributions and Benefits Act (NI) 1992 precludes the award of WPA to her in respect of the period 21 September 2014 to 29 August 2018 and, in so doing, is incompatible with her private law rights under Article 8 ECHR in conjunction with Article 14 ECHR.”

[59] In its determination of the issues raised by these referrals from the Tribunal the starting point of this court is uncomplicated. This court is empowered to grant each of the appellants a remedy. Being empowered, and not obliged, to grant a remedy to either appellant or both, the court must exercise a discretion. In some instances, a court (or public authority) endowed with a discretion is, in determining whether to exercise it and, if so, in what terms, mandated, or sometimes empowered, by statute, and in other instances by binding precedent, to take into account specified considerations. That, however, is not this case.

[60] We consider that the principle commonly known as the *Creednz* or *Findlay* principle provides appropriate guidance. The effect of this principle is to require this court to exercise its discretion taking into account all of the factors which the legislature must, in enacting HRA 1998, by implication have intended it to consider. In *Creednz v Governor General* [1981] 1 NZLR a New Zealand case subsequently approved by the House of Lords in *Re Findlay* [1985] AC 318 at 333–4, Cooke J stated:

“... the more general and the more obviously important the consideration, the readier the court must be to hold that parliament must have meant it to be taken into account.”

[61] There is an associated starting point. The statutory provisions which had the effect of requiring decisions restricting the appellants’ applications for the bereavement benefits concerned are no longer on the statute book. The former, Convention incompatible, statutory regimes have been substituted by newly amended models. This is the effect of the Remedial Order.

[62] This preamble leads to the heart of the adjudication required of this court in these referrals. On behalf of the appellants, it is argued that there are four factors favouring the exercise of this court’s discretion to grant them the remedy pursued by each. These are (a) vindication of each appellant’s Convention rights, (b) clarification by this court of the law, (c) encouragement to the executive/legislature to take appropriate steps to rectify the admitted Convention incompatibility and (d) equipping the appellants with something which might fortify a later application to the

ECtHR under Article 34 ECHR should either pursue that course. In this way, one side of the notional scales is duly loaded.

[63] Belonging to the other side of the notional scales are the following factors: the general principle of parity; the general principle of no, or limited, retrospectivity of social security legislation; the constitutional undesirability of judicial interference with the Remedial Order; inappropriate intrusion on the principle of Parliamentary sovereignty; the nature and depth of the parliamentary processes culminating in the Remedial Order; the consideration that a challenge to a failure to make a remedial order is precluded by section 6(6) of HRA; the entirely unparticularised nature of the appellant's challenge to the multiple provisions of both primary and subordinate legislation altered by the Remedial Order; the availability to both appellants of the alternative remedies of (a) a claim for damages under section 8(3) of HRA 1998 and (b) an application to the ECtHR; and the guidance to be derived from the decided cases examined above.

[64] While the two immediately preceding paragraphs firmly invite the analysis that the factors contraindicating the discretionary grant of a remedy by this court to either appellant significantly outnumber those in favour, we consider that the exercise required of this court is not an arithmetical one. Ultimately, this court must stand back, view everything panoramically and form a rational evaluative judgement. In doing so we bear in mind the observations of the House of Lords concerning the elasticity of the judicial discretion in the grant of remedies under s 8 of HRA 1998: for example, in *Re S (Minors)* [2002] UKHL 10, para 48, per Lord Nicholls and *A-G's Reference (No 2 of 2001)* [2003] UKHL 68, para [33], again per Lord Nicholls.

[65] In our review of the decided cases which featured in the parties' respective arguments above, we have, in certain instances, given expression to this court's analysis, or view, which we do not repeat. We now turn our attention to, and resolve, the further prominent contentious issues which emerged at the hearing:

- (i) To find in favour of either appellant will distort the operation of the general principle of parity as it will afford to one or both of them treatment favourable to that accorded to equivalent persons in GB. We accept Mr Milford's submission to this effect and add only that no contrary argument - or evidence - was presented. Related to this is the well known practice of HM Treasury (of which the court takes judicial notice) whereby any NI deviation from the parity principle generating greater expense must be funded locally.
- (ii) Allied to (i), to accede to either appellant's request for a remedy would be contrary to the legal certainty established by the Remedial Order.
- (iii) The course of action urged by both appellants would unfold in a limited and detached judicial (and not Parliamentary) sphere without the benefit of the detailed process culminating in the Remedial Order.

- (iv) The guidance to be distilled from the cohort of decided cases considered above does not ultimately extend beyond acknowledgment of the judicial remedies discretion, which we have recognized in para [59] above and in our view orientates towards judicial restraint (not refusal) generally in cases of this kind.
- (v) We accept Mr Milford's submission that the two cases before us are a fortiori the *Chester* case, where the refusal by the Supreme Court to make a DOI occurred in a context where a previous DOI had been made and no remedial order or comparable governmental response had followed.
- (vi) The decision of the Supreme Court in *RR*, which ultimately emerged as the sheet anchor in the appellant's arguments, does not promulgate any absolute legal rule or principle. Second, it does not speak to the unique feature of the two referrals before us, namely the Parliamentary response via the Remedial Order to the judicially diagnosed Convention incompatibility. Third, the decision of the Supreme Court explicitly recognises the impropriety of the "disregarding" mechanism in cases where "... it is not clear how the statutory scheme can be applied without the offending provision": para 30. This applies fully to these two referrals, in which the appellants have consistently failed to address this fundamental issue. We further refer to our analysis of and our summary of the evidence concerning the Remedial Order above.
- (vii) The appellants' arguments also fail to address two of the features of the *Kelly* decision, namely HRA 1998 does not guarantee any right to an effective remedy and a DOI (or equivalent) is not designed to provide a back door to an award of damages in some later litigation context.
- (viii) HRA 1998 is not a torts statute. Furthermore, this court has received no material, or argument, suggesting that a claim for damages or an application to the ECtHR by either appellant would be a vacuous remedy.

[66] The four factors advanced by both appellants, summarised in para [62] above, invite the following response:

- (a) The strength of the vindication argument is undermined by the absence of any right to an effective remedy under the scheme of HRA 1998 and, further, must in any event be calibrated in the balancing exercise required of this court in the exercise of its judicial discretion.
- (b) No requirement of clarification of the law for the benefit of Government has been demonstrated. Quite the contrary: the Convention incompatibility of which both appellants complain has been unambiguously and formally recognised by both Departments.
- (c) The suggested "encouragement to parliament" flowing from the grant of either or both of the remedies pursued overlooks the historical fact of the materials

and arguments already considered and debated in the response and consultation phase summarised in paras [27]-[29] above, culminating in the Remedial Order itself. The situation of bereaved persons such as these two appellants has been recently considered and debated in the parliamentary process already. The depth and reach of this solemn exercise cannot be gainsaid.

(d) Factor (d) is essentially speculative.

[67] There are two final considerations to be reckoned. First, the court must accord an appropriate measure of respect to the Schedule 2 HRA process culminating in the Remedial Order. Second, the general orientation of the Supreme Court and Court of Appeal decisions considered in this judgment inclines towards judicial reticence in any case where a remedial order has followed upon a declaration of incompatibility under section 4 of HRA 1998 and the court is later invited to grant a litigant a remedy based on asserted continuing Convention incompatibility.

[68] We would add that we have been disinclined to venture any forecast of a further executive or legislative response to any remedy which this court might grant. While this was one aspect of the reasoning in *Kelly*, we are mindful that this issue lacks any evidential foundation in these appeals and tends to invite impermissible speculation. Furthermore, a judicial assessment of this kind runs the risk of jeopardising the delicate constitutional balance underpinning HRA 1998, expounded in the opening passages of this judgment and rooted in the constitutional separation of powers, and thus could entail an impermissible trespass into the political arena.

[69] Given the foregoing it is unnecessary to determine the argument advanced by Mr McGleenan on behalf of the Department that the decision in *RR* has in some way been obliterated by the later decision of the Supreme Court in *Elan-Cane*. This is an intricate and legitimate argument which will benefit from more intense bilateral examination in an appropriate future case.

Disposal and final order

[70] For the reasons explained, we conclude, in the exercise of our discretion, that there is a preponderance of factors in favour of refusing the remedies pursued. The overarching foundation of our conclusion is the effect of the HRA regime, as outlined particularly in para [1]ff above. While this conclusion suggests inexorably that the Tribunal will determine the two appeals accordingly by dismissing them, the court will defer finality until the parties have provided a draft final order, within 14 days ie by 7 March 2025.

Postscript

The final order of the court, devised following the parties' representations, reflects and confirms the foregoing.

SCHEDULE

Human Rights Act 1998: Relevant Provisions

Section 4

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) the Supreme Court;

(b) the Judicial Committee of the Privy Council;

(c) the [Court Martial Appeal Court];

(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal;

(f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the [Chancellor of the High Court] or 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.

Section 6

6 Acts of public authorities

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if—
 - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
 - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
- (3) In this section “public authority” includes—
 - (a) a court or tribunal, and
 - (b) any person certain of whose functions are functions of a public nature,but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
- (4) ...
- (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.
- (6) “An act” includes a failure to act but does not include a failure to—
 - (a) introduce in, or lay before, Parliament a proposal for legislation; or
 - (b) make any primary legislation or Remedial Order.

Section 7

7 Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –

- (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
- (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) “appropriate court or tribunal” means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of –

- (a) the period of one year beginning with the date on which the act complained of took place; or
- (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) “legal proceedings” includes –

- (a) proceedings brought by or at the instigation of a public authority; and
- (b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

- (8) Nothing in this Act creates a criminal offence.
- (9) In this section “rules” means –
 - (a) in relation to proceedings before a court or tribunal outside Scotland, rules made by . . . [the Lord Chancellor or] the Secretary of State for the purposes of this section or rules of court,
 - (b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,
 - (c) in relation to proceedings before a tribunal in Northern Ireland –
 - (i) which deals with transferred matters; and
 - (ii) for which no rules made under paragraph (a) are in force, rules made by a Northern Ireland department for those purposes,

and includes provision made by order under section 1 of the Courts and Legal Services Act 1990.

- (10) In making rules, regard must be had to section 9.
- (11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to –
 - (a) the relief or remedies which the tribunal may grant; or
 - (b) the grounds on which it may grant any of them.
- (12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.
- (13) “The Minister” includes the Northern Ireland department concerned.

Section 8

8 Judicial remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including –

- (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
- (b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining –

- (a) whether to award damages, or
- (b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be treated –

- (a) in Scotland, for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;
- (b) for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section –

“court” includes a tribunal;

“damages” means damages for an unlawful act of a public authority; and

“unlawful” means unlawful under section 6(1).

Section 10

10 Power to take remedial action

(1) This section applies if –

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies –

(i) all persons who may appeal have stated in writing that they do not intend to do so;

(ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or

(iii) an appeal brought within that time has been determined or abandoned;
or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers –

(a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and

(b) that there are compelling reasons for proceeding under this section,

he may by order make such amendments to the primary legislation as he considers necessary.

(4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility

with a Convention right and the Minister proposes to proceed under paragraph 2(b) of Schedule 2.

(5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.

(6) In this section “legislation” does not include a Measure of the Church Assembly or of the General Synod of the Church of England.

(7) Schedule 2 makes further provision about Remedial Orders.

Section 19

19 Statements of compatibility

(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill –

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

Section 21

21 Interpretation, etc

(1) In this Act –

“amend” includes repeal and apply (with or without modifications);

“the appropriate Minister” means the Minister of the Crown having charge of the appropriate authorised government department (within the meaning of the Crown Proceedings Act 1947);

“the Commission” means the European Commission of Human Rights;

“the Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4 November 1950 as it has effect for the time being in relation to the United Kingdom;

“declaration of incompatibility” means a declaration under section 4;

“Minister of the Crown” has the same meaning as in the Ministers of the Crown Act 1975;

“Northern Ireland Minister” includes the First Minister and the deputy First Minister in Northern Ireland;

“primary legislation” means any –

- (a) public general Act;
- (b) local and personal Act;
- (c) private Act;
- (d) Measure of the Church Assembly;
- (e) Measure of the General Synod of the Church of England;
- (f) Order in Council –
 - (i) made in exercise of Her Majesty's Royal Prerogative;
 - (ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998;
or
 - (iii) amending an Act of a kind mentioned in paragraph (a), (b) or (c);

and includes an order or other instrument made under primary legislation (otherwise than by the [Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government], a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department) to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation;

“the First Protocol” means the protocol to the Convention agreed at Paris on 20 March 1952;

...

“the Eleventh Protocol” means the protocol to the Convention (restructuring the control machinery established by the Convention) agreed at Strasbourg on 11th May 1994;

["the Thirteenth Protocol" means the protocol to the Convention (concerning the abolition of the death penalty in all circumstances) agreed at Vilnius on 3 May 2002;]

"Remedial Order" means an order under section 10;

"subordinate legislation" means any –

(a) Order in Council other than one –

- (i) made in exercise of Her Majesty's Royal Prerogative;
- (ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or
- (iii) amending an Act of a kind mentioned in the definition of primary legislation;

(b) Act of the Scottish Parliament;

[(ba) Measure of the National Assembly for Wales;

(bb) Act of the National Assembly for Wales;]

(c) Act of the Parliament of Northern Ireland;

(d) Measure of the Assembly established under section 1 of the Northern Ireland Assembly Act 1973;

(e) Act of the Northern Ireland Assembly;

(f) order, rules, regulations, scheme, warrant, byelaw or other instrument made under primary legislation (except to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation);

(g) order, rules, regulations, scheme, warrant, byelaw or other instrument made under legislation mentioned in paragraph (b), (c), (d) or (e) or made under an Order in Council applying only to Northern Ireland;

(h) order, rules, regulations, scheme, warrant, byelaw or other instrument made by a member of the Scottish Executive[, Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government], a Northern Ireland Minister or a Northern Ireland department in exercise of prerogative or other executive functions of Her Majesty which are exercisable by such a person on behalf of Her Majesty;

"transferred matters" has the same meaning as in the Northern Ireland Act 1998; and

“tribunal” means any tribunal in which legal proceedings may be brought.

(2) The references in paragraphs (b) and (c) of section 2(1) to Articles are to Articles of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.

(3) The reference in paragraph (d) of section 2(1) to Article 46 includes a reference to Articles 32 and 54 of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.

(4) The references in section 2(1) to a report or decision of the Commission or a decision of the Committee of Ministers include references to a report or decision made as provided by paragraphs 3, 4 and 6 of Article 5 of the Eleventh Protocol (transitional provisions).

(5) ...

Schedule 2

Remedial Orders

Orders

1(1) A Remedial Order may –

- (a) contain such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate;
- (b) be made so as to have effect from a date earlier than that on which it is made;
- (c) make provision for the delegation of specific functions;
- (e) make different provision for different cases.

(2) The power conferred by sub-paragraph (1)(a) includes –

- (a) power to amend primary legislation (including primary legislation other than that which contains the incompatible provision); and
- (b) power to amend or revoke subordinate legislation (including subordinate legislation other than that which contains the incompatible provision).

(3) A Remedial Order may be made so as to have the same extent as the legislation which it affects.

(4) No person is to be guilty of an offence solely as a result of the retrospective effect of a Remedial Order.

Procedure

2 No Remedial Order may be made unless –

- (a) a draft of the order has been approved by a resolution of each House of Parliament made after the end of the period of 60 days beginning with the day on which the draft was laid; or
- (b) it is declared in the order that it appears to the person making it that, because of the urgency of the matter, it is necessary to make the order without a draft being so approved.

Orders laid in draft

3(1) No draft may be laid under paragraph 2(a) unless –

- (a) the person proposing to make the order has laid before Parliament a document which contains a draft of the proposed order and the required information; and
- (b) the period of 60 days, beginning with the day on which the document required by this sub-paragraph was laid, has ended.

(2) If representations have been made during that period, the draft laid under paragraph 2(a) must be accompanied by a statement containing –

- (a) a summary of the representations; and
- (b) if, as a result of the representations, the proposed order has been changed, details of the changes.

Urgent cases

4(1) If a Remedial Order (“the original order”) is made without being approved in draft, the person making it must lay it before Parliament, accompanied by the required information, after it is made.

(2) If representations have been made during the period of 60 days beginning with the day on which the original order was made, the person making it must (after the end of that period) lay before Parliament a statement containing –

- (a) a summary of the representations; and

- (b) if, as a result of the representations, he considers it appropriate to make changes to the original order, details of the changes.
- (3) If sub-paragraph (2)(b) applies, the person making the statement must –
 - (a) make a further Remedial Order replacing the original order; and
 - (b) lay the replacement order before Parliament.
- (4) If, at the end of the period of 120 days beginning with the day on which the original order was made, a resolution has not been passed by each House approving the original or replacement order, the order ceases to have effect (but without that affecting anything previously done under either order or the power to make a fresh Remedial Order).

Definitions

5 In this Schedule –

“representations” means representations about a Remedial Order (or proposed Remedial Order) made to the person making (or proposing to make) it and includes any relevant Parliamentary report or resolution; and

“required information” means –

- (a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and
- (b) a statement of the reasons for proceeding under section 10 and for making an order in those terms.

Calculating periods

6 In calculating any period for the purposes of this Schedule, no account is to be taken of any time during which –

- (a) Parliament is dissolved or prorogued; or
- (b) both Houses are adjourned for more than four days.

[F17(1)] This paragraph applies in relation to –

- (a) any Remedial Order made, and any draft of such an order proposed to be made, –
 - (i) by the Scottish Ministers; or

- (ii) within devolved competence (within the meaning of the Scotland Act 1998) by Her Majesty in Council; and
- (b) any document or statement to be laid in connection with such an order (or proposed order).
- (2) This Schedule has effect in relation to any such order (or proposed order), document or statement subject to the following modifications.
- (3) Any reference to Parliament, each House of Parliament or both Houses of Parliament shall be construed as a reference to the Scottish Parliament.
- (4) Paragraph 6 does not apply and instead, in calculating any period for the purposes of this Schedule, no account is to be taken of any time during which the Scottish Parliament is dissolved or is in recess for more than four days.]

[] The primary argument of DfC, supported by DWP, is that given the adoption of the Remedial Order, a finding by the court that DWP has acted unlawfully, ie contrary to section 6 of HRA 1998, would undermine the constitutional balance established by sections 6, 10 and 21, taking into account that a challenge to a failure to make a Remedial Order is precluded by section 6(6). The alternative argument of DfC, premised on rejection of its primary argument, is that any remedy should be confined to a declaration that the non-payment of the benefits concerned to the two appellants in respect of the period preceding 30 August 2018 is in contravention of their Convention Rights as per the immediately preceding paragraph.