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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY SIOBHAN McLAUGHLIN FOR JUDICIAL REVIEW

Before: Morgan LCJ, Gillen LJ and Weatherup LJ

WEATHERUP LJ (delivering the judgment of the court)

[1] This is an appeal from a decision of Treacy J dated 9 February 2016, neutral citation No. [2016] NIQB 11, by which he found that the decision of the Department for Social Development, in refusing the applicant a Widowed Parent's Allowance on the ground that she was not married or a civil partner at the date of her partner's death, involved discrimination on the ground of marital status, contrary to Article 8 when read with Article 14 of the European Convention on Human Rights. Mr McGleenan QC and Mr Luney appeared on behalf of the appellant and Mr McMillen QC and Ms McMahon appeared on behalf of the respondent.

The decision on payment of bereavement benefits.

[2] The grounding affidavit of Ms McLaughlin states that she lived with her partner John Adams as man and wife for over 23 years until his death on 28 January 2014. Ms McLaughlin and Mr Adams were unmarried and had four children together who were aged 19, 17, 13 and 11 years at the date of his death. The couple had two brief periods of separation, the first being in 2004 for one year and the

second in December 2013 for a couple of days. The four children continued to live at home with Ms McLaughlin after the death of Mr Adams.

[3] Ms McLaughlin claimed Bereavement Payment and Widowed Parent's Allowance. She was refused both benefits because she was neither married to nor a civil partner of Mr Adams at the date of his death. Bereavement Benefit and Widowed Parent's Allowance are contributory State benefits based on payments made by a deceased from occupational income and payable under the Social Security Contributions and Benefits (Northern Ireland) Act 1992. Had Ms McLaughlin qualified for payment she would have received a lump sum of £2,000 and weekly payments for herself and her children.

[4] Ms McLaughlin sought an order quashing the decision of the appellant to refuse payment of the benefits, a declaration that the bereavement provisions in the 1992 Act should be read so as to extend the benefits to unmarried cohabitees and a declaration that, if the 1992 Act cannot be read and given effect in a way that was compatible with Convention rights, the provisions of the 1992 Act are incompatible with Convention rights.

The grounds for Judicial Review.

[5] The original grounds for judicial review, amended on the appeal as appear below, were –

(a) The decision unlawfully discriminated against the applicant on the basis of marital status contrary to section 6 of the Human Rights Act 1998 and Article 14 in conjunction with Article 8.

(b) The decision unlawfully discriminated against the applicant on the basis of marital status contrary to section 6 and Article 14 in conjunction with Article 1 of protocol 1.

(c) The decision failed to have any or adequate regard for the applicant's private or family life and her personal autonomy, as required by section 6 and Article 8 in choosing not to enter into a marriage with Mr Adams.

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

[6] The Court at first instance issued a Notice of Incompatibility pursuant to section 4 of the Human Rights Act 1998 and Order 121 of the Rules of the Court of Judicature notifying the Citizens Advice Bureau, acting on behalf of Ms McLaughlin,

the Department of Social Development and the Attorney General for Northern Ireland that they may enter an appearance as a party to the proceedings.

[7] Further, the Court issued a Devolution Notice pursuant to Schedule 10 paragraph 5 of the Northern Ireland Act 1998 and Order 120 of the Rules of the Court of Judicature giving notice of the application and that insofar as the Department and its officials were responsible for the operation of the 1992 Act there was an incompatible 'act' within the meaning of section 24(1) of the 1998 Act which 'act' would be beyond the competence of the Department. The Devolution Notice was issued to the Citizens Advice Bureau, the Department of Justice, the Attorney General for England and Wales and the Attorney General for Northern Ireland. The Attorney General for Northern Ireland entered an appearance to the Devolution Notice.

The evidence for the Department.

[8] By a replying affidavit Grace Nesbitt, Head of Pensions within the Pension Division of the Department of Finance and Personnel for Northern Ireland, raised general points, first of all, about occupational pension schemes in the public service in Northern Ireland and secondly, the availability of death benefits to the unmarried cohabiting partners of members of such public service occupational pension schemes.

[9] First of all, the affidavit evidence was that occupational pensions in the public service in Northern Ireland had some common features, namely, the scheme membership was defined, employee participation was voluntary, employees and employers made regular financial contributions and specific benefits accrued to employees in return for their contributions. These are defined benefit schemes rather than defined contribution schemes. The schemes are unfunded in that contributions go to central Government rather than a fund (except for the local Government scheme).

[10] Secondly, in relation to unmarried cohabiting partners, the usual approach in Northern Ireland has been to implement policy developed in Great Britain. The affidavit sets out the background that, prior to 2002, public service occupational pension schemes did not generally provide survivor benefits for unmarried partners, in contrast to many private sector schemes. However in October 2002 the Civil Service pension schemes in both Great Britain and Northern Ireland became the first public service schemes to be reformed to include provision for unmarried cohabitees. This change was in response to a Government Pensions Green Paper proposing that eligibility for survivors should extend to unmarried partners, provided that was in accordance with the wishes of the scheme membership and that the membership would meet the costs involved.

[11] A further replying affidavit was filed by Anne McCleary, Director of Social Security Policy and Legislation within the Department of Social Development. Ms McCleary set out the consideration by the Government of the range of persons eligible for bereavement benefits. Section 36 (Bereavement Payment) and Section 39A (Widowed Parent's Allowance) payments to a surviving spouse were inserted in the 1992 Act by Articles 51 and 52 of the Welfare Reform and Pensions (NI) Order 1999 to accord with the parity principle for social security systems between Northern Ireland and Great Britain. Payments were extended to civil partners following the introduction of the Civil Partnership Act 2004.

[12] The 1999 amendments had involved consideration of whether Bereavement Payment and Widowed Parent's Allowance should be extended to unmarried cohabiting couples. In particular, on 25 March 1999 a proposed amendment to the Bill to extend the bereavement benefits to unmarried cohabiting couples was rejected. It was stated on behalf of the Government that marriage was a cornerstone of the contributory benefits system and involved special responsibilities that were reflected in the bereavement benefits regime. Reliance was also placed on the increased administrative complexity that would result if the benefits were extended to unmarried cohabitees. It was stated that other parts of the benefits system were available to assist unmarried cohabitees and their children following bereavement.

[13] In 2011 a consultation document was published concerning a review of the bereavement benefits system in Great Britain and Northern Ireland. The Government's position was stated to be that certain areas were "out of scope for review", namely, marriage and civil partnership as a condition of entitlement. The Government was said to have "no plans to extend eligibility for bereavement benefits to those who are not married or in a civil partnership".

[14] The issue of bereavement benefits for cohabiting couples has been revisited by Parliament since the judgment delivered by Treacy J on 9 February 2016 and to that we shall return.

The legislation.

[15] The Social Security Contributions and Benefits (Northern Ireland) Act 1992 section 36 provides for Bereavement Payment and section 39A provides for Widowed Parent's Allowance as follows:

> "36(1) A person whose spouse or civil partner dies on or after the appointed day shall be entitled to a bereavement payment if-
>
> > (a) either that person was under pensionable age at the time when the spouse or civil partner died or the spouse or civil partner was then not entitled to a Category A retirement pension under section 44 below; and

(b) the spouse or civil partner satisfied the contribution condition for a bereavement payment specified in Schedule 3, Part I, paragraph 4.

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

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

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

39A (1) This section applies where –

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

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

(i) has not remarried before that day, and

(ii) is under pensionable age on that day.

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

(a) the surviving spouse or civil partner is entitled to child benefit ….

[and certain other conditions apply]

(4) The surviving spouse shall not be entitled to the allowance for any period after she or he remarries or forms a civil partnership, but, subject to that, the surviving spouse shall continue to be entitled to it for any period throughout which she or he-

(a) satisfies the requirements of subsection (2)(a) or (b) above; and

(b) is under pensionable age.

(4A) The surviving civil partner shall not be entitled to the allowance for any period after she or he forms a subsequent civil partnership or marries, but, subject to that, the surviving civil partner shall continue to be entitled to it for any period throughout which she or he-

(a) satisfies the requirements of subsection (2)(a) or (b) above; and

(b) is under pensionable age.

(5) A widowed parent's allowance shall not be payable –

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

(c) for any period during which the surviving spouse or civil partner and a person of the same sex who is not his or her civil partner are living together as if they were civil partners.

The Convention rights.

[16] The application relied on Article 8 (right to respect for private and family life), Article 1 of Protocol 1 (right to protection of property) and Article 14 (non-discrimination) of the European Convention.

Article 8

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

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

Article 1 of Protocol 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

> interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties
>
> Article 14
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The judgment of Treacy J.

[17] Treacy J's findings included -

(i) The word 'spouse' in sections 36 and 39A cannot be interpreted as including cohabitees. The clear intention of Parliament was to restrict the relevant benefits to those who were married or in a civil partnership (paragraph [59]).

(ii) Article 8 does not impose any obligation on the State to provide the financial assistance sought (paragraph [65]).

(iii) The different treatment afforded to those who are married or in a civil partnership arises because the couple have made a public contract and made the State aware of their changed circumstances and for that reason the claim for Bereavement Payment must fail (paragraphs [66] and [67]).

(iv) By contrast, a facet of the relationship that is relevant to Widowed Parent's Allowance is the co-raising of children where spouses/civil partners and cohabitees are analogous (paragraph [68]).

(v) The refusal of the Widowed Parent's Allowance is not justified because the responsibilities for the children are the same irrespective of marriage, civil partnership or cohabitation (paragraph [70]).

(vi) The focus should be on the survivor's nexus with the child as otherwise it might be said that the birth status of the child would result in them being treated less favourably (paragraph [72]).

(vii) The refusal of Widowed Parent's Allowance is a violation of Article 8 read with Article 14 as it discriminates against the survivor on the grounds of marital status (paragraph 73).

The grounds of appeal.

[18] The appellant's grounds of appeal are that the trial Judge erred –

1. In finding the relationship of an unmarried cohabitee analogous with that of a spouse or civil partner in the context of a Widowed Parent's Allowance.

2. In finding that the different treatment of cohabitees and spouses/civil partners in that context was not justified.

3. In finding a violation of Article 8 read with Article 14.

4. In having regard to alleged less favourable treatment of the children on the ground of their birth status, none of the children being applicants.

[19] By Respondent's Notice, issued with the leave of the Court, Ms McLaughlin sought to uphold the decision of the trial Judge on the further ground that section 39A(1) of the 1992 Act is incompatible with Article 1 of Protocol 1 read with Article 14. Ms McLaughlin sought declarations that section 39A(1) is incompatible with Article 8 read with Article 14 and Article 1 Protocol 1 read with Article 14.

[20] On the hearing of the appeal the Court gave leave to the respondent to amend the grounds of challenge and the amended grounds are -

(a) The decision amounted to unlawful discrimination on the basis of marital status contrary to Article 14 in conjunction with Article 8, in particular in failing to respect family life, including the welfare of dependent children.

(b) The decision unlawfully discriminated on the basis of marital status contrary to Article 14 in conjunction with Article 1 of the First Protocol, in excluding an unmarried cohabitee from the benefits.

The European Court of Human Rights consideration of benefits for cohabitees.

[21] In the area of State benefits the European Court of Human Rights has found that different treatment may be accorded to cohabitees compared with married couples or civil partnerships as they are not regarded as analogous. On 27 April 2000 the ECtHR dealt with the predecessor of the present benefits in which payment was refused for a surviving cohabitee with three children. The ECtHR had previously held that an applicant's entitlement to social benefits was linked to the payment of contributions into a national fund and had been found to be a 'pecuniary right' for the purposes of Article 1 of Protocol 1. The ECtHR therefore assumed that the right to widow's benefit could be said to be a pecuniary right for the purposes of Article 1 of Protocol 1 and therefore there was no need to determine whether the case fell within Article 8 (Shackell v United Kingdom [2000] 27 April 2000).

[22] The ECtHR referred to a previous finding concerning taxation arrangements where the Commission had held, in relation to unmarried cohabitees who sought to compare themselves with a married couple, that they were not in an analogous situation (Lindsay v United Kingdom [1986] 1 November 1986). It was stated that there were differences in legal status and legal effects and marriage continued to be characterised by a corpus of rights and obligations which differentiated it markedly from those who cohabit. While the ECtHR noted the increased social acceptance of stable personal relationships outside the traditional notion of marriage, it stated that marriage remained an institution which was widely accepted as conferring a particular status on those who entered into it and thus a surviving cohabitee and a widow were not comparable.

[23] In any event, on referring to objective and reasonable justification and the State's margin of appreciation, the ECtHR in Shackell noted that marriage remains an institution widely accepted as conferring a particular status on those who enter into it and is singled out for special treatment under Article 12 of the Convention. The promotion of marriage by way of limited benefits for surviving spouses could not be said to exceed the margin of appreciation afforded to the State.

[24] It is noteworthy for the purposes of the present case that, in relation to the further argument that the children were discriminated against by reason of their illegitimate status and an alleged violation of Article 8 in conjunction with Article 14, it was stated that the reason the surviving cohabitee was not eligible for the benefit was that she and her late partner were not married. The reason was not related to the status of the children. Further, it was stated that the reasons for compatibility under Article 1 of Protocol 1 also applied to compatibility with Article 8.

[25] In the area of inheritance tax, this absence of comparability between married couples and cohabitees was found by the ECtHR to apply equally to civil partners, to the exclusion of unmarried cohabitees. Unmarried sisters who had lived together all their lives did not have the benefit of the inheritance tax relief afforded to married couples and civil partners. The ECtHR found no violation of Article 14 taken in

conjunction with Article 1 of Protocol 1. The Grand Chamber noted that the relationship between siblings was qualitatively of a different nature to that between married couples and civil partners. The very essence of the connection between siblings was consanguinity whereas one of the defining characteristics of a marriage or a civil partnership was that it was forbidden to close family members (Burden v United Kingdom [2008] 47 EHRR 38).

[26] The Grand Chamber considered that the views of the ECtHR stated in Shackell in 2000 still held true in 2008 and also applied to same sex couples since the coming into force of the Civil Partnership Act 2004. The basis of the distinction was stated to be the absence of a legally binding agreement rendering the relationship of cohabitation, despite its long duration, fundamentally different to that of a married or civil partnership couple (paragraphs [65] and [66]).

[27] The same approach was taken by the ECtHR in 2011 in relation to state benefits for 'unmarried' survivors. In Sherife Yigit v Turkey [2011] 53 EHRR 25, the applicant and her partner had gone through a religious ceremony and had six children but her partner died without any official civil ceremony taking place. The applicant was refused a survivor's pension for herself and her daughter based on the deceased's entitlement. The different treatment of religious and civil marriages was aimed at the protection of women's rights. The ECtHR held there was no violation of Article 14 in conjunction with Article 1 of Protocol 1 and no violation of Article 8. The State's margin of appreciation was stated to be wider when it comes to the adoption by the State of general fiscal economic or social measures which are closely linked to the State's financial resources. The ECtHR repeated its ruling that marriage is widely accepted as conferring a particular status and particular rights on those who enter it and that the protection of marriage constitutes in principle an important and legitimate reason which may justify a difference in treatment between married and unmarried couples. Marriage is characterised by a corpus of rights and obligations that differentiated markedly from the situation of a man and woman who cohabit (paragraph [72]).

[28] As to Article 8, it was stated that the right to respect for family life extended to unmarried relationships and a child of such a relationship was a part of the family life. Family life also includes interests of a material kind, such as maintenance and inheritance (paragraph 95). The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. There may in addition be positive obligations inherent in effective 'respect' for family life (paragraph 100). As to the applicant's choice not to live in a civil marriage, the family were able to live together and there was no appearance of interference by the State with the applicant's family life. Article 8 could not be interpreted as imposing an obligation on the State to recognize religious marriage. The Grand Chamber considered it important to point out that Article 8 does not require the State to establish a special regime for a particular category of unmarried couples (paragraph 102). No distinction was made in relation to a survivor with children.

[29] The same view of cohabitees prevailed in the ECtHR in 2013 in Van Der Heijden v Netherlands [2013] 57 EHRR 13 on the issue of testimony privilege afforded to the spouses and registered partners of criminal suspects but not afforded to an unmarried partner. Accordingly the unmarried partner could be compelled to give evidence against the other partner. The ECtHR held that there was no violation of Article 8 in relation to the attempt to compel the applicant to give evidence against her partner and no need to examine a complaint under Article 14 taken together with Article 8. The approach was set out as follows -

> "The legislature is entitled to confer a special status on marriage or registration and not to confer it on other de facto types of co-habitation. Marriage confers a special status on those who enter into it; the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences. Likewise the legal consequence of a registered partnership set it apart from other forms of co-habitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. The absence of such a legally binding agreement between the applicant and Mr A renders their relationship, however defined, fundamentally different from that of a married couple or a couple in their registered partnership. The court would add that, were it to hold otherwise, it would create a need either to assess the nature of unregistered non-marital relationships in a multitude of individual cases or to define the conditions for assimilating to a formalized union a relationship characterised precisely by the absence of formality."

The domestic approach.

[30] The Human Rights Act 1998 requires the court to 'take into account' the decisions of the ECtHR. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental, substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, it would be wrong not to follow that line, per Lord Neuberger in Manchester City Council v Pinnock [2010] UKSC 45 at paragraph [48].

[31] There is a clear and constant line of decisions from Shackell v United Kingdom on the matter of state benefits and cohabitees. The appellant contends that

those decisions are not inconsistent with any fundamental substantive or procedural aspect of our law, nor does the reasoning overlook or misunderstand any argument or point of principle. If that is correct it would be wrong for this Court not to follow the line of decisions from Shackell v United Kingdom.

[32] The Supreme Court has taken into account and followed the approach of the ECtHR in relation to cohabitees. In an example from Northern Ireland, Re G (Adoption: Unmarried Couple) [2008] UKHL 38, which concerned a statutory provision that an adoption order could only be made to a couple if that couple were married, it was held that there was a breach of Article 8 taken with Article 14. Being unmarried was a "status" for the purposes of Article 14. Restrictions on adoption engaged Article 8. The exclusion of all unmarried couples was irrational and contradicted the fundamental statutory principle of adoption law that the most important consideration was the best interests of the child.

[33] Lord Mance noted the decision in Burden v UK [2008] confirming the previous approach in Shackell v UK [2000] and stated at paragraph 133 –

> "The *Shackell* and *Burden* cases were decisions in the context of taxation and social benefits, where the right to which the alleged discrimination related was the right to protection of property under article 1 of the First Protocol to the Convention. The present appeal arises in the different context of the right to respect for private and family life, in relation to which it is clear that distinctions between married and unmarried persons may be unjustifiably discriminatory. "

[34] In the context of the right to respect for private and family life the distinctions between married and unmarried persons may be justified, as was found in Shackell.

[35] This Court of Appeal considered the issue of cohabitees in Brewster v Northern Ireland Local Government Officers Superannuation Committee [2013] NICA 54. The Superannuation Committee refused to pay a survivor's pension following the death of a cohabiting partner. The scheme provided for payment to "a surviving spouse, nominated cohabiting partner or civil partner". The deceased had failed to nominate his partner as the person to receive benefits under the scheme. Higgins LJ and Coghlin LJ found that the requirement to complete a declaration on an appropriate form signed by both parties and notified to the Committee was not unjustified or disproportionate and gave rise to no discrimination under Article 14 and Article 1 Protocol 1, Girvan LJ dissenting. The immediate issue concerned the provision requiring the nomination of a cohabiting partner. However the Court approved the general approach of the ECtHR as to the different treatment of married couples and civil partners on the one hand and unmarried cohabitees on the other hand in relation to the provision of benefits, per Higgins LJ at paragraph [16] and

Coghlin LJ at paragraph [84] and Girvan LJ at paragraph [37]. The decision is under appeal to the Supreme Court.

The approach to Discrimination.

[36] The approach of the ECtHR to discrimination under Article 14 of the Convention was reviewed by Lady Hale in AL (Serbia) v Secretary of State for the Home Department [2008] UKHL 42. In the European cases the principle of discrimination under Article 14 is stated to be that -

> "A difference in treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be realised. The contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

[37] Lady Hale pointed out that this statement makes the Article 14 right different from domestic anti-discrimination laws where the focus is on less favourable treatment as opposed to a difference in treatment, domestic laws draw a distinction between direct and indirect discrimination and emphasis is placed on the identification of an exact comparator. It is noted that in most instances of the Strasbourg case law the comparability test is glossed over and emphasis is almost completely on the justification test. Burden v United Kingdom is stated to be an instructive exception where differences emerged between the Chamber and the Grand Chamber and between different members of the Grand Chamber as to whether the siblings were in an analogous situation to spouses or civil partners or whether the outcome would be on the basis that the difference in treatment was justified (paragraphs [23] to [25]). Lady Hale concluded:

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

[38] Where proportionality arises for consideration under the Convention rights Bank Mellat v HM Treasury (No 2) [2013] UKSC 39 establishes that the test for justification is fourfold: (i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in

mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?

The Government's consideration of bereavement benefits for cohabitees.

[39] In relation to bereavement payments the Government has continued to affirm a distinction between married couples and civil partners and cohabitees. The public consultation document of December 2011 'Bereavement Benefit for the 21st Century' with a Ministerial Foreword by Lord Freud, the Minister for Welfare Reform, stated that marriage and civil partnership as a condition of entitlement were "out of scope for review".

> "Currently, the law on tax and benefit systems only recognise the inheritance rights and needs of bereaved people if they have a recognised marriage or civil partnership. This is despite societal change resulting in a decline in marital status. We have no plans to extend eligibility for bereavement benefits to those who are not married or in a civil partnership."

[40] The Government response to the public consultation dated July 2012 stated that although some of the points raised as general feedback were outside the scope of the consultation, the Government provided a response in relation to extending bereavement benefits entitlement beyond bereaved spouses. It stated that in the bereavement benefits consultation the Government made reference to the fact that the law and tax and benefit systems currently only recognize the inheritance rights and needs of bereaved people if they have a recognised marriage or civil partnership. The Government position on this issue was stated to be unchanged; there were no plans to extend eligibility for bereavement benefits to those who are not married or in a civil partnership.

[41] There followed a Pensions Bill which provided the legislative framework for a new benefit known as Bereavement Support Payment which is designed to replace the existing bereavement benefits for any new claims starting from 2016-17.

[42] At the Committee stage of the Pensions Bill in the House of Lords a proposed amendment to extend the benefit to cohabiting couples met this response from Lord Freud on 15 January 2014 -

> "Our law and tax systems recognise inheritance rights and needs of bereaved people only if they have a recognised marriage or civil partnership. This stems from the founding principle of the National Insurance system which is that all rights to benefits derive from another person's contributions or based on the concept of legal marriage and civil partnership. Allowing co-habiting couples to have access to bereavement benefits would significantly increase

complexity and proving co-habitation can be incredibly challenging not to say an intrusion into claimant's private lives."

[43] The House of Commons Work and Pensions Committee, 9th Report of Session 2015/16, on Support for the Bereaved, printed on 23 March 2016, examined the proposed reformed bereavement benefits that sought to replace existing benefits with a single bereavement support payment from April 2017. In Chapter 4 'Co-habiting Couples' the Committee referred to the National Insurance system having recognised non-married people before, particularly where the care of the child was involved; reference was made to the decision of Mr Justice Treacy in the present case where it was stated that the needs of bereaved children of cohabiting parents are not different to those whose parents were married or in a civil partnership; while the cost of a blanket extension to cohabitees was estimated at £300m cumulatively over the first four years of reform, extending to only those cohabitees with children reduced the figure substantially to an estimated £21.6m per year. The Committee recommended that the Bereavement Support Payments be extended to cohabiting couples with dependent children using medium term savings from the bereavement benefits reform.

[44] The Government response to the Committee's 9th Report, printed 15 June 2016, reaffirmed the previous position as follows:

> "19. The Government maintains that a key principle of a National Insurance system is that all rights to benefits derived from another person's contributions are based on the concept of legal marriage or civil partnership. A husband, wife or civil partner pays National Insurance contributions to ensure, amongst other things, that if they die prematurely, their surviving spouse or civil partner will be entitled to benefits based on these contributions.
>
> 20. Proving co-habitation is a lengthy complex process which would be distressing, especially to the recently bereaved. It is not a straightforward concept and can be open to interpretation leading to delays and additional requirements for claimants.
>
> 21. Additionally, there would be the potential for multiple claims, for example one from the legal spouse and another from a co-habiting partner.
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> 22. The Government previously made reference to this position in the Bereavement Benefits Consultation, stating unambiguously that the question of allowing bereavement benefits for co-habiting couples was out of scope."

The Courts approach to the Governments decision on bereavement benefits.

[45] The appellant contends that this Court should not interfere with the decision of the Government unless their assessment is manifestly without reasonable foundation. In (SG) v Secretary of State for Work and Pensions [2015] UKSC a challenge was made to the benefits cap on the basis that it discriminated unjustifiably between men and women contrary to Article 14 read with Article 1 of Protocol 1. The Supreme Court, in finding no incompatibility and in considering the issues arising under Article 14, examined the process of the legislation in order to identify the aims pursued by the legislation and information relevant to the issue before the court. The purpose of the exercise was not to assess the quality of the reasons advanced in support of the legislation by Ministers or other Members of Parliament, nor to treat anything other than the legislation itself as the expression of the will of Parliament (paragraph 16).

[46] Lord Reed in the majority stated *(italics added)* -

> "Since the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. It is therefore necessary for the court to give due weight to the considered assessment made by those institutions. *Unless manifestly without reasonable foundation, their assessment should be respected"* (paragraph [93]).

[47] On the other hand, it was contended on behalf of Ms McLaughlin that the intensity of the Court's review of Government decision-making varied in the circumstances and the context so that there was a spectrum from 'manifestly without reasonable foundation' to a requirement for 'very weighty considerations' to justify interference. In the present case it was contended that the intensity of review lay along the spectrum and was higher than met the test of manifestly without reasonable foundation.

[48] Tigere v Secretary of State [2015] UKSC concerned eligibility for student loans based on being lawfully ordinarily resident in the UK for three years or settled in the UK, requirements that were said to be discriminatory in relation to the right to education under Article 2 of the First Protocol. While the 'manifestly without reasonable foundation' test was recognised in general measures of political, economic or social strategy, including access to cash welfare benefits, citing (SG) v Secretary of State, education was stated to be rather different. Unlike other social welfare benefits, education is given special protection by Article 2 Protocol 1. Lady Hale stated that the court must treat the judgements of the Secretary of State, as the primary decision maker, 'with appropriate respect'. That respect is heightened where the decision maker has addressed his mind to the particular issue or that

issue has received active consideration in Parliament, which had not occurred in Tigere (paragraph 32).

[49] The latitude or margin of discretion or discretionary area of judgement afforded to Government in political, economic or social strategy also varies with the nature of the protected characteristic, with greater scrutiny in those cases where the characteristic is 'suspect'. Swift v Secretary of State [2013] EWCA Civ 193 concerned the provision in the Fatal Accidents Act 1976 that a dependency claim could not be made by a cohabitee of the deceased where they had lived together for less than two years. The provision was found not to be incompatible with rights under Article 14 in conjunction with Article 8, nor was it incompatible with Article 8 alone. The difference in treatment based on the duration of cohabitation was not founded on a 'suspect' ground of discrimination, which the court would subject to particularly severe scrutiny. 'Suspect' grounds of discrimination are those based on personal characteristics (including sex, race and sexual orientation) which an individual cannot change (paragraph 24).

[50] The Government had introduced a 'bright line rule' in fixing a two year cohabitation period. Lord Dyson stated that it was now well understood that where Parliament chooses to draw a line, it is inevitable that hard cases will fall on the wrong side of it. But that is not a sufficient reason for invalidating such a rule. The two year requirement provided greater certainty as to the scope of the Act and it reduced the need to conduct an intrusive and intimate inquiry into the nature and quality of the relationship, in order to establish whether it satisfied some objective standard of permanence and constancy (paragraphs 39 and 40).

[51] Marital status is not a 'suspect' ground. Birth status is a 'suspect' ground. In Johnson v Secretary of State [2016] UKSC 56 the Supreme Court posed the question for decision as being, 'Is it compatible with the European Convention on Human Rights to deny British citizenship to the child of a British father and a non-British mother simply because they were not married to one another at the time of his birth or at any time thereafter?' It was said to be clear that birth outside wedlock falls within the class of 'suspect' grounds, where "very weighty reasons" are required to justify discrimination, citing Inze v Austria, (1988) 10 EHRR 394, at para 41, where children born in wedlock were given priority over children born outside wedlock in the inheritance of a family farm.

[52] In Johnson what needed to be justified was the current liability of the appellant, and others whose parents were not married to one another when they were born or at any time thereafter, to be deported when they would not be so liable had their parents been married to one another at any time after their birth. That was a distinction which was said to be based solely on the accident of birth outside wedlock, for which the appellant was not responsible and for which no justification had been suggested.

[53] The Government's approach to cohabitees in various contexts may change over time. As their approach develops the Government may be found not to have implemented those changes in a reasonable manner. This has been found to have occurred in respect of police pensions in Northern Ireland but not in respect of armed forces war pensions. In Ratcliffe v Secretary of State for Defence [2009] EWCA Civ. 39 the Court of Appeal in England and Wales dealt with the eligibility for a war pension of an unmarried partner of a member of the armed forces whose death was due to service occurring prior to the relevant date when changes were made to extend the benefit to an unmarried partner. The claim under Article 14 and Article 1 of the First Protocol was rejected. As to cohabitees being in an analogous situation, the decision must be made in the light of the scheme under examination. By the end of 2003 unmarried couples were being treated substantially the same as married couples for the purposes of the occupational pensions scheme and the Government had announced that it would by 2005 be treating them the same for the purposes of the 2005 Order. This was said to distinguish the case from the situation in Burden. Hooper LJ concluded "Thus in 2004 it would, in my view, be wrong to say that they were not, in the context of armed forces benefits, in an analogous position for the purposes of Article 14" (paragraph [72]). As to justification, the outcome turned on the point in time that unmarried partners were put in an analogous position to spouses in the field of pensions, being a decision for the Government and a decision with which the courts would not normally interfere (paragraph [89]).

[54] There was a different outcome in Morrison's Application [2010] NIQB 51. The provision of injury benefit for the survivors of deceased police officers under 2006 Regulations excluded unmarried partners and was challenged under Article 1 of the First Protocol read with Article 14. Under 2007 Regulations provision was made for police pensions to be extended to nominated partners. Treacy J concluded that at the date of death in 2008, in the context of police force injury benefits, the unmarried partner was being treated as analogous to a spouse or civil partner. In relation to justification it was stated that "Where discrimination is a result of historic fact, maintenance of a discriminatory regime will still fall within the State's margin of appreciation for such a period as is *reasonable* to effect legislative change following the change in public attitudes" (Paragraph [48]). Thus it was found that, in the context and history of the impugned provisions, by the time of the deceased's death in November 2008 the maintenance of the discrimination on the grounds of marital status exceeded the State's latitude. By November 2008 it was no longer reasonable not to have removed the discrimination on the grounds of marital status inherent in the eligibility criteria (paragraph [49]).

[55] The above are instances of the benefit entitlement of cohabitees in certain areas being in transition, the provider having settled on a new course. In some instances the benefits for survivors are paid to cohabitees on conditions such as a specified period of cohabitation or formal nomination of the survivor as the beneficiary. The latter approach may be seen as a means of addressing the administrative reasons advanced for the different treatment of cohabitees. However it does not address the

broader reasons advanced on the formal recognition of the relationship and the corpus of rights and obligations involved in a formal relationship. That such changes have been made in some instances in relation to cohabitees does not herald an overall change of policy by the Government in relation to bereavement benefits or indicate that the approach of the court should be to determine whether such changes should be introduced in other areas or to apply the approach in Ratcliffe and Morrison and determine whether the pace of reform was reasonable.

The approach at first instance

[56] Treacy J did not find incompatibility under Article 1 of Protocol 1 or under Article 14 with Article 1 of Protocol 1. Nor did he find incompatibility under Article 8. The finding concerned incompatibility under Article 14 with Article 8 on the ground of marital status.

[57] Treacy J distinguished between Bereavement Payments and Widowed Parents' Allowances. In relation to Bereavement Payments he accepted that marriage and civil partnerships were not analogous to cohabitees. In relation to the Widowed Parent's Allowance he accepted that spouses and civil partners were not analogous to cohabitees. Further, where the sole beneficiary of the benefit was the partner of the deceased it was held that the different treatment of cohabitees was justified.

[58] However in relation to the Widowed Parent's Allowance he accepted that spouses and civil partners with children were analogous to cohabitees with children as there was common ground arising from the co-raising of children. Further, where the benefit was paid to survivors with children the refusal to make the payment to a surviving cohabitee with children was found not to be justified. This was stated to be because the responsibilities of one parent in relation to the children, after the death of a partner, do not arise from and are not necessarily connected to the public contract that they made at the time of marriage or civil partnership. Parents are under the same or similar financial obligations regarding the maintenance of their children, irrespective of whether they are married, in a civil partnership or cohabiting (paragraph [70]). Thus the survivor was found to have been excluded on the basis of her lack of marital status. Further Treacy J stated that the focus should be upon the survivor's nexus with the child of the partner as there might otherwise be less favourable treatment on the ground of the birth status of the children.

[59] The distinction made by Treacy J is based on the survivor's responsibilities for the children not being related to a public contract entered into by the couple. However, in the approach of the Government to the provision of survivors' benefits, the responsibilities of survivors is not a determining factor. As outlined above, other considerations have prevailed in the Government's approach. Nor has the approach of the courts in finding no incompatibility in the different treatment of cohabitees in

relation to bereavement benefits been altered by reference to the responsibilities of survivors.

[60] The appellant challenges the contention that the statutory scheme is based on a direct nexus between the deceased and the child. Rather the appellant contends that the statutory scheme is based on the deceased's National Insurance contributions and a direct nexus with the spouse or civil partner. Under the Matrimonial Causes (NI) Order 1978 and the Civil Partnership Act 2004 spouses and civil partners have responsibility for 'children of the family' who may not be the children of the parties to the marriage or of a party to the civil partnership. While the children in respect of whom the benefit would otherwise be payable would have been living with the cohabiting couple prior to the death, cohabitees have no similar financial responsibility for the children of others. We are satisfied that the statutory scheme is not based on a nexus between the deceased and the children.

[61] The different treatment of cohabitees is based on 'marital status', a non suspect ground. Treacy J referred to the 'birth status' of the children, a 'suspect' ground. We take into account the conclusion of the ECtHR in Shackell that the difference in treatment does not concern the status of the children but the status of the relationship of the adults. The difference in treatment is not based on a suspect ground.

[62] The appellant contends that the reference by Treacy J to birth status of the children is misplaced as the children are not applicants. The children are not applicants but that is irrelevant for present purposes. Ms McLaughlin is the applicant for the benefit for herself and the children. The refusal of payment of the benefit was based on her status as a cohabitee. It was not based on the status of the children.

[63] In matters of economic, political and social policy the discretionary area of judgement accorded to the Government has been at its widest in relation to entitlement to state benefits, particularly when the Government has made a considered, recent assessment of the issue. The Government's longstanding rejection of entitlement to bereavement benefits for cohabiting couples has recently been restated.

[64] The approach at first instance would extend the benefit to a surviving cohabitee with children. This was rejected by the Government as recently as June 2016. The Work and Pensions Committee recommended such an approach with an estimated cost of £21.6m per year, equivalent to 4.7% of forecast bereavement benefit expenditure in 2020-21. It was also considered that this extra money could be obtained within the reforms being undertaken and the Committee's recommendation was that the extension of the payment to cohabiting couples with dependent children would be financed using medium term savings from the bereavement benefits reform. Thus the rejection of the recommendation that was based on the extension of the benefit being funded by other reforms would not have

been by reason of the added cost of the recommendation. Rather the Government's response relies on the character of contributions to the National Insurance system and the practical issues of processing a multitude of individual cohabitees.

[65] The basis of the different treatment of cohabitees in relation to survivors' benefits has been recognised by the Strasbourg and the domestic case law as being based on legal status and the special treatment accorded to marriage under Article 12 of the Convention. Further the determinative basis of the different treatment is stated to be the public undertaking that arises in marriage and civil partnership with the legal effects of rights and obligations of a contractual nature relating to a formalised union. The State is therefore said to be entitled to take measures to promote marriage by according benefits to those who enter such formalised unions. In addition there is the practical aspect that recognises the inclusion of cohabitees as involving an administrative burden of assessing a multitude of individual cases.

[66] To these general considerations the Government maintains that a key principle of the National Insurance system is that all rights to benefits derived from another person's contributions are based on the concept of legal marriage or civil partnership. In addition the Government adds the practical aspects that proving co-habitation would be a lengthy complex process and would be distressing to the recently bereaved and would create the potential for multiple claims.

[67] In any event the ECtHR in Shackell v United Kingdom rejected the claim in relation to the refusal of bereavement benefits for the children. The applicant had argued that her children were discriminated against by reason of their illegitimate status. The applicant alleged violation of Article 8 taken in conjunction with Article 14 on the basis that refusal to pay widow's benefit in respect of the children had a direct financial consequence on family life. However the ECtHR held that her ineligibility was not related to the status of the children. Her ineligibility was because she was not married and whether under Article 1 of Protocol 1 or Article 8 that ineligibility was compatible with the Convention.

[68] The courts have considered differences in treatment for entitlement to state benefits primarily under Article 1 of Protocol 1 and Article 14. In the related area of tax arrangements for separated fathers there has been a finding of incompatibility under Article 1 of Protocol 1 and Article 14 in PM v United Kingdom [2005] 18 BHRC 668, on which Treacy J relied.

[69] In PM v United Kingdom an unmarried father claimed discrimination under Article 14 in conjunction with Article 1 of Protocol 1 because he did not qualify for tax deduction in respect of maintenance payments made after separation from the mother of his daughter. The statutory scheme placed responsibility on separated fathers for the maintenance of their children, regardless of marital status. A married father making such payments after separation was entitled to tax relief. The ECtHR found the married and the unmarried father were in an analogous position. Further,

the ECtHR found that the different treatment was not justified. Accordingly there was a violation of Article 14 in conjunction with Article 1 of Protocol 1.

[70] The ECtHR reiterated that, as in Lindsay v UK, married and unmarried couples could be subject to different taxation arrangements as they were not in a comparable position. However PM was not a case where the applicant sought to compare himself with a couple living in a subsisting marriage. The comparison was with a married father who had separated or divorced and was living apart from and providing maintenance for his child. Different treatment was afforded to the applicant who was also a separated father supporting his child. The only difference was marital status and the applicant could, for the purposes of the application, claim to be in a relatively similar position (paragraph [27]).

[71] As to justification, it was noted that as a general rule unmarried fathers, who have established family rights with their children, may, upon the breakdown of the relationship, claim equal rights of contact and custody as married fathers who have separated. The unmarried father had financial obligations towards his daughter which he had duly fulfilled and there was no reason to treat him differently from a married father now divorced or separated from the mother.

[72] The first instance finding in the present case was based on Article 8 and Article 14 on the basis of marital status. In the related area of access to children for separated fathers there has been a finding of incompatibility under Article 8 with Article 14 in Sahin v Germany [2003] 2 FLR 671, also relied on by Treacy J.

[73] In Sahin v Germany the father of a child born outside marriage was denied access to the child by the mother, being a child for whom the father had financial responsibility. Divorced fathers of children born within marriage were legally entitled to access to their children but fathers of children born outside marriage could only have access if the child's mother agreed or they obtained a court ruling that such contact was in the child's interest. The ECtHR found interference with the right to respect for private and family life under Article 8 but on the facts the procedural requirements of Article 8 were complied with and so there was no breach. However, in considering whether the interference was discriminatory, it was stated that, in relation to the child, there had to be "very weighty reasons" for different treatment. The same approach was applied to the applicant, as the father of the child. No such weighty reasons had been given. Thus there was found to have been a violation of Article 14 taken together with Article 8.

[74] Lindsey and Shackell were concerned with subsisting relationships, as is the present case. The subsisting relationships of the couple in a marriage or a civil partnership carry a corpus of rights and obligations that concern the couple and that corpus of rights and obligations does not arise with cohabitees. On the other hand Sahin and PM were concerned with relationships that had broken down and with the resulting impact on the separated parent and a child. Cases that concern children in the setting of a breakdown of the relationship do not relate to the rights and

obligations of the couple. Rather, the cases relate to the different corpus of rights and obligations concerning the separated parent and the child. A separated parent, whether formerly married or a civil partner or a cohabitee, has obligations imposed in relation to a child that do not depend on the nature of the former relationship between the couple. A separated parent, whether formerly married or a civil partner or a cohabitee, may have rights of access to the child and to tax relief on maintenance payments made for the child and equally the character of those rights should not depend on the form of the relationship between the couple.

[75] Thus, in neither Sahin nor PM was the issue that of cohabitation. The issue concerned the corpus of rights and obligations of a separated parent and children. One incident is the obligation imposed by the State on a father to provide for his children. Other incidents include, in the former case, access to those children, and in the latter case, tax relief for payments made for those children. The State imposes the obligation to maintain the children regardless of the marital status of the father and should apply correlating rights regardless of the marital status of the father.

[76] On the other hand, in the present case, the issue is indeed that of cohabitation. The State has adopted a position on marital status and bereavement benefits that the courts have endorsed and Parliament has reaffirmed. It has done so for reasons outlined above where consideration of the responsibilities of survivors in relation to children has not prevailed. This is an issue within the discretionary area of judgement afforded to Parliament. Whether a Court would adopt a different policy based on a different balance of considerations is irrelevant. It is not for the courts to determine the policy in this area. In the present context it is for this Court to determine if the Government's assessment is manifestly without reasonable foundation. We are unable to reach that conclusion.

[77] In relation to the appellant's grounds of appeal, this Court is satisfied that the relationship of an unmarried cohabitee is not analogous with that of a spouse or civil partner in the context of a Widowed Parent's Allowance; the different treatment of cohabitees and spouses/civil partners in that context is justified; there is no violation of Article 8 read with Article 14 and the treatment of the children is not on the ground of their birth status.

[78] In relation to the notice issued by the respondent, this Court is satisfied that section 39A(1) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 is not incompatible with Article 1 of Protocol 1 read with Article 14 nor incompatible with Article 8 read with Article 14.

[79] Accordingly, this appeal is allowed. The application for Judicial Review is dismissed.