Neutral Citation Number: [2020] EWHC 183 (Admin)

Case No: CO/975/2019

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2020

**Before**:

**MR JUSTICE HOLMAN**

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**Between:**

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| **(1) JAMES JACKSON**<br>**(2-4) JJ, TJ AND GJ**<br>**(children, by their litigation friend JAMES JACKSON)**<br>**(5) KEVIN SIMPSON**<br>**(6-7) KS AND DS**<br>**(children, by their litigation friend KEVIN SIMPSON)** | **Claimants** |
| **- and -**<br>**THE SECRETARY OF STATE FOR WORK AND PENSIONS** | **Defendant** |

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**MS HELEN MOUNTFIELD QC and MR TOM ROYSTON** (instructed by **Child Poverty Action Group**) for the **claimants**
**MR JULIAN MILFORD and MR BEN MITCHELL** (instructed by **The Government Legal Department**) for the **defendant**

Hearing date: 28 JANUARY 2020

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# Approved Judgment

**MR JUSTICE HOLMAN:**

## Introduction and the issue

1. Higher rate bereavement support payment may be payable to the surviving parent if his or her spouse or civil partner dies and there is one or more dependent child. It cannot be paid to the surviving parent if his or her non-married cohabitee or non-civil partner dies, no matter how long or settled the cohabitation. The claimants in this case claim that that unjustifiably discriminates against the surviving parent and/or the child or children in a cohabiting relationship, on the ground of the non-married status, or, in the case of the child, his or her birth, in a way prohibited by Article 14 of the European Convention on Human Rights (the Convention). The claimants seek a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998.

2. In this judgment "WPA" means widowed parent's allowance which was (and still is) payable under section 39A of the Social Security Contributions and Benefits Act 1992 (the 1992 Act) in respect of deaths occurring on or before 5 April 2017, if (simplifying) the surviving spouse or civil partner has a child or children. Since WPA may, in certain circumstances, be payable until a child attains the age of 20, WPA may continue to be paid for many years even although there can be no new claims in respect of deaths occurring on or after 6 April 2017. "BSP" means bereavement support payment which is payable under section 30 of the Pensions Act 2014 (the 2014 Act) to the surviving spouse or civil partner in respect of deaths occurring on or after 6 April 2017. "HRBSP" means higher rate bereavement support payment which is payable, at a higher rate, to a qualifying surviving spouse or civil partner if (simplifying) he/she has a child or children. HRBSP is provided for by the Bereavement Support Payment Regulations 2017, SI [2017] No. 410 ("the regulations") which are made pursuant to section 30 of the 2014 Act.

3. Both section 39A(1)(a) of the 1992 Act and section 30(1)(a) of the 2014 Act limit the entitlement to WPA or BSP respectively to the surviving spouse or civil partner after the death of his or her spouse or civil partner. A surviving cohabitee or partner (other than a civil partner) could not claim WPA, and a surviving cohabitee or partner cannot claim BSP (nor HRBSP if he/she has a child or children) no matter how long and enduring the cohabitation nor how many children the cohabiting couple may have had.

4. In *Re: McLaughlin* [2018] UKSC 48, on appeal from Northern Ireland but considering identical WPA legislation to the 1992 Act, the majority of the Supreme Court held and declared, in judgments handed down on 30 August 2018, that that legislation is incompatible with Article 14 of the Convention, read with Article 8, in so far as it precludes any entitlement to WPA by a surviving unmarried partner of the deceased. (That shorthand declaration is not, with respect, quite accurate, since entitlement to WPA is not precluded in relation to an unmarried partner who was in a civil partnership with the deceased.)

5. The claimants in the present claim contend that there is, in relation to this issue, no material distinction between WPA and HRBSP, payable in cases where there is a child or children, and that, for the reasons given by the majority of the Supreme Court in *McLaughlin*, which are, of course, binding upon me, the 2014 Act and the regulations, when considered together, are also incompatible with the Convention in

so far as they preclude entitlement to HRBSP (viz where there is a child or children) by a surviving unmarried (or not in a civil partnership) partner or cohabitee of the deceased.

6. Neither the word "cohabitee" nor the word "partner" have any precise definition in law and, indeed, one of the issues in this case lies in the difficulty of establishing when a relationship exists which can be characterised as that of "cohabitee" or "partner" (not being in a civil partnership). Further, the choice of terminology may be quite subjective to the couple themselves. Cohabitation (living together) may be largely a question of fact, but requires a certain duration. Whether a relationship amounts to that of "partner" is essentially a matter of subjective choice. These semantic and philosophical distinctions do not affect the substance of the present case and I propose to refer throughout to "cohabitee" without further defining the term, but recognising that it requires a certain degree of duration although not necessarily permanence.

7. The defendant Secretary of State for Work and Pensions (the SSWP) contends and submits that there are material differences between WPA and BSP, or HRBSP, and between the respective statutory schemes, such that the reasoning in *McLaughlin* does not apply and that the 2014 Act and regulations are compatible with the Convention.

8. The issue in this case is, in short, is section 30(1)(a) of the 2014 Act, read with regulation 4 of the regulations (which makes provision for HRBSP), incompatible with the Convention?

## The claimants and their facts

9. The first claimant is Mr James Jackson, who lives in Nottingham. He is now aged 40. He met Natalie, whom he describes as his "partner", in 2001. They moved in together into a council flat in their joint names in late 2004/early 2005. He was then aged 25 and she was 20. They lived together seamlessly from then until her sudden death in October 2018. They had three children together, who are now aged 13, 8 and 4. Those children lived with the couple together and continue now to live with Mr Jackson, their father. Mr Jackson says that he was "simply not interested in getting married" which seemed to him an unnecessary waste of money just for one day [viz the wedding] and would not change the relationship between Natalie and himself. But he says that marriage was important to her, and in 2014 he agreed to marrying "once we could afford it". Mr Jackson says that it was only in early summer 2018 that he felt that his financial prospects were sufficiently secure to be able to propose to Natalie. They planned on actually marrying in late summer 2019. On 7 October 2018 Natalie, who had not previously had any health issues, died suddenly. Mr Jackson says that her death "was completely unexpected and I was completely unprepared for it." A welfare rights adviser informed Mr Jackson about BSP and he promptly applied for it. His claim was rejected on 29 October 2018 on the (correct, having regard to the statute) ground that he and Natalie had not been married to each other nor in a civil partnership. Mr Jackson says in his statement that "when I received the decision… I was disappointed and felt it was unfair. Somebody who had only been married for 6 months could qualify whereas having lived together with Natalie for almost 14 years and having three children together apparently counted for nothing."

10. Currently, Mr Jackson is not working. He is receiving housing benefit, employment support allowance, child tax credit and child benefit. He says that "we are just about managing on this but it is inevitably tight."

11. Mr Jackson's three children have been named as the second, third and fourth claimants to this claim.

12. The fifth claimant is Mr Kevin Simpson, who lives in Chester. He is also aged 40. He first met Deborah when they were both teenagers. Her age or date of birth are not stated but I infer that she was broadly of a similar age to him. In 2008 they moved in together. Their elder child was born in 2010 and is now aged 9. Deborah then suffered breast cancer for which she was treated "and made a full recovery." Their second child was born in 2012 and is now aged 7. They all lived together. Mr Simpson says that on 5 November 2015, bonfire night, he proposed to Deborah. After this the wedding was often talked about but they had no specific date in mind, partly because Deborah could not decide whether she wanted "a large traditional wedding" or a small one. But Mr Simpson says that "events took over and marriage was pushed to the back of our minds" when, in December 2016, Deborah was again diagnosed with breast cancer. She died on 7 March 2018. The children continue to live with Mr Simpson. The hospice advised Mr Simpson to apply for BSP. His claim was refused on 9 April 2018. He made a further application which was again refused on 11 December 2018, on the ground that he was not married to, nor in a civil partnership with, Deborah. Mr Simpson describes a considerable financial struggle since Deborah died. Mr Simpson's two children have been named as the sixth and seventh claimants.

## The statutory framework

13. No issue arises as to construction in this case and it is not necessary to set out verbatim the relevant statutory provisions. There are further qualifying pre-conditions, but the essential one for the purpose of this case is that under both section 39A(1) of the 1992 Act, in the case of WPA, and section 30(1) of the 2014 Act, in the case of BSP, "a person's spouse or civil partner" dies. It is common ground that it is impossible to construe either enactment as extending to cohabitees, non-civil partners, or any other relationship or status than that of spouse or civil partner.

14. Both enactments require the deceased person to have paid sufficient national insurance contributions during his or her lifetime. Both WPA and BSP are based upon contributions made by the deceased and are not means tested.

15. The allowance under the 1992 Act, being a widowed *parent's* allowance, is, by section 39A itself, only payable if the surviving spouse or civil partner is entitled to child benefit. (There are further provisions in relation to surviving women who are pregnant at the time of the death which are not relevant to the present case.) The entitlement to BSP under the 2014 Act is different. It is payable to the surviving spouse or civil partner irrespective of whether there is any child.

16. Section 30(2) of the 2014 Act required ("must") the Secretary of State by regulations to specify the rate of the benefit and the period for which it is payable. Section 30(3) provides that the regulations may specify different rates for different periods. Section 30(4) provides that:-

> "30(4) In the case of a person who is pregnant or entitled to child benefit in specified circumstances, the regulations may –
>
> (a) specify a higher rate;
>
> (b) provide for the allowance to be payable for a longer period."

17. Section 30(4) accordingly (i) expressly contemplates that in a case where there is a child or children BSP may (in specified circumstances) be paid both at a higher rate and/or for a longer period; and (ii) empowers ("may"), but does not require, the regulations to so provide.

18. Regulation 4 of the regulations makes provision as to the categories of child or children in relation to whom the surviving spouse or civil partner is entitled to HRBSP. The details are not relevant. It is common ground that if either of the present adult claimants had been married to, or in a civil partnership with, his cohabitee at the date of her death he would have been so entitled.

19. Paragraphs (4) and (5) of regulation 3 provides that the "standard rate" of BSP is £2,500 for the first month and also £100 per month. Paragraphs (1) and (2) of regulation 3 provide that the HRBSP is £3,500 for the first month and also £350 per month.

20. Regulation 2 of the regulations provides that the period for which BSP (which includes HRBSP) is payable ends 18 months after the day after the death.

21. The entitlement to HRBSP, and the rates of it, are unaffected by the number of children and are the same whether there is one child or several.

22. The effect of these regulations is, on current figures, that if standard rate BSP is received for the maximum period it totals £4,300. If HRBSP is received for the maximum period it totals £9,800. The difference between the two is a maximum of £5,500. However, the difference between what a surviving parent is entitled to (viz. zero) if he was cohabiting with, but not married to or in a civil partnership with, the deceased, and what he is entitled to if he was, is a maximum of £9,800. The whole argument in this case is that to pay that to a surviving parent who was married to, or in a civil partnership with, the deceased, but to deny it to one who was cohabiting with, but not married to or in a civil partnership with, the deceased, is unjustifiably to discriminate against surviving cohabiting parents and their child or children in a way which is incompatible with Article 14 of the Convention read with Article 8 and/or Article 1 of the First Protocol.

**McLaughlin**

23. The parents of four children had lived together for 23 years but had never married. The father died. He had made sufficient national insurance contributions for the surviving mother to be entitled to WPA if they had been married or in a civil partnership. Her claim for WPA was rejected as they had not been. The Supreme Court held unanimously that the claim fell within the ambit of Article 8 of the Convention and Article 1 of the First Protocol and that not being married could be a "status" within the meaning of Article 14. They held by a majority that the legislation

was unjustifiably discriminatory and, accordingly, incompatible with Article 14, read with Article 8, in so far as it precluded any entitlement to WPA by a surviving unmarried partner of a deceased parent.

24. Baroness Hale of Richmond gave a judgment with which the other members of the court apart from Lord Hodge agreed. Lord Mance gave a judgment with which the other members of the court apart from Lord Hodge also agreed. So both judgments appear to be equally authoritative. At paragraphs 38 and 39 Baroness Hale said:-

> "38. This, as it seems to me, is the nub of the matter. Where means-tested benefits are concerned, it is difficult indeed to see the justification for denying people and their children benefits, or paying them a lower rate of benefit, simply because the adults are not married to one another. Their needs, and more importantly their children's needs are the same. But we are concerned here with a non-means-tested benefit "earned" by way of the deceased's contributions. And the allowance is a valuable addition to the household income if the survivor is in work. Is it a proportionate means of achieving the legitimate aim of privileging marriage to deny Ms McLaughlin and her children the benefit of Mr Adams's contributions because they were not married to one another?
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> 39. In my view, the answer to that question is manifestly "no", at least on the facts of this case. The allowance exists because of the responsibilities of the deceased and the survivor towards their children. Those responsibilities are the same whether or not they are married to or in a civil partnership with one another. The purpose of the allowance is to diminish the financial loss caused to families with children by the death of a parent. That loss is the same whether or not the parents are married to or in a civil partnership with one another."

25. At paragraphs 49 – 53 Lord Mance said:-

> "49… what I regard as the clear purpose of this allowance, namely to continue to cater, however broadly, for the interests of any relevant child. Refusal of the allowance to the survivor of a couple who are neither married nor civil partners cannot simply be regarded as a detriment to the survivor of the couple. Refusal would inevitably operate in a significant number of cases to the detriment of the child.
>
> 50…Bearing in mind that the main purpose of widowed parent allowance is to secure the continuing well-being of any child of a survivor, there seems in this context to be no tenable distinction, and indeed manifest incongruity in the difference in treatment, between a child of a couple who are married or civil partners and the child of a couple who are not.
>
> 51…
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> 52. A policy in favour of marriage or civil partnership may constitute justification for differential treatment, when children are not involved. But it cannot do so in relation to a benefit targeted at the needs and well-being of children. The fact that the widowed parent's allowance may cease or be suspended in some situations is no answer to this. The underlying thinking is no doubt that adequate support will be or is likely to be derived from another source in such situations. The

> provisions for cessation or suspension may not be entirely logical or reflect entirely accurately the circumstances in which adequate alternative support may be expected. But, if so, that does not appear to me to affect the analysis that widowed parent's allowance is fundamentally aimed at securing the needs and well-being of children.
>
> 53. I take the points made by Lord Hodge JSC (paras 85-87) that it is not always easy to judge how different benefits interact and how easy they may be to administer. But the position of couples who are neither married nor civil partners is already catered for in other situations known to the law. The starting point is surely that, where children are for relevant purposes in a similar situation, the law would be expected to deal with them in the same way. I am not persuaded that any substantial grounds exist for thinking that this was not and is not feasible, as well as just, in the present context."

**A comparison of WPA, and BSP and HRBSP**

26. They are different and I avoid saying that BSP "replaced" WPA, although it did seamlessly succeed it at midnight on 5/6 April 2017. Most obviously, WPA was, and still is, a benefit or allowance which is only payable at all when there is a child or children. Entitlement to BSP does not depend upon the existence of a child at all, although entitlement to HRBSP does. Both WPA and BSP are based upon the contributions made by the deceased and are not means tested. However, WPA was, and still is, capable of providing an income stream for many years which is taxable in the hands of the recipient parent. BSP is of relatively short duration (maximum 18 months) and is not taxable. Further, there is abundant evidence that the government originally conceived and intended BSP to be a single lump sum payment, receivable soon after the death and as a cushion or buffer for higher expenditure associated with the aftermath of a death. The government only moved to the mixture of a (lower) lump sum payment and monthly payments for a relatively short period, not exceeding 18 months, in the light of representations to the effect that there was too great a risk of the bereaved spouse or civil partner, in the period of his or her grief, squandering the payment recklessly or unwisely. I accept the case of the Secretary of State that BSP is essentially a death grant. Nevertheless, the effect of the regulations, made pursuant to the statute, is that when there is a child or children that death grant is higher (and may indeed be more than double, viz an additional £5,500 as indicated above).

27. I accept the case of, and submission on behalf of, the Secretary of State that WPA was intended to provide a potentially long term income stream. BSP, including HRBSP, is not. For longer term income the surviving spouse or civil partner is now expected to seek and rely upon other benefits to which he or she may be entitled, including, but not limited to, universal credit, and including, if there is a child or children, child benefit.

28. Where I simply cannot accept the case of the government is their submission that HRBSP is not intended to benefit the relevant child or children and that it is not "for" the relevant child or children, so as to distinguish HRBSP from WPA and the reasoning in *McLaughlin*. Of course, the state is not prescriptive as to the manner in which the recipient actually spends (or saves) BSP, HRBSP or many other benefits, including indeed WPA (an exception is housing benefit paid directly to the landlord). But where the state may pay over twice as much to a person who has a dependent

child than to one who does not, it is, to my mind, fanciful to suggest that part, if not all, that extra sum is not intended to benefit, and does not usually benefit, the child or children. The fact that it is paid to the parent is irrelevant, since it obviously could not be paid directly to a young child. In this regard, the government's own consultation paper "Bereavement Benefit for the 21st Century", Cm 8221, presented to Parliament in December 2011, in a bullet point on internal page 9 (now at exhibit HW 96) is telling. One of the government's aims "for modernised benefit are that …. there should be additional support for families, to recognise the additional costs associated with raising children." The government never later qualified or deviated from that aim.

29. There are nevertheless sufficient points of difference between WPA on the one hand and BSP and HRBSP on the other that, in my view, *McLaughlin* cannot simply be "read across" into the present case. Indeed, in *McLaughlin* itself the Supreme Court were of course well aware of the legislative changes which had come into effect in April 2017 (see paragraphs 11 and 12 of the judgment of Baroness Hale of Richmond) and they were to observe (see paragraph 44) that "It also does not follow that the new law is incompatible. Although we have been advised of its existence, we have not heard argument about it, and the argument would no doubt be very different from the argument we have heard in this case."

30. I must, therefore, consider critically and sequentially the "four questions" which the Supreme Court identified at paragraph 15 of *McLaughlin*.

**Within the ambit?**

31. It is common ground that the circumstances fall within the ambit of Article 1 of the First Protocol. The claimants contend, but the SSWP disputes, that they also fall within the ambit of Article 8. Mr Julian Milford and Mr Ben Mitchell on behalf of the Secretary of State submit that "the proper home for the claim is A1P1 rather than Article 8." The reference to Article 1 of the First Protocol being the proper, or "more natural" home echoes paragraph 70 of the minority judgment of Lord Hodge in *McLaughlin*, but even he, too, concluded at the end of that paragraph that the benefit (viz WPA) fell within the ambit of Article 8: "It is the positive act of providing the widowed parent's allowance, which provides assistance to the survivor who is responsible for children and thereby promotes family life, that brings the benefit within the ambit of Article 8." Those words apply no less to HRBSP than to WPA. In any event, the majority of the Supreme Court make clear in *McLaughlin* at paragraph 23 that the two rights are not mutually exclusive and, indeed, that the circumstances of that case fell within the ambit of both rights. In the present case counsel have trawled again over earlier authority of both the European Court of Human Rights (ECtHR) and the House of Lords all of which was fully considered in *McLaughlin*. Mr Milford and Mr Mitchell submit that paragraph 22 of *McLaughlin* "does not provide the answer to this issue" since, they submit, it is predicated on WPA being a benefit "securing the life of children with their families." It was enough for Lord Hodge that the allowance or benefit "provides assistance to the survivor who is responsible for children and thereby promotes family life." Although HRBSP is of shorter maximum duration than WPA, and even if it is viewed as a single lump sum payment payable by instalments over a short period, it still seems to me to be a positive measure which is a modality of the rights guaranteed by Article 8, no less than in the case of WPA. It is, as I have already said, intended at least in part to assist

or benefit children and to do so at a time when family life may be under its greatest strain, fractured if not broken by the recent death.

32. I thus conclude that, as in *McLaughlin,* HRBSP does fall within the ambit of Article 8.

**Analogous situation**

33. The next question is whether there is a difference of treatment between two persons who are in an analogous situation or, as the Grand Chamber put it in *Yigit v Turkey (2011)* 53 EHRR 25 at paragraph 67, "in relevantly similar situations." The comparators are a surviving cohabitee who has a dependent child (such as Mr Jackson and Mr Simpson) on the one hand, and a surviving spouse or civil partner who has a dependent child on the other. In human rights cases the analysis requires that the situations are analogous or relevantly similar, not that they are identical or exactly the same. The critical question is whether the fact of marriage or civil partnership breaks the analogy down.

34. From the perspective of the children themselves the two situations must surely be analogous. A child below a certain age and degree of understanding will have no appreciation that his parents were not married to, or in a civil partnership with, each other whereas another child's parents are or were. Even after he may have some appreciation of marriage and that his parents were not married to each other, a child is unlikely to understand why it makes any difference to him or his family life. As Baroness Hale said in *McLaughlin* at paragraph 27: "… the situation [of the children] is the same, whether or not the couple were married to one another. It makes no difference to the children."

35. In relation to comparing the positions of surviving parents Mr Milford understandably placed reliance upon the Strasbourg jurisprudence of *Shackell v United Kingdom, Burden v United Kingdom,* and *Yigit v Turkey*.

36. However in *McLaughlin* the majority of the Supreme Court clearly distinguished *Burden* at paragraph 25, and held at paragraph 28 that *Shackell* cannot be regarded "as conclusively against the conclusion that for this purpose the situations are analogous." Lord Mance at paragraph 49 was uncompromising: "We are therefore squarely confronted with a need to consider whether the court's approach in *Shackell v United Kingdom* …should now be regarded as wrong or should not be followed, at least domestically. In my opinion, that is indeed the position." The distinction from *Yigit v Turkey* was clearly explained in *McLaughlin* at paragraph 30: "The United Kingdom is unusual in channelling benefits for children through their parents."

37. The position in relation to a bereavement payment to the survivor cohabitee simpliciter, who has no child or children, may be different. That was not the subject of any appeal in *McLaughlin* - see paragraph 26 - and is not the issue before me. However the majority in *McLaughlin* clearly considered that in the case of a payment which benefits children (viz WPA in that case or, in my view, HRBSP) the situations of marriage and cohabitation are analogous.

38. At paragraph 26 Baroness Hale quotes, with agreement and approval, the words of Treacy J at first instance. In the case of the allowance "… the relevant 'facet of the relationship' was not their public commitment [viz. marriage or a civil partnership]

but the co-raising of children. For that purpose marriage and cohabitation were analogous."

39. It does not seem to me that, for the purpose of the analogy, there is any material difference between WPA and HRBSP. In my view the situations of the surviving cohabitee claimants in this case are analogous with, or relevantly similar to, that of a surviving spouse or civil partner who, if he has a child, can claim HRBSP. It is not in issue that there is a difference in treatment between the two persons who are in that analogous situation.

**Status**

40. Article 14 of the Convention requires that the enjoyment of the rights and freedoms in the Convention "shall be secured" (not merely respected) without discrimination on any of a non-exhaustive list of grounds including "other status". In *McLaughlin* the Supreme Court unanimously agreed that "not being married can be a status" (see Baroness Hale at paragraph 31 and Lord Hodge at paragraph 72). That must apply no less in this case than in that case.

**Discrimination**

41. Pausing here, I thus conclude that this claim is within the ambit of Article 8. There is discrimination between persons in a relevantly analogous situation; and that discrimination is on the ground (and indeed the sole ground) of the "other status" of not being married or in a civil partnership. There is discrimination against Mr Jackson and Mr Simpson. There is also discrimination against their respective children on the ground of the children's status of not being the children of parents who were married to each other or in a civil partnership. In the case of children, the ground of "birth" in Article 14 may also be engaged.

42. Further, the discrimination is not confined to the present seven claimants. In *McLaughlin* at paragraph 43 Baroness Hale said "… the test is not that the legislation *must* operate incompatibly in all or even nearly all cases. It is enough that it will operate incompatibly in a legally significant number of cases…" There is evidence in this case that in 2011 31% of all births in the United Kingdom were to cohabiting but not-married couples; and that in 2013 about 1.9 million dependent children in the United Kingdom were living in "opposite sex cohabiting couple families." Of course, happily, most parents do not die during the minority of their children, but the Child Poverty Action Group estimate that about 2,000 families each year suffer bereavement of a parent where the parents were cohabiting but not married or in a civil partnership. (As that figure pertains to "families" the number of individual children affected is likely to be greater.) In my view this is clearly a "legally significant number of cases" and Mr Jackson and Mr Simpson and their children are not in such isolated or extreme circumstances that they can be ignored as simply a very rare "hard case" on the wrong side of a bright line. The line has been deliberately drawn to exclude them and a legally significant number of others.

43. It follows that the discrimination requires to be justified. Can it be?

**Justification**

44. In considering the issue of justification I bear very firmly in mind that Strasbourg jurisprudence clearly recognises the special status of marriage, or now also civil partnership. The jurisprudence recognises that states have a margin of appreciation to treat the status of marriage and civil partnership differently, and more favourably, including within the realm of social policy and social security. This is very clear from *Burden v United Kingdom* (2008) 47 EHRR 38 at paragraphs 63-65 where the ECtHR focused on "the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature" as making marriage and civil partnerships "fundamentally different to" cohabitation, despite its long duration. In *Yigit v Turkey* (2011) 53 EHRR 25 at paragraph 72 the ECtHR said that "marriage is widely accepted as conferring a particular status and particular rights on those who enter it. 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 differentiate it markedly from the situation of a man and woman who cohabit. Thus, states have a certain margin of appreciation to treat differently married and unmarried couples, particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security."

45. I also bear very firmly in mind when considering justification the observations of Lord Neuberger of Abbotsbury in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 at paragraphs 56 and 57. The court must be very slow before finding a policy or legislation unjustifiable. "The fact that there are grounds for criticising, or disagreeing with these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified."

46. The test which I propose to apply is whether the discrimination is manifestly without reasonable foundation. This is the test to which Baroness Hale referred in *McLaughlin* at paragraph 34. This test has recently been the subject of considerable analysis by Lord Wilson of Culworth in *DA and others v Secretary_of State for Work and Pensions* [2019] UKSC 21 in which judgments were handed down in May 2019, and even more recently by the Court of Appeal in *Langford v Secretary of State for Defence* [2019] EWCA Civ. 1271 in which judgment was given in July 2019. Lord Wilson said in *DA* at paragraph 65 that: "…at any rate in relation to the government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits [viz, also the present case], the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it." Lord Wilson said at paragraph 66 that the court must "proactively examine" whether the foundation is reasonable, but "…reference in this context to any burden… is more theoretical than real."

47. The test is clearly a high one, emphasised by use of the word "manifestly." There is clearly a considerable margin left to the executive, and even more so, the legislature, and the court must be very slow to intervene. As Mr Milford and Mr Mitchell submit that I should (see paragraph 72 of their Skeleton Argument dated January 2020), I ask as a single, compendious question, is the difference in treatment manifestly without reasonable foundation?

48. At internal page 17 of their original consultation paper in December 2011 the government expressly placed marriage and civil partnership as a condition of

entitlement "out of scope for review", saying "Currently, the law and tax and benefit system 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."

49. The government thus made their position very clear from the outset of the consultation and subsequent legislative process. They did nevertheless receive responses to the consultation directed to this issue, as well as questions in both Houses of Parliament. The clearest and most succinct statement of the government's policy and intention during the passage of the resulting Bill is the answer of the then Minister of State for Pensions, Steve Webb MP, to a question from Pamela Nash MP at the House of Commons Committee stage on 4 July 2013 (now at exhibits page HW 596) which, accordingly, I quote in full:-

> "**Pamela Nash**: The Minister says that the changes are supposed to reflect modern life. However, families with parents who have decided not marry but to cohabit are excluded. In most other comparable areas of the law, those couples are now included. Why have they not been included in this legislation?
>
> **Steve Webb**: The national insurance system, of which the payment is a part, has always been and remains based on legal marriage and, subsequently, civil partnership. The provisions in the single-tier pension for partners are for married partners and civil partners. All national insurance benefits to the extent that marriage is relevant, are based on marriage, not cohabitation.
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> I entirely take the hon. Lady's point that cohabitation is a part of modern society. She asked why we have not reflected that in the provisions. One of the biggest challenges is entirely practical. The payment is not a means-tested benefit, but when we assess a couple for mean-tested benefits, defining cohabitation is a messy business. People argue about it; they go to appeal tribunals about it; and they say, "No, we are not cohabitating because I spend only one night a week there." Sometimes we even have fraud inspectors going into people's houses and sitting outside in cars, watching what goes on. Cohabitation is not a straightforward concept when trying to write the law of the land.
>
> It is difficult enough when the two parties are still alive. Imagine a situation where someone has died and someone else comes along and said, "I was the cohabiting partner of the person who has died. I would like a bereavement support payment." We would need some evidence of that. We do not have a marriage certificate to prove it, so the question is, what would be the nature of the proof we would seek? Would we pry, at a time of bereavement, into the nature of the relationship? Would we ask how long they had lived together or whether they slept together? What we have found in other spheres of life is that there could be multiple people who could legitimately claim to be the partner of the deceased. Trying to ask all those questions is difficult at the best of times; at a time of bereavement, it is all the more difficult.
>
> Clearly, an option is for a cohabiting couple to marry, after which they become entitled to all those things. Who knows whether a future Government will allow civil partnerships for heterosexual couples? In that environment, that might well

> be the way to deal with the point that the hon. Lady raised. I could go on at much greater length. The more we think about how we might do it, the more intrusive and difficult it looks."

50. In this passage one can see very clearly three of the same pillars of justification which the SSWP now advances and relies upon. These boil down to the following, however much they may be elaborated.

51. First, the SSWP argues that the national insurance system always has been based on legal marriage, and now also civil partnership. This point was clearly made to the Supreme Court in *McLaughlin* and is referred to by Baroness Hale at paragraph 12 and again in the last sentence of paragraph 37 where she said: "The fact remains that the social security system does privilege marriage and civil partnerships in a few ways: principally by permitting one partner to benefit from the contributions made by the other, not only for bereavement but also for retirement pension purposes." But the argument does not seem to have weighed with, and certainly did not sway, the Supreme Court. It provides no greater justification in the case of HRBSP than in the case of WPA and is, to my mind, of little weight. To say that something has always been done in a certain way is, of itself, no justifying reason at all, and risks failing to keep pace with societal change.

52. Second, Mr Webb said that couples have a choice ("option"), whether or not to marry "after which they become entitled to all those things." This is an expression of the social policy, which Strasbourg jurisprudence recognises, of encouraging and supporting marriage. This, too, was advanced in *McLaughlin* and was considered by Baroness Hale at paragraph 36 where she expressly recognised that the promotion of marriage, and now civil partnership, is a legitimate aim. But she continued at paragraph 37: "The mere existence of a legitimate aim is not enough: there has to be a rational connection between the aim pursued and the means employed … Whether there is a rational connection between the aims in this case and the measure in question is more debateable. It seems doubtful in the extreme that any couple is prompted to marry – save perhaps when death is very near – by the prospect of bereavement benefits." I here interject that in the case of Mr Jackson the death of Natalie was totally unexpected and unforeseen. In the case of Mr Simpson, the burden of paragraph 5 of his witness statement is that when Deborah became ill again with cancer, that very "event took over and marriage was pushed to the back of our minds." At all events, the policy argument and legitimate aim of encouraging and promoting marriage or civil partnership is no different and no stronger in the present case than it was in *McLaughlin*. It did not sway the Supreme Court, and it seems to me a wholly unconvincing reason for discriminating in the case of children and entitlement to HRBSP. The child cannot make the choice between marriage and cohabitation. In relation to BSP simpliciter, when there is no child, the justification may be different.

53. Third, the SSWP argues that the fact of marriage or civil partnership is clear cut and susceptible of clear proof from registration and production of a certificate. The circumstances of cohabitation may be much less clear cut and far harder for the state to verify, which, as Mr Webb said, is difficult at the best of times and all the more difficult at a time of bereavement. This is clearly a consideration that impressed Lord Hodge in *McLaughlin*, at paragraph 87, although it was not finally a part of his reasoning (see the last sentence of paragraph 87: "… the respondent does not need to

rely on this additional consideration as I am satisfied that without it the difference in treatment about which the appellant complains is proportionate and thus objectively justified."). But the point of the difficulty and sensitivity of administration, especially at a time of bereavement, was considered and expressly rejected by the majority in *McLaughlin*. See, in particular, Lord Mance at paragraph 53 where he said: "I take the points made by Lord Hodge… that it is not always easy to judge how different benefits interact and how easy they may be to administer. But the position of couples who are neither married nor civil partners is already catered for in other situations known to the law. The starting point is surely that, where children are for relevant purposes in a similar situation, the law would be expected to deal with them in the same way. I am not persuaded that any grounds exist for thinking that this was not and is not feasible, as well as just, in the present context."

54. That reasoning, too, must apply equally to the present case. Like Lord Mance and the majority who agreed with him, I "take the point" so clearly made by Mr Webb about the administrative challenge and its sensitivity, particularly after a bereavement. I accept, too, that HRBSP is a relatively short term benefit, intended to be payable (when entitled) rapidly after the death when the sudden extra expenses may be at their most acute. This objective does not lie easily with the enquiries which would inevitably require to be made when cohabitation, but no documented marriage or civil partnership, is relied upon. In many cases, however, including the cases of Mr Jackson and Mr Simpson, the fact of the long and settled cohabitation is likely to be easily and rapidly demonstrable.

55. Whilst I understand this practical consideration it does not seem to me to justify the discrimination.

56. Additionally, although not directly addressed by Mr Webb in his parliamentary answer, the SSWP submits that the availability of other benefits, including universal credit, addresses the living costs of bereaved cohabitees and their children. This point was made repeatedly during the consultation and legislative process. Mr Milford and Mr Mitchell refer, for example, to what Lord Freud, another Minister of State, said in the House of Lords on 15 January and 24 February 2014 during the debates on the Bill in that House (now at exhibits HW 583, 584, 590 and 591). In these passages Lord Freud referred to the new benefit as being "a cash boost" "to provide support when it is needed most." It is a short term payment followed by "longer term income replacement benefit in the shape of universal credit." But the minister's own answers recognise the need for greater support when there are dependent children. He said, now at exhibit HW583, "we recognise that those with dependent children need a greater level of support, so the Bill provides the ability to set out a higher amount in regulations, which is what we intend to do."

57. That "need [for] a greater level of support" soon after the bereavement when there are dependent children cannot be different according to whether the parents were married or not.

58. In summary, there is, in my view, no more justification for the discrimination in relation to HRBSP than there was in relation to WPA, and the same resounding answer ("manifestly "no"…") which the Supreme Court gave in *McLaughlin* applies also to this case. In my view there is manifestly no reasonable justification whatsoever for giving the additional "cash boost" (the extra £5,500 maximum) which it is

recognised that families with a child or children need after the death of a parent and which the HRBSP provides to families based on marriage or civil partnership, yet denying it to those based on cohabitation. The impact of the death upon the child or children, and the financial and other needs of the children, are precisely the same.

**Victim status and standing**

59. In view of my conclusion in relation to the ambit of Article 8 above, it is clear, and not as I understand it controversial, that the children of Mr Jackson and Mr Simpson respectively do have victim status and do have standing to bring this claim, jointly with their fathers.

**Declaration as to incompatibility**

60. Section 4 of the Human Rights Act 1998 empowers ("may make") the court to make declarations of incompatibility, but does not necessarily require it to do so. In a case such as this, however, in which the minister has maintained to the last that there is no incompatibility I should clearly do so.

61. The precise form of that declaration is a more difficult matter. The restriction of the payment to cases of marriage and civil partnerships is contained in, and governed by, the primary legislation, namely section 30(1) (a) of the 2014 Act. However, the discrimination in point in the present case relates only to children and the HRBSP, which is provided for solely by the regulations, although enabled by section 30(3) and (4) of the Act.

62. Whether or not section 30(1)(a), standing alone, is discriminatory and incompatible even in the case of a surviving cohabitee who does not have any child, is not raised or in point in the present case, and is not the subject of this judgment. Although the incompatibility in this case stems from section 30(1) (a) in its effect upon HRBSP, I cannot, and do not, say, let alone declare pursuant to section 4(2), that that provision of primary legislation, standing alone, is incompatible.

63. Nor, however, is any provision of the regulations of itself incompatible. It is the regulations which make provisions for HRBSP, but the statute which forces the regulations to limit it to the case of marriage or civil partnership. So, I cannot directly make a declaration of incompatibility in relation to any provision of the regulations, and the legislative circumstances of this particular case do not fall neatly within section 4(4) of the 1998 Act. This problem did not arise in *McLaughlin*.

64. Counsel on both sides have submitted alternative draft wording of a declaration in the event that I found, as I do, that there is incompatibility.

65. In practice, little turns on the precise language of the declaration, since the message of this judgment is clear. On balance, I prefer the wording suggested by counsel on behalf of the Secretary of State. The real problem lies with the primary legislation and it is upon that that their proposed wording focuses.

66. I accordingly declare pursuant to section 4 of the Human Rights Act 1998 that:

> "Section 30(4)(a) of the Pensions Act 2014, read with section 30(1), is incompatible with Article 14 of the European Convention on Human Rights read with Article 8 in so far as it empowers the Secretary of State to order by regulations that Bereavement Support Payment 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."

67. I was very grateful to Ms Helen Mountfield QC and Mr Tom Royston, and to Mr Milford and Mr Mitchell for their sustained written and oral submissions in this case.