DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the Worcester First-tier Tribunal dated 21 September 2017 under file reference SC024/17/05431 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal can re-make the decision under appeal. The decision that the First-tier Tribunal should have made is as follows:

> *The Secretary of State's decision of 12 October 2016 is revised. The Appellant is entitled to a bereavement payment and widowed parent's allowance.*

This decision is given under section 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This case is about whether the surviving partner of a religious marriage recognised in Pakistan, but not recognised in England and Wales, is entitled to a bereavement payment and widowed parent's allowance.

2. I held an oral hearing of this appeal at Field House on 5 April 2019. The Appellant was represented by Ms Celia Rooney of Counsel, acting *pro bono* and instructed by the Free Representation Unit. The Respondent was represented by Ms Zoë Leventhal of Counsel, instructed by the Government Legal Department. I am indebted to them both for their incisive submissions, both oral and written, which have been of great assistance in determining this complex appeal.

3. It would also be remiss of me not to recognise the efforts of the Appellant's nephew throughout these proceedings, who has been fighting his aunt's corner from the very outset of this matter and represented her before the First-tier Tribunal. If it were not for his commitment and tenacity, I very much doubt we would be where we are today.

4. In the interests of clarity, I refer throughout this decision to the Appellant's late husband as her husband, even though this may appear from one standpoint to beg the question which lies at the heart of this appeal. I adopt this course as under both the law of Pakistan and under Islamic law there is no argument but that the Appellant was his wife and is now his (sole surviving) widow. In some passages, to aid clarity, I refer to him simply as Mr A. I also use the expression "'lawful' widow" in discussion from time to time. This is a shorthand term to describe the surviving (female) spouse of a marriage which is recognised by the law of England and Wales. A 'lawful' widow is not necessarily the same as the widow of a monogamous marriage. This is because, as will be seen, our law does recognise polygamous marriages in certain circumstances and for certain purposes. From time to time I also use the term "'ordinary' cohabitant" – by this I mean a person living with another as husband and wife without any attempt to have that relationship formalised, e.g. through a religious ceremony, whether here or abroad.

5. I should also add that I held an earlier hearing of this appeal on 11 February 2019, but without full argument. That hearing was adjourned to 5 April 2019 as the Secretary of State had not had sufficient time to prepare a full response to the human rights submissions advanced on behalf of the Appellant. The Secretary of State subsequently applied for a stay of the present appeal pending the outcome of judicial review proceedings in the Administrative Court in the case of *R (on the application of Rehman) v Upper Tribunal and Secretary of State for Work and Pensions* (CO/3704/2017). I refused that application in a ruling dated 4 March 2019 for three main reasons: (i) although both cases concerned Islamic marriages, the marriage in *Rehman* had taken place in England, so raising issues of validity under the Marriage Act 1949 which did not arise in the present appeal; (ii) the special regulations governing polygamous marriages and social security benefits were not in issue in *Rehman*; and (iii) *Rehman* was exclusively concerned with widowed parent's allowance, whereas the instant appeal is about both widowed parent's allowance and bereavement payment.

The factual background to the present appeal

6. The underlying facts in this appeal are not in dispute. The Appellant's husband, Mr A, was born in Pakistan in 1958. On 1 July 1976, at the age of 17, Mr A, then a bachelor, married his first wife, Ms B (who was also 17), in Pakistan. Later the same month, and having turned 18, Mr A moved to the UK to live with his parents. In 1979 Ms B moved to the UK to join him. Although there were doubtless visits to Pakistan, it seems that Mr A made his home in the UK. In 1993 he became a British citizen. However, in 2001 he pronounced a *talaq*, with the intention of divorcing Ms B, and the couple separated. On 28 November 2008 Mr A married the Appellant in Pakistan. A year later, following proceedings in the Birmingham County Court, Mr A obtained a decree absolute of divorce from Ms B. In December 2010 the Appellant moved to the UK to live with Mr A. In May 2011 Ms B died. Mr A and the Appellant had a daughter, born in November 2012, but on 18 July 2016 Mr A died. By that date the Appellant had been married to Mr A in the eyes of Islamic law for eight years and had been his only living spouse for five years. On that basis the Appellant claimed bereavement benefits. After initially deciding that she was entitled to such benefits, one of the Secretary of State's decision-makers issued a revised decision refusing the Appellant's claim.

The First-tier Tribunal's decision

7. The First-tier Tribunal (FTT) dismissed the Appellant's appeal. This was on the basis, according to the decision notice, that "the appellant's marriage was a polygamous marriage when entered into and is therefore not valid under English law". The essence of the FTT's reasoning was captured in paragraph [15] of the subsequent statement of reasons:

> "In accordance with the Marriage Act 1949 the marriage to the appellant in 2008 was polygamous as at the date of his second marriage he was still married to his first wife, that first marriage being valid under Pakistani law and accepted as valid under English law as it was at the date of the marriage monogamous and took place in accordance with the law of Pakistan. The marriage to the appellant in 2008 was polygamous as [Mr A] was still married to [Ms B] and as English law does not recognise polygamous marriages and we are satisfied on the facts set out above that [Mr A] was clearly domiciled in the UK at the time of the second marriage and did not have the capacity to enter into the polygamous marriage as these are invalid when entered into under English law."

8. The FTT accordingly concluded that "the appellant was not lawfully married to [Mr A] and the fact that [Mr A] subsequently divorced his first wife under English law

does not change that fact" (statement of reasons at paragraph [21]). The FTT also dismissed the argument advanced by the Appellant's nephew that she had been unjustifiably discriminated against on the grounds of her marital status. The FTT concluded that the Secretary of State's decision did not breach the Appellant's rights under Article 8 of the European Convention on Human Rights (referred to in this decision as the ECHR, or simply 'the Convention') in the light of the exceptions in Article 8(2). In support, the FTT cited the proposition that "the refusal of a benefit in accordance with the law cannot constitute an interference with the claimant's private and family life, her home or correspondence". This was (wrongly) attributed to the High Court's judgment in *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2002] EWHC 426 (Admin). In fact, the proposition was expressed in those terms in the course of the Secretary of State's supplementary submission to the FTT.

9. I subsequently granted the Appellant permission to appeal to the Upper Tribunal.

A summary of Upper Tribunal's decision and the structure of these reasons

10. Not everyone will wish to read to the end of what is necessarily a lengthy decision. I therefore summarise the gist of my decision here. I accept Ms Rooney's submission that the State's refusal to provide the Appellant with a bereavement payment is contrary to Article 14 of the Convention read in conjunction with A1P1. The bereavement payment is within the ambit of Article 14, the Appellant is in an analogous situation to a 'lawful' widow and the difference in treatment is not objectively justified or proportionate. The same is true as regard the refusal of WPA, but in any event the Appellant is the victim of unlawful discrimination on the same basis as the applicant in *Re McLaughlin*. I further conclude, for the purposes of the Appellant's entitlement to both bereavement payment and widowed parent's allowance, that the relevant secondary legislation (the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 (SI 1975/561)) can be read down under section 3 of the Human Rights Act 1998 so as to be Convention-compliant. I therefore allow the Appellant's appeal to the Upper Tribunal, set aside the decision of the First-tier Tribunal and re-make the decision under appeal in the terms set out above.

The shifting framework of provision for bereavement benefits

11. Widows' benefits date back to the early years of the modern Welfare State (see the Widows', Orphans' and Old Age Contributory Pensions Act 1925) and were a central feature of the Beveridge national insurance scheme which came into being in 1948. Social changes have been such that widows' benefits have diminished in significance in recent years (see the illuminating discussion by Baroness Hale in *Re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250 at paragraphs 4-12). For present purposes it is sufficient to note the last three decades have seen three major reforms to provision for the bereaved by way of social security benefits.

12. First, in the period after 11 April 1988, and following the Social Security Act 1986, there were three principal social security benefits available to widowed women, each of which was based on the National Insurance contributions record of the late husband rather than that of the widow herself. These were (1) a Widow's Payment (a single, tax-free payment of £1,000); (2) Widowed Mother's Allowance (WMA) (a taxable weekly benefit for widows with dependent children, which ended when the youngest child ceased to be a dependant); and (3) a Widow's Pension (a taxable weekly benefit for widows who were not entitled to WMA or whose WMA had ceased). Entitlement to both WMA and the Widow's Pension ended if the widow re-married, and neither benefit was payable for any periods during which she and a man lived together as husband and wife. Similarly, a Widow's Payment was not payable if,

at the time of her husband's death, she and another man were living together as husband and wife.

13. Secondly, the Welfare Reform and Pensions Act 1999 brought in changes with effect from 9 April 2001 and made the scheme gender neutral. The main changes were that the Widow's Payment was replaced by a Bereavement Payment of £2,000, paid to both widows and widowers on bereavement. In turn WMA was replaced by a Widowed Parent's Allowance (WPA), for which entitlement continued until the youngest (or only) dependent child was aged 16 (or up to age 19 if still in full-time further education). The Widow's Pension was replaced by Bereavement Allowance, a weekly age-related benefit payable for one year only, for widows and widowers aged 45 and over with no dependent children.

14. Thirdly, since 6 April 2017 the tripartite benefits structure in place since 1988 has been abolished. The only remaining contributory benefit in this area is the bereavement support payment, comprising a lump sum payment in the first month and then monthly payments payable thereafter for a maximum period of 18 months.

15. Access to bereavement benefits has always been governed by marital status and by what the Department refers to as a "bright line rule". However, that boundary has shifted over time, recognising wider social changes. Initially, benefits were only available to *widows*. Later, and recognising the (at that time) indirect effects of the ECHR, bereavement provision was widened to include *widowers*. Later still, the scope of those bereaved persons who were entitled was extended to cover *civil partners*. Historically both the Department and Parliament have always resisted attempts to bring cohabitants[1] within the remit of bereavement benefits, although this policy has now had to be reconsidered in the light of the Supreme Court's decision in *Re McLaughlin*, to which I return further below. For the present it is instructive to turn first to the relevant provisions of the Convention and domestic legislation.

The European Convention on Human Rights

16. Article 8 of the ECHR declares as follows:

> **Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic 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.

17. Article 14 further provides that:

> **Prohibition of discrimination**
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour,

[1] I noted both counsel tended to use the term "cohabitee"; I prefer to use the gender-neutral expression "cohabitant", whilst recognising that in practice most surviving partners of cohabiting relationships who seek to claim bereavement benefits will be female.

language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

18. Article 1 of Protocol 1 ('A1P1') is in these terms:

Protection of property

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.

The social security primary legislation governing bereavement benefits

19. It will be recalled that the Appellant's husband died in 2016 and she made her claim for bereavement benefits shortly afterwards. As such, the question of the Appellant's entitlement is governed by the social security legislation then in force (which provided for the benefits summarised in paragraph 13 above). Entitlement to the bereavement payment at that date was expressed by section 36 of the Social Security Contributions and Benefits Act 1992 ("the SSCBA 1992") in the following terms:

Bereavement payment

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 or a state pension under Part 1 of the Pensions Act 2014; 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 that person and a person whom that person was not married to, or in a civil partnership with, were living together as a married couple at the time of the spouse's or civil partner's death.

(3) In this section "the appointed day" means the day appointed for the coming into force of sections 54 to 56 of the Welfare Reform and Pensions Act 1999.

20. Entitlement to widowed parent's allowance was governed by section 39A of the SSCBA 1992. So far as is material, section 39A at that time provided as follows:

Widowed parent's allowance

39A.—(1) This section applies where—

(a) a person's spouse or civil partner has died before the day on which section 30 of the Pensions Act 2014 comes into force (but see subsection (1A)),

(b) the person has not married or formed a civil partnership after the death but before that day, and

(c) the person is under pensionable age on that day.

(1A) This section does not apply in cases where a woman's husband has died before 9 April 2001.

(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 in respect of a child or qualifying young person falling within subsection (3) below;

(b) …

(c) …

(3) A child or qualifying young person falls within this subsection if the child or qualifying young person is either—

(a) a son or daughter of the surviving spouse or civil partner and the deceased spouse or civil partner; or

(b) a child or qualifying young person in respect of whom the deceased spouse or civil partner was immediately before his or her death entitled to child benefit; or

(c) if the surviving spouse or civil partner and the deceased spouse or civil partner were residing together immediately before his or her death, a child or qualifying young person in respect of whom the surviving spouse or civil partner was then entitled to child benefit.

(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.

21. Although the scope of this appeal is restricted to the law as it stood before 6 April 2017, and I therefore heard no argument on the position under the current primary legislation, I simply note that entitlement to the new bereavement support payment is restricted to where a person's "spouse or civil partner dies" (Pensions Act 2014, section 30(1)(a)). There is no reason why this phrase should be read any differently to the same expression as used in sections 36(1) and 39A(1)(a) of the SSCBA 1992, as those provisions are in issue in the present appeal, and every reason why it should be read in the same way.

22. Before turning to consider the other relevant statutory provisions, this is a convenient juncture at which to summarise the Supreme Court's decision in *Re McLaughlin*.

The decision of the Supreme Court in *Re McLaughlin*

23. Ms McLaughlin had never married her partner but had lived with him as husband and wife for 23 years. Her partner died in January 2014, leaving her with their four children aged 19, 17, 13 and 11. She was refused bereavement benefit and WPA on the grounds that sections 36 and 39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 – to all intents and purposes identical to sections 36 and 39A of the SSCBA 1992 in Great Britain – only provide for entitlement for a spouse or civil partner, and not for a long-term unmarried cohabitant.

24. Treacy J, sitting in the High Court in Northern Ireland ([2016] NIQB 11), ruled that Ms McLaughlin's claim for bereavement benefit must fail. However, Treacy J also held that (i) WPA was paid to diminish the financial hardship on families consequent upon the death of one of the parents; (ii) it was not justifiable to discriminate between cohabitants and spouses or civil partners in the context of WPA; and (iii) therefore section 39A of the Northern Ireland legislation was incompatible with article 14 of the ECHR. Treacy J's judgment was overturned by the Court of Appeal of Northern Ireland ([2016] NICA 53), but that decision in turn was

reversed by the Supreme Court in a judgment handed down on 30 August 2018 (*Re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250). The Supreme Court (Lord Hodge dissenting) held that the refusal of WPA to a woman who was not married to the deceased father of their children was incompatible with article 14 of the ECHR. The Supreme Court accordingly made a declaration of incompatibility under section 4 of the Human Rights Act 1998 in respect of section 39A of the Northern Ireland legislation.

25. In delivering the leading judgment, Baroness Hale of Richmond addressed the four central questions (summarised in these terms at paragraph 15):

> "(1) Do the circumstances 'fall within the ambit' of one or more of the Convention rights?
> (2) Has there been a difference in treatment between two persons who are in an analogous situation?
> (3) Is that difference of treatment on the ground of one of the characteristics listed or 'other status'?
> (4) Is there an objective justification for that difference in treatment?"

26. For present purposes it is sufficient to note that the answers of the majority of the Supreme Court to those questions in *Re McLaughlin* were, in short: (1) Yes; (2) Yes; (3) Yes; and (4) No.

Other relevant statutory provisions

Introduction

27. The social security primary legislation governing bereavement benefits has been set out above. This appeal also requires consideration of two other sources of domestic statutory provisions. One is the primary legislation governing the validity of marriages under the law of England and Wales. The other is the secondary social security legislation that deals specifically with the position of polygamous marriages.

Primary legislation on the validity of marriages under the law of England and Wales

28. This is not the place for a treatise on the circumstances under which the matrimonial law of England and Wales[2] recognises the validity of a marriage. Suffice to say that section 11 of the Matrimonial Causes Act ('MCA') 1973 sets out the only grounds on which a marriage is void:

> **Grounds on which a marriage is void**
> **11.** A marriage celebrated after 31st July 1971, other than a marriage to which section 12A applies, shall be void on the following grounds only, that is to say—
> (a) that it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986 (that is to say where—
> (i) the parties are within the prohibited degrees of relationship;
> (ii) either party is under the age of sixteen; or
> (iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage);
> (b) that at the time of the marriage either party was already lawfully married or a civil partner;
> (c) [*repealed*]

[2] I use the geographical and jurisdictional expression advisedly, in recognition that family law (and especially the law of marriage and nullity) in Scotland is different in several important respects.

> (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.
>
> For the purposes of paragraph (d) of this subsection a marriage is not polygamous if at its inception neither party has any spouse additional to the other.

29. The final deeming provision relating to paragraph (d), as originally enacted, read as follows: "For the purposes of paragraph (d) of this subsection a marriage *may be polygamous although* at its inception neither party has any spouse additional to the other" but was amended by paragraph 2(2) of Schedule 1 to the Private International Law (Miscellaneous Provisions) Act 1995. The effect of that amendment would appear to be to clarify the position (and confirm beyond any doubt the validity of the marriage) of e.g. an English-domiciled bachelor who travels to Pakistan to contract an Islamic marriage with an unmarried woman.

30. That deeming provision aside, the proper interpretation of section 11(d) has at times been undeniably problematic (see e.g. *Hussein v Hussein* [1983] Fam 26[3]). However, it is tolerably clear that some polygamous marriages will survive section 11(d):

> "The implicit corollary of section 11(d) of the 1973 Act is that where *neither* party is domiciled in the UK at the time of the relevant polygamous marriage, valid under the law of the place of celebration, then that marriage – assuming no other incapacity – *will* be recognised as valid in English law."[4]

Secondary social security legislation dealing with polygamous marriages

31. Section 162 of the Social Security Act 1975 (which has now been superseded in rather different terms by section 121 of the SSCBA 1992) provided for an enabling power in the following terms:

> **Treatment of certain marriages**
> **162.–** Regulations may provide—
> (a) for a voidable marriage which has been annulled, whether before or after the date when the regulations come into force, to be treated for the purposes of such provisions of, or of any regulations under, this Act, subject to such exceptions or conditions as may be prescribed, as if it had been a valid marriage which was terminated by divorce at the date of annulment;
> (b) as to the circumstances in which, for the purposes of this Act—
> (i) a marriage celebrated under a law which permits polygamy, or
> (ii) any marriage during the subsistence of which a party to it is at any time married to more than one person,
> is to be treated as having, or not having, the consequences of a marriage celebrated under a law which does not permit polygamy;
> and regulations made for the purposes of subsection (b) above may make different provision in relation to different purposes and circumstances.

[3] See A. Briggs, "Polygamous Marriages and English Domiciliaries" (1983) 32 *International and Comparative Law Quarterly* 737-741.

[4] *R v Bala* [2016] EWCA Crim 560; [2017] QB 430 at paragraph 67. And see also s.5 of the Private International Law (Miscellaneous Provisions) Act 1995.

32. In the exercise of the power under section 162(b), the then Secretary of State for Social Services made the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975 (SI 1975/561; "the 1975 Regulations"), a short statutory instrument containing just three provisions. Regulation 1 deals with citation, commencement and interpretation, regulation 2 with the "General rule as to the consequences of a polygamous marriage for the purpose of the Social Security Act and the Family Allowances Act" and regulation 3, which is not relevant here, with special rules for retirement pension for women. For present purposes the key provisions are the definitions in regulation 1(2) and the "general rule" in regulation 2. According to regulation 1(2):

> "(2) In these Regulations, unless the context otherwise requires–
> …
>
> "polygamous marriage" means a marriage celebrated under a law which, as it applies to the particular ceremony and to the parties thereto, permits polygamy;
>
> "monogamous marriage" means a marriage celebrated under a law which does not permit polygamy, and "in fact monogamous" is to be construed in accordance with regulation 2(2) below;

33. Regulation 2 then provides as follows:

> **General rule as to the consequences of a polygamous marriage for the purpose of the Social Security Act and the Family Allowances Act**
> **2.** (1) Subject to the following provisions of these regulations, a polygamous marriage shall, for the purpose of the Social Security Act and the Family Allowances Act and any enactment construed as one with those Acts, be treated as having the same consequences as a monogamous marriage for any day, but only for any day, throughout which the polygamous marriage is in fact monogamous.
> (2) In this and the next following regulation—
> (a) a polygamous marriage is referred to as being in fact monogamous when neither party to it has any spouse additional to the other; and
> (b) the day on which a polygamous marriage is contracted, or on which it terminates for any reason, shall be treated as a day throughout which that marriage was in fact monogamous if at all times on that day after it was contracted, or as the case may be, before it terminated, it was in fact monogamous.

Untangling the legal consequences of the factual background

34. Given the underlying facts of this appeal (see paragraph 6 above), conventional wisdom would suggest the following analysis.

35. *The 1976 marriage in Pakistan to Ms B*: this would appear to have been a valid marriage under the law of Pakistan and hence also recognised by the law of England and Wales as a valid marriage. At an earlier stage in the proceedings, the Appellant's nephew had raised a question mark over the validity of this marriage, given the parties were both under age at the time. However, as I noted in earlier observations on the appeal, the Child Marriage Restraint Act 1929 of Pakistan sets out a series of sanctions to discourage child marriages, but does not appear to say anything about the legal validity of such marriages. Moreover, as the standard work (in English at

least) notes, "such marriages have consistently been recognised as legally valid" (D Pearl and W Menski, *Muslim Family Law* (1998), p.155; the authors cite the decision of the Supreme Court of Pakistan in *Bakhshi v Bashir Ahmed* P.L.D. 1970 S.C. 323).[5] The issue of the validity of the first marriage has not been further pursued in this appeal.

36. *The 2001 talaq in the United Kingdom*: a marriage cannot be dissolved in proceedings in this country under the law of England and Wales unless those proceedings are in a court of law (Domicile and Matrimonial Proceedings Act 1973, section 16). Mr A (and indeed Ms B) may well have assumed that as he had married Ms B in an Islamic ceremony under the law of Pakistan then it followed that he could divorce her by *talaq* without resort to the courts of his adopted home country. If so, he was mistaken. So, the 2001 *talaq* was ineffective and the couple remained married in the eyes of the law of England and Wales, although they had in fact separated.

37. *The 2008 marriage in Pakistan to the Appellant*: it is accepted that this marriage was valid according to the law of Pakistan and Islamic law. The parties were recognised as husband and wife by their families and in their community. However, Ms Rooney concedes that as Mr A was by this date domiciled in the UK, the 2008 marriage was void for the purposes of the law of England and Wales (see section 11(d) of the MCA 1973).

38. *The 2010 divorce from Ms B in the United Kingdom*: the decree absolute regularised Mr A's separation from Ms B. The divorce added the official imprimatur of the Birmingham County Court to the earlier Islamic *talaq*. However, that English divorce was only effective from the date of the decree absolute. It may well have been enough to regularise the Appellant's status for immigration purposes, so that she was able to join Mr A in the UK. However, it did not have the effect of retrospectively validating their 2008 marriage in the eyes of domestic law here. Ms Rooney expressly acknowledged that there was insufficient material to run a "legitimate expectation" argument.

39. I should add there is no suggestion that Mr A in any way sought to avoid the proper legal processes in terms of his matrimonial affairs. He appears to have sought advice at various stages but unfortunately appears not to have been given complete or completely accurate advice. Given the legal complications and technicalities involved in such matters, this may not be surprising.

40. *So where did all this leave the position of the Appellant?* According to the Respondent, the short answer to this appeal was that the Appellant was not Mr A's spouse at the time of his death. Rather, she was his unmarried partner, because their polygamous marriage was void and so of no effect under our domestic law. The essence of the Secretary of State's submission is summed up in paragraph 10250 of the *Decision Makers Guide*, published by the Department for Work and Pensions. Chapter 10 of this guidance deals with evidence of age, marriage and death, and paragraph 10250 states that "A void marriage cannot be treated as valid under any circumstances. For benefit purposes it must be regarded as never having existed." The guidance gives *R(G)3/59*, a decision of the National Insurance Commissioner (a forerunner of the Upper Tribunal), as authority for that proposition. I recognise Ms

[5] See to similar effect Mudasra Sabreen, 'Sawāra Marriages and Related Legal Issues' *Islamabad Law Review* (Vol. 1, no.1) at p.51: "the Child Marriage Restraint Act does not declare such marriage void so a child marriage itself is valid".

Rooney's point that the *Decision Makers Guide* is in principle no more than official guidance, so it is important to identify the principle for which *R(G)3/59* stands.

41. In *R(G)3/59* the claimant was the innocent victim of a bigamous marriage (such a marriage is void under what is now section 11(b) of the MCA 1973). She subsequently claimed a child's special allowance on the death of her partner. Regulations made provision for a voidable marriage which had been annulled to be treated as a valid marriage for the purposes of such a claim. The National Insurance Commissioner ruled that her claim failed as "the claimant's so called marriage was not a voidable marriage which was annulled, but a void marriage from the beginning, although she was unaware that it was. Accordingly there was no marriage" (at paragraph 5). That analysis is entirely consistent with traditional legal doctrine in the context of nullity of marriage – in sum, void marriages are void from the start and never existed, whereas voidable marriage are valid until annulled. *R(G)3/59*, of course, was about a bigamous marriage (unwittingly, from the claimant's perspective) but the same reasoning applies in principle to a marriage which is void under section 11(d) as under section 11(b) – or, for that matter, section 11(a).

42. Other than a passing reference to *R(G)3/59*, the jurisprudence of the former National Insurance Commissioners and Social Security Commissioners and now the Upper Tribunal (Administrative Appeals Chamber) did not feature prominently in the submissions of counsel. This may well be because there was no real dispute as to the existing line of authority in the case law. So, for example, Ms Leventhal referred me to *ES v Secretary of State for Work and Pensions* [2010] UKUT 200 (AAC), in which Upper Tribunal Judge Levenson held that "spouse" in section 36 of the SSCBA 1992 meant "a person married in the conventional sense to the other spouse following a proper legally recognised ceremony" (at paragraph 16), so excluding a long-term unmarried partner. In holding as such, Judge Levenson in effect followed the reported Social Security Commissioner's decision *R(G) 1/04*, where it was held that "widow" did not include a surviving cohabitant. Such decisions must now be read in the light of *Re McLaughlin*, insofar as that case is relevant.

43. I was not taken by counsel to any of the jurisprudence in this jurisdiction (or its predecessors) on the validity of polygamous marriages entered into abroad. Again, this may well be because the line of authority is undisputed. *Secretary of State for Work and Pensions v MN (BB)* [2018] UKUT 68 (AAC) may be a case in point. This was a decision of mine which I must confess I had entirely forgotten about until I came to writing up this judgment.[6] In that case the claimant, Mrs N, as here, was Mr S's second wife. Mr S married his first wife, Mrs B, in Bangladesh in 1959. Mr S came to the UK in 1963 and in 1983 returned to Bangladesh to marry the claimant. Mrs B (the first wife) died in 1997 and in 2003 Mrs N arrived in the UK to live with Mr S. He died in April 2016 and Mrs N applied for bereavement benefit. Her claim was refused on the ground that her marriage to Mr S was not a valid marriage under domestic law. A First-tier Tribunal allowed Mrs N's appeal finding that, at the time of Mr S's death, he only had one wife and therefore he and Mrs N were not in a polygamous marriage. The Secretary of State then appealed to the Upper Tribunal. The claimant was unrepresented and no human rights arguments were ventilated in that appeal.

44. Allowing the Secretary of State's appeal in that case, I referred to section 11(d) of the MCA 1973 and observed as follows:

[6] I have not asked for further submissions on this case given it did not address any human rights arguments.

> "16. It is accepted that Mr S's second marriage in 1983 was valid under Islamic law and the law of Bangladesh, which permits polygamy. However, by virtue of section 11(d) of the 1973 Act, it follows that if at the time of his second marriage Mr S was domiciled in the United Kingdom, then under the law of England and Wales he had no capacity to marry Mrs N. So, while valid by local law, the marriage would be void under English (and Welsh) law as 'at its inception' Mr S did have 'any spouse additional to the other' (i.e. Mrs B, who was still alive and had not been divorced)."

45. That observation is equally applicable to the circumstances of the present case (the place of marriage being Pakistan rather than Bangladesh being immaterial for these purposes).

46. I also referred to the 1975 Regulations and ruled as follows (the references in bold in the extract from Social Security Commissioner's decision CG/2611/2003 are as in the original):

> "19. Thus regulation 2(1) provides that "a polygamous marriage shall … be treated as having the same consequences as a monogamous marriage for any day, but only for any day, throughout which the polygamous marriage is in fact monogamous". However, this does not have the effect of converting a void marriage into a valid one simply by virtue of the parties being in practice monogamously married immediately prior to one party's death. Instead, it means that a *valid* polygamous marriage can be treated as "a monogamous marriage for any day … throughout which the polygamous marriage is in fact monogamous". As Mr Commissioner Howell put it in unreported decision CG/2611/2003 at paragraph 6:
>
> > "A person seeking to claim widow's benefit under the **Social Security Contributions and Benefits Act 1992** has to be *either* the surviving member of a monogamous marriage recognised as valid under United Kingdom law *or* the surviving member of a valid marriage under a law which permits polygamy but in fact the only spouse of the deceased at the date of his death: section 121(1)(b), and regulation 2 of the **Social Security and Family Allowances (Polygamous Marriages) Regulations** 1975 SI No 561."
>
> 20. The key expression in this passage for present purposes is "*a valid marriage*". If Mr S had been domiciled in Bangladesh in 1983 he would have had capacity to enter into a valid polygamous marriage. If the sequence of events had then continued as before, Mrs N would be able to claim bereavement benefit on his death as she would be, in the words of Mr Commissioner Howell, "the surviving member of a valid marriage under a law which permits polygamy but in fact the only spouse of the deceased at the date of his death". If, however, Mr S had been domiciled in the United Kingdom in 1983, then he would not have had capacity to enter into a polygamous marriage abroad in the first place and, by the law of England and Wales the second marriage in Bangladesh was void from the outset and could not be rescued by regulation 2. In effect it never existed as a valid marriage for the purposes of social security law (see R(G) 3/59)."

The Appellant's human rights challenge to the orthodoxy

47. By the 'orthodoxy' I refer to the (accepted and agreed) effect of section 11(d) of the MCA 1973, namely that a polygamous marriage entered into abroad will be void

under the law of England and Wales if either party was domiciled here at the time of the marriage. At this stage it is helpful to summarise the bare bones of the parties' respective submissions (and putting the issue of potential remedies to one side for the present).

Bereavement payment and the human rights challenge

48. Ms Rooney submitted that the Department's decision to refuse the Appellant's claim for bereavement payment fell within the ambit of Article 8 and A1P1 of the ECHR, read with Article 14. She further argued that the Appellant, as the widow of a religious marriage, is analogous to the position of the widow of a legal marriage, rather than being comparable to a cohabitant. Furthermore, it was said, the difference in treatment was not objectively justified and/or proportionate in circumstances where the Appellant was the only surviving wife and the UK benefits system does recognise polygamous marriages for certain purposes.

49. Ms Leventhal's principal submission in response was that the Appellant was seeking to rely on a false analogy. She contended that the characterisation of the Appellant's marriage as a religious marriage was to miss the point – it was a marriage that was void from the outset because of section 11(d) of the MCA 1973. There was an obvious and clear difference between (a) a marriage that was lawful under the law of England and Wales and (b) a marriage that was void under that same law. Furthermore, and in any event, Ms Leventhal argued that the bright line distinction between lawful and void marriages was such that any differential treatment was both objectively justified and proportionate.

Widowed parent's allowance and the human rights challenge

50. Ms Rooney's submission in this regard was straightforward. Irrespective of whether the Appellant's situation was seen to be analogous to that of a widow of a legal marriage or rather to that of a surviving cohabitant, the Appellant's case was on all fours with *Re McLaughlin*. Accordingly, the Department's denial of WPA was contrary to Article 14 of the ECHR, read in conjunction with A1P1, and/or in breach of the Appellant's right to respect for her family life, contrary to Article 8.

51. Ms Leventhal acknowledged that as a matter of principle the logic of *Re McLaughlin* applied in equal measure to the case of the Appellant, who was on any basis a surviving cohabitant with a child. It followed that the religious dimension to the appeal was immaterial and no issue as to discrimination arose. Instead, the dispute between the parties revolved around what remedy, if any, was appropriate in these circumstances.

52. I now turn to explore each of those challenges in more detail.

The question of entitlement to bereavement payment

Introduction

53. The Secretary of State's starting point was simple. Section 36 of the SASCBA 1992 provides that only a surviving "spouse or civil partner" can qualify for a bereavement payment. There was no suggestion that the Appellant was a civil partner. Nor was she a "spouse", Ms Leventhal submitted, as her marriage was not recognised under the law of England and Wales; it was void *ab initio* (from the start) – see section 11(d) of the MCA 1973. On that basis the Appellant was in the same position as a surviving unmarried partner, and *Re McLaughlin* was authority for the proposition that the exclusion of surviving cohabitants from entitlement to the bereavement payment did not represent a breach of their Convention rights.

54. On one level *Re McLaughlin* would certainly appear to provide no direct assistance for the Appellant's claim to be entitled to bereavement payment. In the High Court of Northern Ireland, Treacy J held that it was not unlawful under Article 14 of the ECHR to treat married and unmarried surviving partners differently, for the purpose of promoting marriage, where the benefit was directed towards the surviving partner. Treacy J held that the position of a widowed spouse and a cohabitant were not analogous, explaining the lack of comparability in the following terms:

> "66. Through marriage (or civil partnership) a couple regulates their relationship with each other and with the state through their public contract. The couple puts the state 'on notice' of their relationship. A cohabiting couple make no such public contract. This in itself is usually sufficient to make the two relationships sufficiently different in a material particular to lawfully treat the relationships differently in certain circumstances. By the act of marriage the couple 'opt in' to this different treatment – the treatment arises not by virtue of the quality of the relationship or the length of the relationship, but because the couple have made the contract and made the state aware of their changed circumstances."

55. Baroness Hale endorsed that analysis in the Supreme Court:

> "26. It is always necessary to look at the question of comparability in the context of the measure in question and its purpose, in order to ask whether there is such an obvious difference between the two persons that they are not in an analogous situation. The factors linking the claim to article 8 are also relevant to this question. It was for this reason that Treacy J was able to distinguish between Ms McLaughlin's claim for the bereavement payment and her claim for widowed parent's allowance. In the case of the former, he held that the lack of a public contract between Ms McLaughlin and Mr Adams meant that her situation was not comparable with that of a widow and her claim must fail (paras 66, 67). That decision has not been appealed. In the case of the latter, he held that the relevant 'facet of the relationship' was not their public commitment but the co-raising of children. For that purpose marriage and cohabitation were analogous (para 68).
>
> 27. In my view, that analysis is correct…".

56. I also recognise that in the judicial review case of *Rehman* (see paragraph 5 above) Cockerill J granted permission in respect of the Upper Tribunal's ruling only as it related to WPA. Permission was refused on the bereavement payment point, as it was "not arguable to the requisite standard. It gains no support from *Re McLaughlin* and appears to be determined by other authority."

57. So, the omens from *Re McLaughlin* may perhaps not be promising so far as the Appellant is concerned. However, it is important to address the four questions posed in any Article 14 challenge sequentially, while at the same time recognising they are not to be "rigidly compartmentalised" (Baroness Hale at paragraph 15).

Do the circumstances 'fall within the ambit' of one or more of the Convention rights?

58. This first question need not delay the analysis unduly.

59. Ms Rooney submits that the refusal to award a bereavement payment was contrary to Article 14 of the ECHR, read together with A1P1 and/or Article 8.

60. The Secretary of State accepts that bereavement payment falls within the ambit of A1P1 for the purposes of the Appellant's claim under Article 14 of the ECHR.

However, the Respondent makes no admission as to whether it also falls within the ambit of ECHR Article 8.

61. I agree with Ms Leventhal that in the event Article 8 adds nothing to the overall analysis. I also recognise that although the Supreme Court held that WPA fell within the ambit of Article 8 (see Baroness Hale at paragraph 23), the question of bereavement benefit was not before the Court. It is sufficient for me to proceed on the basis that the circumstances of the claimed breach of Article 14 fall within the ambit of A1P1.

Is there a difference in treatment between two persons in an analogous situation?
62. The parties part company on the second question. In summary, Ms Rooney argues that the Appellant, as the surviving partner of a religious marriage, is not comparable to a 'mere' or 'ordinary' cohabitant; rather, she is in an analogous position to a surviving spouse. Ms Leventhal, on the other hand, submitted there is no true analogue here as the comparison is between the widow of a lawful marriage and, in contradistinction, the survivor of a marriage that is void because it is polygamous.

63. Extracting a clear principle from the ECHR jurisprudence (see e.g. *Van der Mussele v Belgium* (1983) 6 EHRR 163) to assist in identifying whether a claimant's situation is relevantly similar to those of her comparators is not straightforward. On the domestic front, Ms Leventhal referred me to Lord Nicholls's short concurring judgment in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 (at paragraph 3):

> "the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometime the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

64. *Carson*, of course, was a challenge to the UK Government's policy of not up-rating the state retirement pension for pensioners living abroad (unless they happened to live in a country with which a reciprocal agreement was in place). The majority of the House of Lords agreed with Lord Hoffmann that "the position of a non-resident is materially and relevantly different from that of a UK resident (at paragraph 25). Lord Hoffmann rejected the contention that because Mrs Carson (living in South Africa) had paid the same national insurance contributions in the UK she was in an analogous situation to that of a UK resident (paragraph 20). Rather, the "interlocking nature" of the social security and tax systems meant that it was "impossible to extract one element for special treatment" (paragraph 22). Commenting on the Strasbourg court's "analogous situation" test, Lord Hoffmann observed that "whether cases are sufficiently different is partly a matter of values and partly a question of rationality" (paragraph 15). As Lord Walker of Gestingthorpe put it, "this assessment calls for a process of judicial evaluation which must be sensitive to the factual context. Some analogies are close, others are more distant" (at paragraph 68). Moreover, "it is sometimes a matter of impression which does not profit from elaborate analysis" (paragraph 79). The approach taken by the House of Lords was endorsed by the majority of the Grand Chamber in the subsequent Strasbourg challenge (*Carson v United Kingdom*, Application no.42184/05; (2010) 51 EHRR 13)

65. It is also instructive to consider the judgment of the European Court of Human Rights in *Shackell v United Kingdom* (Application no.45851/99; [2000] ECHR 784), an earlier challenge to the exclusion of surviving cohabitants from entitlement to widow's benefits. The Strasbourg court ruled as follows:

> "The applicant in the present case seeks to compare herself to a widow, in other words a woman whose husband, as opposed to partner, has died. The Court recalls that the European Commission of Human Rights held, in a case concerning unmarried cohabitees who sought to compare themselves with a married couple that
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> > "these are not analogous situations. Though in some fields, the *de facto* relationship of cohabitees is now recognised, there still exist differences between married and unmarried couples, in particular, differences in legal status and legal effects. Marriage continues to be characterised by a corpus of rights and obligations which differentiate it markedly from the situation of a man and woman who cohabit" (*Lindsay v. the United Kingdom*, Comm. Dec. 1.11.86, D.R. 49, p. 181).
>
> The Court notes that that decision of the Commission dates from 1986, that is, over 14 years ago. The Court accepts that there may well now be an increased social acceptance of stable personal relationships outside the traditional notion of marriage. However, marriage remains an institution which is widely accepted as conferring a particular status on those who enter it. The situation of the applicant is therefore not comparable to that of a widow."

66. On the face of it that passage would seem to support the Respondent's case on this aspect of the appeal. However, Ms Leventhal did not take me to that passage, or indeed to that ruling, and understandably so given that the majority in *Re McLaughlin* did not regard *Shackell* as determinative, the case being either distinguished (see Baroness Hale at paragraph 28) or explicitly not followed (see Lord Mance at paragraph 49). I recognise that *Shackell* was followed relatively recently by the Grand Chamber in *Burden and Burden v United Kingdom* (Application no.13378/05); (2008) 47 EHRR 38, but that was an unusual case in which two unmarried sisters who lived together were held not to be in an analogous position to spouses or civil partners.[7]

67. So, is the Appellant in an analogous position to a 'lawful' widow? Ms Leventhal's submission is that the Appellant is not, for the simple reason that she is the survivor of a void marriage and not the widow of a lawful marriage. I do not consider that such a binary approach is consistent with principle, given Lord Walker's observation in *Carson* that "some analogies are close, others are more distant". In my view there is a spectrum of potentially analogous situations. At one end of the spectrum is the surviving spouse of a lawful marriage. At the other end of the spectrum there is, for example, the surviving partner of a short-term cohabiting relationship where the parties had made a conscious and deliberate decision not to get married or enter into a civil partnership. In between, there is a positive kaleidoscope of other types of quasi-matrimonial relationships. These might include, again by way of examples, the

[7] And I note *Burden* is described as "a highly unsatisfactory decision" (p.1691) in *The Law of Human Rights* (OUP, 2nd edition, p.1691) by R. Clayton QC and H. Tomlinson QC, where the authors observe that the Chamber had been prepared to assume that the applicants' position was analogous to that of a married couple – see (2007) 44 EHRR 51 at paragraph 58.

surviving partner of (i) a voidable marriage (ii) a void marriage; (iii) a non-marriage (see e.g. *Hudson v Leigh* [2009] EWHC 1306 (Fam), permission to appeal refused at [2009] EWCA Civ 1442); (iv) a long-term cohabiting relationship. The question then is where one draws the line on that spectrum, and whether there is enough of a relevant difference between the surviving spouse and the Appellant to justify different treatment.

68. I do not consider it is a good enough answer to say the Appellant had never been married in the eyes of the law of England and Wales. The couple's marriage was valid under the law of Pakistan and valid more generally under Islamic law. As such, the parties regarded themselves as bound by the "corpus of rights and obligations which differentiate it markedly from the situation of a man and woman who cohabit" (to adopt the language of *Lindsay v United Kingdom*, as cited in *Shackell*). Indeed, even today, had the parties been domiciled in Pakistan at the time of their marriage, there would have been no dispute over its validity. In that context it is relevant that the test of domicile can be notoriously difficult to apply in practice (see e.g. Commissioner Howell QC's observations in *CG/2611/2003* at paragraph 10), such that an individual may well not know for sure at the time of such an overseas marriage whether it will subsequently be treated as valid in England and Wales.

69. As the case law demonstrates, there is also an impressionistic element to this assessment. My overall conclusion, bearing in mind all the factors discussed above, is that the Appellant, as the sole surviving widow of an overseas religious marriage, is in an analogous position to that of a 'lawful' widow under a marriage recognised by the law of England and Wales.

Is that differential treatment based on one of the characteristics listed or 'other status'?

70. Having established that the Appellant is in an analogous situation to that of a 'lawful' widow, the third stage is to ask whether the difference of treatment is based on one of the characteristics listed in Article 14 (see paragraph 17 above) or "other status". This point, as with the first, can be taken relatively shortly. Ms Leventhal's submission – which I do not accept for the reasons outlined above – is that the Appellant is not in an analogous position to the widow of a valid marriage. However, she also accepted that (if the matter proceeded that far) the Appellant had an "other status" for the purposes of Article 14. That concession was rightly made, given the Grand Chamber of the Strasbourg Court's decision in *Yiğit v Turkey* (Application no.3976/05; (2011) 53 EHRR 25.

71. The applicant in *Yiğit* married Mr K in Turkey in a religious ceremony in 1976 and had six children with him. The Turkish Civil Code, reflecting the principle of secularism at the heart of the Republic, provides that the only recognised type of marriage is one before the civil status registrar. However, no official civil ceremony ever took place. Mr K died in 2002 and the applicant's claim for a survivor's pension was rejected by the Turkish authorities. The applicant challenged that refusal, arguing that it was contrary to Article 14 of the ECHR, being based as it was on "her status as a woman married in accordance with religious rites" (paragraph 57). The Court accepted that the differential treatment "with regard to the benefits in question was based solely on the non-civil nature of her marriage to her partner" (paragraph 80). Moreover, the Court considered that "the absence of a marriage tie between two parents is one of the aspects of personal status which may be a source of discrimination prohibited by art.14" (paragraph 79). As Baroness Hale subsequently noted in *Re McLaughlin*, the Strasbourg Court, having found that being party to a religious marriage was a status within Article 14, went on directly to consider the issue of justification, "implying that the situations were relevantly similar" (at

paragraph 29). I return to *Yiğit* in the context of justification further below. For present purposes it is sufficient to observe that the applicant in *Yiğit* was a party to what English matrimonial lawyers would characterise as a 'non-marriage' – under the law of the place where it was celebrated it had no effect. Thus, the religious marriage that took place in Turkey was simply of no effect according to the Civil Code. In contrast, the Appellant's marriage in the present case was lawful and recognised where it was entered into (and doubtless in other jurisdictions where Islamic law forms the basis of matrimonial law), reinforcing the point made above that her situation was analogous to that of a 'lawful' widow.

Is there an objective justification for that difference in treatment?
72. Ms Leventhal's submission was that even if I were to find against her on the discrimination question, i.e. whether the Appellant was in an analogous situation to a 'lawful' widow (the 'ambit' and 'status' issues being conceded), the Respondent had nevertheless shown there was an objective justification for the differential treatment. She reminded me of the well-established overarching principle that courts and tribunals will respect the Secretary of State's judgement on matters of social policy in the welfare benefits context unless that judgement can be demonstrated to be "manifestly without reasonable foundation" (see e.g. *Humphreys v HMRC* [2012] UKSC 18; [2012] 1 WLR 1545 at paragraphs 19-20 *per* Baroness Hale). She also relied on the witness statement put in evidence by Ms Anila Naseem, the DWP official with responsibility for bereavement benefits policy. Putting together Ms Leventhal's submissions and Ms Naseem's evidence, the Secretary of State's justification arguments may be summarised as follows.

73. The first is what might be termed *the primacy of legal marriage justification*. It was legitimate for the State to promote and prioritise legal marriage, a public contract recognised by law and complying with the requirements of that law, as shown by Treacy J's finding in *Re McLaughlin* (approved *obiter* in the Supreme Court) that it was permissible to differentiate between marriage and cohabitation for the purposes of entitlement to a bereavement payment.

74. The second, *the polygamy public policy justification*, is to an extent the converse of the first justification. As Ms Leventhal put it, domestic law has set its face against the acceptability of polygamy for reasons of public policy. Section 11(d) of the MCA 1973 provides a clear rule – if you are domiciled in England and Wales, you cannot enter into a polygamous marriage abroad.

75. The third justification is a related argument, that hardy perennial from the Secretary of State when facing challenges to benefits rules, *the bright line justification*. Ms Leventhal submitted that section 11(d) of the MCA 1973 provided a clear bright line rule – polygamous marriages are recognised in England and Wales only if neither party is domiciled here, the marriage is entered into overseas and the parties subsequently settle in the UK. The adoption of a bright line rule is a legitimate way of achieving a workable rule and legal certainty. The fact that there may be hard cases which fall the 'wrong side' of a bright line rule does not invalidate the rule if on the whole it is beneficial (see *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250 per Lord Wilson at paragraph 27 and *per* Lord Mance at paragraph 51).

76. The fourth is *the Beveridge contributory principle justification*. A 'lawful' widow's ability to rely on the contributions record of her late husband was a founding principle of the social security system and especially the scheme of national insurance benefits (including, but not confined to, bereavement benefits).

77. The fifth is *the administrative workability justification*. Claimants necessarily apply for bereavement benefits at a difficult time and the system needs to be straightforward and non-intrusive to administer so as to minimise distress. Extending entitlement to bereavement payment and WPA to survivors of religious marriages that are not recognised under the law of England and Wales would be administratively difficult and costly.

78. Finally, there is *the Yiğit v Turkey justification*: Ms Leventhal submitted that the Secretary of State's submissions garnered support from the Strasbourg Court's decision in *Yiğit v Turkey*. Although the Court had found that the applicant was in an analogous situation and had the requisite status to complain under Article 14, it held that a difference in treatment in terms of entitlement to survivor's benefits as between those married under the civil law and those who were only religiously married was justified. States enjoyed a wide margin of appreciation and the relevant measure was held to be proportionate to the aims of protecting public order and the rights and freedoms of others. The rules governing the recognition of marriage under the Civil Code were clear, accessible and straightforward and did not place an excessive burden on the applicant.

79. I will address each of these potential justificatory grounds in turn.

80. In my assessment the Secretary of State's first justification, *the primacy of legal marriage justification*, whilst at first sight apparently compelling, on closer inspection is less so. Typically, this justification is primarily framed in public policy terms of the State favouring marriage over cohabitation, rather than the State favouring marriage as understood under the Marriage Act 1949 and the MCA 1973 as against marriage which is valid in a jurisdiction abroad but not recognised in the UK. Even then, while accepting that the distinction (at least as between marriage and 'ordinary' cohabitation) was regarded as permissible in the context of the bereavement payment, the courts have found this justification as wanting in the context of WPA. Furthermore, unlike 'ordinary' cohabitants, the Appellant and her late husband *did* enter into a "public contract" of mutual commitment – it is just that contract, while recognised in Pakistan and within their community, was not recognised by English law because of section 11(d). In the final resort, reliance on the primacy of legal marriage as recognised by the law of England and Wales is to invoke the qualifying criterion in dispute for entitlement to the bereavement payment as the justification for itself.

81. The Secretary of State's first justification shades into the second, namely *the polygamy public policy justification*. There are, it is said, strong public policy reasons why the British state regards polygamy as unacceptable. Although Ms Leventhal did not frame the objection in these terms, there are obvious objections to polygamy based on sexual equality.[8] However, as Ms Rooney points out, the supposed public policy principle is not absolute as our law recognises polygamous marriages in some circumstances and for some purposes. Furthermore, I suspect that most passengers on the upper deck of a Birmingham bus, whether or not they are of Bangladeshi or Pakistani heritage, would regard the Appellant as a 'lawful' (rather than a polygamous) widow. They would, I suggest, take account of the fact that Mr A had never lived with both wives at the same time, had divorced his first wife both by Islamic law and English law, and the Appellant was his sole surviving widow. I

[8] Islamic law, according to some schools of thought at least, permits a man to have up to four wives, whereas a woman can only ever have one husband. In practice the incidence of 'true' polygamy is minimal.

consider they would be rather taken aback to be advised that on a true understanding of the complexities of English matrimonial law the Appellant's marriage was void and of no effect in this country. Plainly this case is not a case of multiple wives, the scenario which understandably fully engages the public policy arguments against polygamy (see e.g. *Bibi v Chief Adjudication Officer* and *R(P) 2/06*).

82. The third justificatory argument is *the bright line justification*. Ms Leventhal submitted that section 11(d) represented a bright line rule in terms of public policy on welfare benefits. But there are bright lines and not so bright lines in the social security system. In my view section 11(d) draws a distinctly dim line. It is inherent in the notion of a bright line rule that the provision in question is clear and simple to apply in any given factual situation. Thus, in *Mathieson*, the bright line rule – that the Secretary of State was in the event unsuccessful in seeking to justify – was the regulation which suspended payments of disability living allowance (DLA) to disabled children who had been inpatients in a National Health Service hospital for more than 84 days. Such a statutory provision involved a sequence of stark bright lines: the claimant was either a child or he was not; he was either in receipt of DLA or not; he was either an NHS inpatient or not; and he had been in hospital for more than 84 days or not. Each of those was a readily discernible straightforward question of fact. Section 11(d), however, turns on the issue of domicile, which can be notoriously difficult to assess and is a mixed question of fact and law (see paragraph 68 above). The Respondent's argument that to treat the Appellant in the same way as a 'lawful' widow generates legal uncertainty is unconvincing, given that section 11(d) itself fails in practice to provide legal certainty. Indeed, the complexity of the law in this type of case is brought into sharp relief by the fact that the Department originally awarded the Appellant bereavement benefits before reversing its decision and issuing a disallowance. The brighter the bright line, the easier it may be for the Secretary of State to rely on it as justification. This so-called bright line is so hazy that it does not carry much weight in the overall assessment of justification.

83. Fourthly, I am not persuaded by *the Beveridge contributory principle justification*. The 1948 national insurance reforms were certainly built on individuals' contribution records, which could only be relied upon to found entitlement to benefit by the insured person himself or his widow. But the Beveridge scheme was a creature of its time. What was fit for British society in 1948 – when married women's employment was typically the exception rather than the rule and immigration from the New Commonwealth was minimal – is not necessarily fit for a more open and multi-cultural society seven decades later in 2016. In terms of both the wider principles and the sheer numbers involved, there have been significant expansions in the right to rely on a deceased partner's national insurance record in the contributory benefits system, driven by human rights considerations, i.e. to widowers and more recently to surviving civil partners. By comparison the extension of coverage to someone in the Appellant's position is marginal.

84. Fifthly, nor do I place much reliance on *the administrative workability justification*. As Ms Rooney noted, the Department already has a specialist Relationship Validity Unit (RVU) to which its decision-makers can refer cases for advice on the validity of marriages for social security purposes. Indeed, RVU advice was sought in the present appeal. Ms Naseem reports that there were only 22 appeals in relation to spousal status in 2018, citing this statistic in support of the Department's existing understanding of "spouse". There is the hint of an undeveloped 'floodgates' argument here. However, as someone who has sat in this jurisdiction, including at first instance, for over 25 years, I have only ever seen a steady trickle of appeals where such advice has been sought, typically involving potentially (or

actually) polygamous marriages entered into abroad. If the present Appellant's case were to be allowed, it is by no means clear that there would be anything more than a marginal increase in such difficult cases (indeed, as any claim such as the Appellant's would succeed, there might even be *fewer* such appeals). As Ms Rooney argued, the *administrative workability justification* has a much greater potential purchase in the context of 'ordinary' living together cohabitants, where there are no special features such as an unrecognised religious marriage, which may in part account for the Secretary of State's failure so far to chart a way forward in bereavement benefits policy in the light of the Supreme Court's judgment in *Re McLaughlin*.

85. Lastly, I am not persuaded by Ms Leventhal's parallel with *the Yiğit v Turkey justification*. Inevitably each such case will turn on its own facts and the wider social context. It was plain in *Yiğit* that the principle of secularism which underpinned the modern Turkish state was a vital, if not overriding, consideration in the Court's reasoning (see paragraphs 61 and 81-82). The principle of secularism in relation to matrimonial law in Turkey admitted of no exceptions. In contrast, the UK's disapproval of polygamy on public policy grounds lacks that absolutist nature. Thus the 1975 Regulations recognise some polygamous marriages for social security purposes and recognition has also been indirectly accorded by case law (as e.g. in the context of the liable relative rules, on which see *Iman Din v National Assistance Board* [1967] 2 Q.B. 213, discussed below). Nor do I consider that the rule enshrined in section 11(d) of the MCA 1973 can be regarded as clear, accessible and straightforward in the way that the Turkish Civil Code was found to be. The applicant in *Yiğit* knew what needed to be done to regularise her matrimonial status but no such steps were taken (see paragraphs 83-87). In the present case the Appellant had no such knowledge or forewarning.

86. In any justification case there must be a reasonable relationship of proportionality between the aim and the means pursued. The distinction that the law makes between a 'lawful' widow and someone in the Appellant's shoes is justified to the extent that it prevents more than one spouse claiming National Insurance benefits on the basis of the contributions paid by one and the same husband (see *Bibi v Chief Adjudication Officer* and *R(P) 2/06*). However, for the reasons set out above I do not consider that the distinction between the Appellant and a 'lawful' widow can be justified or is proportionate in circumstances where the Appellant is the only surviving spouse of Mr A and in circumstances where the law of England and Wales already recognises the validity of some polygamous marriages based on a criterion (domicile) which lacks a clear bright line and may only be established (or indeed disproved) after the event.

The question of entitlement to widowed parent's allowance

87. I can take this aspect of the appeal relatively shortly. Ms Rooney had both a primary submission and a secondary submission on the question of the Appellant's entitlement to WPA. The former submission was that the Appellant's position was analogous to that of a widow of a legal marriage, essentially for the same reasons as advanced in the context of access to the bereavement payment (see above). On that basis, it was argued, the Appellant was discriminated against because of the solely religious status of her marriage in circumstances where there was no objective justification for the differential treatment. The secondary submission was that, in any event, the Appellant's position was on all fours with the claimant in *Re McLaughlin*, and the Supreme Court had in effect confirmed that the exclusion of surviving

cohabitants from access to WPA involved unlawful discrimination.[9] As Baroness Hale explained, having referred to the reasoning of Treacy J in the Northern Ireland High Court:

> "27. In my view, that analysis is correct. Widowed parents' allowance is only paid because the survivor is responsible for the care of children who were at the date of death the responsibility of one or both of them. Its purpose must be to benefit the children. The situation of the children is thus an essential part of the comparison. And that situation is the same whether or not the couple were married to one another. It makes no difference to the children. But had the couple been married, their treatment would be very different: their household would have significantly more to live on while their carer is in work."

88. Ms Leventhal vigorously opposed the first of Ms Rooney's submissions (for the reasons also considered above) but quite rightly and inevitably accepted the second submission. Thus, Ms Leventhal conceded that the logic of *Re McLaughlin* applied to the Appellant, as she was a surviving cohabitant with the care of her child with her late husband (or, as Ms Leventhal would put it more strictly, with Mr A). On the basis of that concession, no question of discrimination on the ground of a 'religious marriage' (in contradistinction to a lawful marriage) arose. Although not germane to the present appeal, Ms Leventhal put down a marker to the effect that the Secretary of State did not accept that all religious marriages fell within the scope of the *Re McLaughlin* principle. This appears to be a live issue in the case of *Rehman*, which as noted (paragraph 5 above) is currently before the Administrative Court.

89. On the facts of the present case, I did not understand Ms Rooney to be arguing that her first submission put the Appellant in any better position as regards entitlement to WPA than her second submission. The parallel with *Re McLaughlin* as a surviving cohabitant was sufficient to get the Appellant home on entitlement. It followed that the real area of dispute in this aspect of the appeal was on what remedy was both available and appropriate.

Pausing there

90. In summary, therefore, I accept Ms Rooney's submission that the State's refusal to provide the Appellant with a bereavement payment is contrary to Article 14 of the Convention read in conjunction with A1P1. The bereavement payment is within the ambit of Article 14, the Appellant is in an analogous situation to a 'lawful' widow with the necessary status and the difference in treatment is not objectively justified or proportionate. The same is true as regard the refusal of WPA, but in any event the Appellant is the victim of unlawful discrimination on the same basis as the applicant in *Re McLaughlin*.

The question of remedy and bereavement payment

Introduction

91. In terms of the Appellant's claim for bereavement payment and the question of remedy, Ms Rooney makes two principal submissions in the alternative. The first, applying section 3 of the Human Rights Act 1998, is to read section 36 of the SSCBA 1992 compatibly with the Convention, so as to require payment of bereavement payment to the sole surviving spouse of a religious marriage. The second, also applying section 3 of the Human Rights Act 1998, is to read regulations 1 and 2 of

[9] The fact that Ms McLaughlin had four children and the Appellant just the one is plainly not material.

the 1975 Regulations such as to treat the Appellant's "polygamous marriage" as "in fact monogamous" for the purpose of section 36 of the SSCBA 1992.

Reading down section 36 of the Social Security Contributions and Benefits Act 1992

92. Section 3 of the Human Rights Act 1998 provides as follows:

> **Interpretation of legislation.**
> **3.**— (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
> (2) This section—
> (a) applies to primary legislation and subordinate legislation whenever enacted;
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

93. As Lord Nicholls of Birkenhead observed in *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557:

> 32. … the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.
>
> 33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

94. Even before grappling with the requirements of section 3, Ms Rooney contended that the pre-Human Rights Act case law justified an expansive interpretation of the word "spouse" in section 36 of the SSCBA 1992. She relied on *Iman Din v National Assistance Board* [1967] 2 QB 213 and *Bibi v Chief Adjudication Officer* [1998] 1 FLR 375.

95. In *Iman Din v National Assistance Board* the appellant, when domiciled in Pakistan, had married two wives. He later came to the UK with his second wife and their children but abandoned them. The National Assistance Board supported the appellant's second family and brought liable relative proceedings against the

appellant. The appellant argued that the wife of a polygamous marriage was not a "wife" within the relevant statutory definition and so he was not liable for maintenance. The Divisional Court held that the Board was entitled to bring liable relative proceedings. According to Salmon LJ, *Hyde v Hyde* (1866) LR 1 P&D 130 did not mean that polygamous marriages were not recognised for all purposes. It was simply authority for the proposition that parties to a polygamous marriage "cannot obtain matrimonial relief against each other in the courts of this country" (at 218G-219A). Ms Rooney relied, in particular, on the following passage (at 218F):

> "When a question arises of recognising a foreign marriage or of construing the word 'wife' in a statute, everything depends upon the purpose for which the marriage is to be recognised and upon the objects of the statute."

96. However, the rhetorical question posed by Salmon LJ in the same paragraph is instructive:

> "I ask myself first of all: is there any good reason why the appellant's wife and children should not be recognised as his wife and children for the purpose of the National Assistance Act, 1948? I can find no such reason, and every reason in common sense and justice why they should be so recognised."

97. *Iman Din v National Assistance Board* was, of course, a case about means-tested social security benefits and the State's statutory power to recover the costs of supporting recipients of such benefits from those liable relatives (typically husbands and fathers) with the legal responsibility to maintain them. Given that special context, I do not consider that it advances Ms Rooney's argument in this appeal about entitlement to a National Insurance benefit based on the contributions record of the Appellant's late husband.

98. In *Bibi v Chief Adjudication Officer* [1998] 1 FLR 375 the appellant was the first wife of a man who, while domiciled in Bangladesh, had married two wives, both of whom survived him with their respective children – the first wife living in England and the second wife in Bangladesh. The appellant's claim for widowed mother's allowance was refused on the basis that she was the widow of a valid marriage which was *actually* polygamous and was not 'saved' by the 1975 Regulations. Accordingly, a key issue in the case was the absence of any provision within the scheme of widow's benefits for such allowances to be divided between two or more polygamous beneficiaries. Dismissing the claimant's appeal. Ward LJ referred as follows (at p.380) to *Imam Din v National Assistance Board* (emphasis added):

> "However, the court in that case, being a Divisional Court with the judgment being given by Salmon LJ, did comment obiter on the social security Acts with which we are concerned. The court drew attention to decisions of commissioners under these Acts, for example, the decision in *R(G) 18/52* which the commissioners have held, and have held consistently, that the polygamous wife is not entitled to a widow's benefit. Salmon LJ said this at 221:
>
> > 'The ground for those decisions was that as the man paid only one lot of contributions, calculated on the basis of one wife at a time, the Acts applied only in cases of monogamous marriages. It would clearly be wrong for a man paying contributions on the basis indicated to reap benefits in respect of perhaps three or four current wives.'
>
> <u>The meaning must depend on the statute concerned.</u> I am entirely persuaded by the reasoning of Salmon LJ that upon its proper construction s 25 envisages that

> if a woman who is widowed is entitled to the allowance, she is entitled to the full allowance and that it is not contemplated that the allowance will be divided between more than one widow."

99. The reference to section 25 in that extract was to section 25 of the Social Security Act 1975, in effect the statutory predecessor to section 37 of the SSCBA 1992, as it provided for a "woman who has been widowed" to qualify for what was then widowed mother's allowance (now replaced by WPA under section 39A). Ms Rooney relied on the sentence I have underlined, but in my view this takes her no further than the ordinary canons of statutory interpretation. More telling, and in support of Ms Leventhal's submissions, is Ward LJ's observation (at p.379) that "Widowhood is therefore, in my judgment, dependent upon a marriage existing at the time of the husband's death. The issue is whether or not that has to be a valid marriage *recognised as a marriage in our law*" (emphasis added). His answer was that it did.

100. I also note that the Respondent's position on this question of statutory construction is supported by the more recent decision of the Court of Appeal (Criminal Division) in *R v Bala* [2016] EWCA Crim 560; [2017] QB 430.[10] The defendants, who were charged with immigration offences, had contracted a polygamous marriage in Nigeria that was valid under local law. The trial judge ruled the marriage was void under English law (see section 11(d) of the MCA 1973) as the husband had been domiciled here. The defence argued the couple could not be guilty of criminal conspiracy as they were "spouses" within the meaning of section 2(2)(a) of the Criminal Law Act 1977. Dismissing the appeals, the Court of Appeal held that for the purposes of section 2(2)(a) the reference to a "spouse" was to be taken "as a reference to a husband or wife (or, of course, civil partner) under a marriage, or civil partnership, recognised under English law" (at paragraph 55).

101. Summing up, the traditional maxims of statutory interpretation do not assist the Appellant. The clear preponderance of case law authority is to the effect that "spouse" in section 36 of the SSCBA 1992 means a spouse in a marriage recognised as such by English law. Ms Rooney acknowledged that the Supreme Court in *Re McLaughlin* had no option but to issue a declaration of incompatibility given that it was not possible to read down "spouse" to include "cohabitant", as to do so would do violence to the statutory language. However, her submission was that to read "spouse" as including "the surviving spouse of a religious and formerly polygamous marriage" was permissible as it would not wreak such damage. The difficulty with this argument is that it divorces consideration of the wording of section 36 of the SSCBA 1992 from section 11(d) of the MCA 1973, which is one of the ways in which the term "spouse" is defined by English law. In the absence of any other definition of "spouse" in the SSCBA 1992, one must fall back on the understanding supplied by matrimonial legislation.

Reading down regulations 1 and 2 of the 1975 Regulations

102. There is, however, an alternative approach. Ms Rooney invited me to read down the 1975 Regulations in such a way as to be Convention compliant. The relevant provisions are set out in paragraphs 32 and 33 above. The starting point is the definition of a "polygamous marriage" in regulation 1(2):

[10] This case was not cited in argument but simply reinforces the orthodox understanding of section 11(d).

> "polygamous marriage" means a marriage celebrated under a law which, as it applies to the particular ceremony and to the parties thereto, permits polygamy.

103. The "general rule", as set out in regulation 2(1), is that for the purposes of the SSCBA 1992 such a polygamous marriage "shall … be treated as having the same consequences as a monogamous marriage for any day, but only for any day, throughout which the polygamous marriage is in fact monogamous." We know from regulation 1(2) that ""in fact monogamous" is to be construed in accordance with regulation 2(2) below", which provides that:

> (2) In this and the next following regulation—
> (a) a polygamous marriage is referred to as being in fact monogamous when neither party to it has any spouse additional to the other; and
> (b) the day on which a polygamous marriage is contracted, or on which it terminates for any reason, shall be treated as a day throughout which that marriage was in fact monogamous if at all times on that day after it was contracted, or as the case may be, before it terminated, it was in fact monogamous.

104. These interlocking definitions can arguably be read in either of two ways. The conventional or orthodox reading is that the definition of a "polygamous marriage" in regulation 1(2) is only referring to a polygamous marriage which is recognised as being valid by the law of England and Wales. It excludes a polygamous marriage which is void under our domestic law owing to section 11(d) of the MCA 1973. So, it involves reading into the definition the words in italics:

> ""polygamous marriage" means a *valid* marriage *recognised according to the law of England and Wales and* celebrated under a law which, as it applies to the particular ceremony and to the parties thereto, permits polygamy;".

105. There is, however, a second possible reading. The definition refers to a "polygamous marriage" as meaning "a marriage celebrated under a law (etc)…"; in the present case, the Appellant's marriage to Mr A was indeed in its own terms a marriage celebrated "under a law which, as it applies to the particular ceremony and to the parties thereto, permits polygamy". There has been no suggestion that there were any irregularities in the form of the marriage ceremony conducted in Pakistan. The law of that jurisdiction, as it applied to both (a) the particular ceremony and (b) the parties, plainly permits polygamy. On that basis the Appellant's marriage to Mr A fell within the scope of the statutory definition of "polygamous marriage" in regulation 1(2) of the 1975 Regulations.

106. That then takes us to regulation 2(1) and the general rule. Such a polygamous marriage "shall … be treated as having the same consequences as a monogamous marriage for any day, but only for any day, throughout which the polygamous marriage is in fact monogamous." This provision does not in terms require that the polygamous marriage only achieves parity with a monogamous marriage if it was *actually* monogamous *throughout*, i.e. from the date it was contracted to the date (if relevant) that it ended. Rather, it is to have the same consequences "for any day, but only for any day" that it was in fact monogamous. The Appellant's marriage was necessarily monogamous at least from the date of Mr A's English divorce from Ms B in 2009.

107. The expression "in fact monogamous" is then defined by regulation 2(2). The requirement in regulation 2(2)(a) is not limited in point of time to the precise date on which the marriage was contracted. From the relevant date of Ms B's divorce in 2009

"neither party to it has any spouse additional to the other" and so was "in fact monogamous". However, the further requirement in regulation 2(2)(b) might be read as requiring monogamy throughout the marriage, i.e. from the date of the marriage to the date of termination. There is, however, an alternative reading. The regulation refers to being "in fact monogamous", which can be read in contradistinction to being "in law monogamous". As previously noted, Mr A and Ms B separated in 2001. When Mr A married the Appellant in 2008, he was in the eyes of the law of England and Wales still married to Ms B so the relationship with the Appellant could not be "in law monogamous". His marriage to the Appellant, however, was "in fact monogamous" as in fact he only ever lived with one spouse.

108. Ms Leventhal seeks to resist a reading down of regulations 1 and 2 of the 1975 Regulations on the basis that it is inconsistent with the definition of "spouse" as understood in the terms of section 11(d) of the MCA 1973. However, the meaning of "spouse" is not central to the interpretation and application of the 1975 Regulations. Rather, the focus of the exercise is the expression "polygamous marriage" and how that should be read in a Convention-compliant manner. I conclude, for the purposes of the Appellant's entitlement to a bereavement payment, that the 1975 Regulations can be read down under section 3 of the Human Rights Act 1998 so as to be Convention-compliant.

109. My decision is that the First-tier Tribunal erred in law in failing to read section 36 of the SSCBA 1992 in the Convention-compliant way adumbrated above. I therefore allow the Appellant's appeal and set aside the First-tier Tribunal's decision. There are no further facts to be found, so I can give the decision that the first instance tribunal should have done. That decision is as follows:

> *The Secretary of State's decision of 12 October 2016 is revised. The Appellant is entitled to a bereavement payment.*

The question of remedy and widowed parent's allowance

110. In terms of the Appellant's claim for WPA and the question of remedy, Ms Rooney puts her case in two ways. First, her preferred option is that I allow the appeal, set aside the FTT's decision and re-make it reading regulations 1 and 2 of the 1975 Regulations compatibly with the Convention, so as to treat the Appellant's "polygamous marriage" as "in fact monogamous" for the purpose of section 39A of the SSCBA 1992 in circumstances where she is the sole surviving wife of a religious, polygamous marriage. Second, and in the alternative, she accepts that I cannot make a declaration of incompatibility but invites me to make findings as to the discriminatory nature of the WPA provisions on an *obiter* basis (following the approach and guidance of Upper Tribunal Judge Markus QC in *PL v Secretary of State for Work and Pensions* [2016] UKUT 177 (AAC)).

111. Ms Leventhal resists both those proposed remedies. As to the former, the Secretary of State opposes a reading down of the 1975 Regulations for the same reasons as set out above in the context of bereavement payment – in short it is said the marriage is void and so the 1975 Regulations can provide no assistance. As to the latter, Ms Leventhal contends it is inappropriate for the Upper Tribunal to make any further findings given that (a) it has no jurisdiction to make a declaration of incompatibility; (b) such a declaration has already been made in relation to the identical parallel Northern Ireland legislation; (c) any such findings would be non-appealable and so unfair (see *Robertson v Secretary of State for Work and Pensions* [2015] CSIH 82) and (d) the Secretary of State has her response to the decision in *Re McLaughlin* "under active consideration" (Ms Leventhal's skeleton argument at §38). Ms Leventhal accordingly proposes that the appeal is dismissed.

112. For the same reasons as set out above in the context of the Appellant's entitlement to a bereavement payment, I also conclude, for the purposes of the Appellant's entitlement to WPA, that the 1975 Regulations can be read down under section 3 of the Human Rights Act 1998 so as to be Convention-compliant. It follows my decision on this aspect of the appeal is as follows:

> *The Secretary of State's decision of 12 October 2016 is revised. The Appellant is entitled to widowed parent's allowance.*

113. For completeness, not least if I am wrong about the previous point, I should also deal with counsels' submissions on the issue of a declaration of incompatibility. Technically there has been no declaration of incompatibility in Great Britain in relation to the discriminatory nature of the WPA provisions. The Supreme Court's declaration of incompatibility in *Re McLaughlin*, made under section 4(2) of the Human Rights Act 1998, was made in respect of section 39A of the parallel Northern Ireland legislation, not the equivalent SSCA 1992 provision. Understandably, given the two section 39As are effectively in identical terms, everyone regards the declaration as having an equal impact on section 39A of the SSCBA 1992. Be that as it may, the jurisdictional niceties are largely irrelevant as in any event the Upper Tribunal does not have the power to make a declaration of incompatibility (see the definition of "court" in section 4(5) of the 1998 Act).

114. Ms Leventhal contends that the appropriate approach for the Upper Tribunal is to dismiss the appeal, not least as (leaving aside the problem of the parallel jurisdictions) the declaration of incompatibility in *Re McLaughlin* "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given" (section 4(6)(a) of the 1998 Act). Her submission is that the proper approach is to allow the constitutional settlement of the Human Rights Act to take effect and run its course.

115. In the event I am mistaken about reading down regulations 1 and 2 of the 1975 Regulations, I would still allow the appeal on the basis that the First-tier Tribunal failed to give adequate reasons for its conclusion on the human rights dimension to the appeal. In doing so I recognise the First-tier Tribunal has not had the benefit of the argument I have heard. I would also set aside the First-tier Tribunal's decision as being in error of law. In that scenario, I do not accept that it would be proper for me to re-make the decision under appeal. I do not consider that it would be in keeping with the spirit of the Human Rights Act to re-make the First-tier Tribunal's decision to the same effect, namely to confirm the Department's decision that the Appellant has no entitlement to WPA as the law currently stands. At the very least I can record that the Appellant, inasmuch as she is in the same position as the applicant in *Re McLaughlin*, is likewise the victim of unlawful discrimination as a surviving cohabitant with care of her child. In addition, I would remit the case to the Secretary of State for her to consider revising the original disallowance decision as and when she brings forward such amendments to section 36 of the SSCBA 1992 as are considered appropriate in the light of the Supreme Court's decision.

116. I readily accept Ms Leventhal's argument that it is not for the Upper Tribunal to second guess what the Secretary of State may or may not decide to do in response to the decision in *Re McLaughlin*. However, I think it is appropriate to express judicial concern at the apparently glacial pace of the Secretary of State's consideration of such matters. The Supreme Court's decision was promulgated on 30 August 2018. It is now 8 months later and all we have to show for this review is Ms Leventhal's assurance (repeating assurances to Parliament) that the matter is under

consideration, or even under active consideration. I recognise that the Department has had other pressing priorities over the past year, both internally (universal credit reform) and externally (Brexit), but there must be very many bereaved partners whose possible entitlement to WPA remains in limbo. I simply note that the House of Commons Work and Pensions Select Committee has recently established a follow-up enquiry to what it has described (in the context of *Re McLaughlin*) as the "profound injustice" of the bereavement benefits system (Press Release, 9 April 2019). The Rt Hon Frank Field MP, Chair of that Committee, has also written to Mr Will Quince MP, the new Parliamentary Under-Secretary with policy responsibility for this area, seeking an update on how the Government proposes to respond to the *Re McLaughlin* judgment (letter dated 8 April 2019).

Conclusion

117. The Appellant's appeal is allowed.

Signed on the original
on 30 April 2019

Nicholas Wikeley
Judge of the Upper Tribunal