Case No: CG/1781/2017

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Before: MRS JUSTICE FARBEY CP
UPPER TRIBUNAL JUDGE WARD
UPPER TRIBUNAL JUDGE CHURCH

Date of decision: 26 May 2020

DECISION

The appeal is dismissed. The decision of the First-tier Tribunal sitting at Rochdale on 14 March 2017 under reference SC947/16/01669 did not involve the making of an error on a point of law and is not set aside.

REASONS

Introduction and facts

1. This is an appeal against the decision of the First-tier Tribunal (Social Entitlement Chamber) ("the FtT") confirming the respondent's decision to refuse the appellant's claim for bereavement benefit following the death of her partner. The appellant met her partner in about 2004 and they began living together in about 2008. On 25 September 2010 the couple entered into a religious marriage ceremony (Nikah) in accordance with Islamic principles.

2. The appellant's evidence to the FtT was that she and her partner entered into the Nikah believing that all the requirements for a valid marriage under English law were met. Two or three months afterwards, she had "double checked" with Oldham Registry Office as to the formalities required for a Nikah to be recognised under English law, in order to reassure herself that the marriage was valid. The appellant's evidence to the FtT is not consistent with her witness statement made in judicial review proceedings in the Administrative Court which says that she had checked with the Registry Office before – not after - the Nikah. However, nothing turns on this. Before us, the parties were agreed that, in order to be recognised as a matter of English law, the Nikah was required to be registered with the Registrar General at the General Register Office, and that it was not registered.

3. Following the Nikah the couple held themselves out to their family and their community as married. They had two daughters, born in 2011 and 2014.

4. On 22 April 2016, some 5 years and 7 months after the date of the Nikah, the appellant's partner sadly died. The appellant made an application for bereavement benefit (i.e. bereavement payment and widowed parent's allowance). On 11 August 2016 a decision-maker on behalf of the respondent refused the appellant's application on the basis that the

Nikah did not comply with the formal requirements of the Marriage Act 1949 (the "1949 Act") and the presumption of marriage did not apply, so the appellant did not satisfy the entitlement conditions for bereavement benefit which require that the applicant is a surviving "spouse" or "civil partner." Following the mandatory reconsideration procedure, the decision was confirmed and the appellant lodged a notice of appeal to the FtT.

Procedural history

5. The appeal has a regrettably lengthy history. It was first heard in the FtT before Judge Bawden in Rochdale on 14 March 2017. The hearing was attended by the appellant and her representative.

6. Judge Bawden found that, whatever the appellant might have thought about the ceremony at the time or thereafter, the couple had not contracted a valid marriage because the requirements of the 1949 Act had not been complied with. While it was undisputed before Judge Bawden (though inconsistent with evidence now before us) that the appellant had lived with her partner for some 10 years before his death, the judge found that the presumption of marriage did not apply in the appellant's case because only 5 years and 7 months had passed between the Nikah and her partner's death. Judge Bawden held that it was this latter period that was relevant for the purposes of the presumption of marriage, and not the length of any period of cohabitation. She said that a longer period than 5 years and 7 months was required. Judge Bawden refused the appeal and confirmed the respondent's decision.

7. On 18 May 2017 the FtT refused the appellant's application for permission to appeal on the basis that the FtT's decision involved no error of law. The appellant then applied to the Upper Tribunal for permission to appeal. On 11 July 2017 Upper Tribunal Judge Wright refused permission because he did not consider it to be arguable with a realistic prospect of success that the FtT had erred materially in law.

8. On 4 August 2017 the appellant applied to the Administrative Court for permission to pursue a *Cart* judicial review of Judge Wright's refusal of permission to appeal. On 21 September 2017 Lang J stayed the matter pending the outcome of the *McLaughlin* litigation in the Supreme Court. The *McLaughlin* appeal was decided on 30 August 2018 (see *In re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250). Permission to apply for judicial review in the present case was granted by Cockerill J on 9 January 2019. The judicial review application was allowed by consent without a hearing on 29 April 2019. Judge Wright's refusal of permission to appeal was quashed and the matter was returned to the Upper Tribunal for a fresh determination on the issue of permission based on substantially amended grounds of appeal. The matter came before Upper Tribunal Judge Ward. On 22 May 2019 he granted permission to appeal.

The grounds of appeal

9. The appellant's amended grounds of appeal are that both her and her children's rights under the European Convention on Human Rights ("the Convention") would be breached on an ordinary construction of the term "spouse" in section 39A of the Social Security Contributions and Benefits Act 1992 (the "1992 Act") because such a construction would

result in unjustified discrimination against them contrary to article 14 read with article 8 of the Convention. It is submitted on her behalf that:

a. It is possible, applying section 3 of the Human Rights Act 1998, to construe the term "spouse" in section 39A of the 1992 Act as including someone in the position of the appellant, namely a person living with her partner having participated in a religious marriage ceremony according to the rites of that religion and subjectively believing herself (on objectively reasonable grounds) to be thereby married;

b. Such a construction must therefore be adopted; and

c. The appeal should be allowed and a decision substituted that she is entitled to a widowed parent's allowance.

The appeal hearing

10. On 15 October 2019 Farbey J CP allowed the appellant's application for the appeal to be heard by a three-judge panel of the Upper Tribunal because it involves a point of law of special difficulty and an important point of principle. The appeal was heard in the Rolls Building on 13 February 2020. Mr Tim Amos QC and Mr Tom Royston appeared on behalf of the appellant, instructed by the Child Poverty Action Group. Ms Katherine Apps appeared for the respondent, instructed by the Government Legal Department. We are grateful to each of them for their clear and helpful submissions.

11. On 14 February 2020 the Court of Appeal handed down judgment in *Her Majesty's Attorney General v Akhter and Khan* [2020] EWCA Civ 1122. As the Tribunal was aware of the imminence of that judgment, the parties had been invited at the hearing to make post-hearing submissions in relation to the implications of the Court of Appeal's decision for their respective cases, which they duly did.

Social security legislation

12. When the deceased person, by reference to whom the claim is made, died before 8 March 2017, the bereavement benefits which could be claimed were bereavement payment under section 36 of the 1992 Act and, where there were children, widowed parent's allowance under section 39A. While the present case concerns only the latter, it is necessary to set out both sections below. Section 36 was introduced in its substituted form, and section 39A was introduced, by the Welfare Reform and Pensions Act 1999 ("the 1999 Act"). The award of both benefits required a condition to be met (which was not onerous) regarding the deceased's national insurance contributions. It is not necessary to set out the detail.

13. As at the date of the respondent's decision (11 August 2016), the relevant sections provided as follows:

> "**36.— Bereavement payment.**
>
> (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."

"**39A.— Widowed parent's allowance.**

(1) This section applies where—

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

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

(i) has not remarried before that day, and

(ii) is under pensionable age on that day.

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

(a) the surviving spouse or civil partner is entitled to child benefit in respect of a child or qualifying young person falling within subsection (3) below;

(b) the surviving spouse is a woman who either—

(i) is pregnant by her late husband, or

(ii) if she and he were residing together immediately before the time of his death, is pregnant in circumstances falling within section 37(1)(c) above; or

(c) the surviving civil partner is a woman who–

(i) was residing together with the deceased civil partner immediately before the time of the death, and

(ii) is pregnant as the result of being artificially inseminated before that time with the semen of some person, or as a result of the placing in her before that time of an embryo, of an egg in the process of fertilisation, or of sperm and eggs.

(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.

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

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

(b) is under pensionable age.

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

(a) for any period falling before the day on which the surviving spouse's or civil partner's entitlement is to be regarded as commencing by virtue of section 5(1)(k) of the Administration Act; or

(b) for any period during which the surviving spouse or civil partner and a person whom she or he is not married to, or in a civil partnership with, are living together as a married couple."

14. "Spouse" is not a defined term in the 1992 Act. It is a term used in various places in the Act, notably (though not exclusively) in relation to retirement pensions and national insurance contributions.

15. "Civil partner" is not defined either, but as a concept created by Civil Partnerships Act 2004 must be taken to have the meaning conferred by that Act.

Human rights legislation

16. The respondent accepts, in the light of the Supreme Court's decision in *McLaughlin*, that there was discrimination against the appellant on the grounds that she was not married, contrary to article 14 read with article 8 of the Convention. It is therefore only necessary to consider the sections of the Human Rights Act relevant to the interpretation of

legislation (on which the appellant relies) and on declaration of incompatibility (which the respondent regards as the only avenue available to those in the appellant's position).

17. Section 3 provides:

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

18. Section 4 of the Human Rights Act enables courts of the level of the High Court and above (but not the Upper Tribunal) to make a declaration of incompatibility if the court is satisfied that a provision of primary legislation is incompatible with a Convention right. By virtue of section 4(6), a declaration of incompatibility does not affect the validity or continuing operation of the provision in respect of which it is given and does not have any binding effect on the parties to the proceedings in which it is made.

McLaughlin

19. *McLaughlin* concerned Northern Ireland social security legislation, which for present purposes is not materially different. Ms McLaughlin had been refused both bereavement payment and widowed parent's allowance following the death of her long-term unmarried partner. She applied for judicial review of the decision on the grounds that the legislation was incompatible with her rights under article 14 read with article 8 of, or article 1 of the First Protocol to, the Convention. The High Court in Northern Ireland made a declaration of incompatibility in relation to widowed parent's allowance only and thereafter the claim for bereavement payment was not pursued. The Court of Appeal of Northern Ireland found that the legislation did not breach the Convention. The Supreme Court reversed the Court of Appeal, making a declaration of incompatibility in respect of section 39A, insofar as it precludes any entitlement to widowed parent's allowance by a surviving unmarried partner.

20. The terms of section 4(6) of the Human Rights Act are such that the appellant, like others in a similar position, still could not succeed in her claim unless and until legislative steps were taken to address the incompatibility, in terms sufficiently broad to enable her to do so, which to date they have not been. The present appeal concerns whether the interpretative obligation under section 3 of the Human Rights Act can assist her.

Application of section 3 of the Human Rights Act

21. The interpretation of section 3 was considered in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557. Lord Nicholls of Birkenhead reviewed its scope and held:

> "29. …It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning. The decision of your Lordships' House in *R v A (No 2)* [2002] 1 AC 45 is an instance of this. The House read words into section 41 of the Youth Justice and Criminal Evidence Act 1999 so as to make that section compliant with an accused's right to a fair trial under article 6. The House did so even though the statutory language was not ambiguous.
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> 30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.
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> 31. On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.
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> 32. From this the conclusion which seems inescapable is that 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."

22. Lord Nicholls nevertheless went on to emphasise that, despite the reach of section 3, the different democratic functions of Parliament and the courts must be respected. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning of statutory words imported by application of section 3 "must be compatible with the underlying thrust of the legislation being construed" (para 33).

23. Lord Rodger held that section 3 does not empower the courts to imply words into statute that contradict any principle enshrined in the legislation or the principles of the legislation as a whole (para 117). Any implication imposed by the courts as to the meaning of a specific provision must "go with the grain of the legislation" (para 121). If section 3 were to be interpreted otherwise, the boundary between interpretation and amendment of statute would be crossed (para 121).

24. It was also emphasised in *Ghaidan v Godin-Mendoza* that Parliament could not have intended that section 3 should require courts to make decisions for which they are not equipped, Lord Nicholls observing (at para 33) that there may be "several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."

25. Lord Steyn, agreeing, added:

> "49. A study of the case law…reveals that there has sometimes been a tendency to approach the interpretative task under section 3(1) in too literal and technical a way. In practice there has been too much emphasis on linguistic features. If the core remedial purpose of section 3(1) is not to be undermined a broader approach is required. That is, of course, not to gainsay the obvious proposition that inherent in the use of the word 'possible' in section 3(1) is the idea that there is a Rubicon which courts may not cross…
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> 50…What is necessary…is to emphasise that interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights."

Analysis and conclusions

The grain of the legislation

26. It is, accordingly, necessary to consider the "grain" of the legislation in a way which avoids crossing the Rubicon, as cautioned against by Lord Steyn. Mr Amos submitted that the grain of section 39A is determined by the view reached by the majority in *McLaughlin*, expressed by Baroness Hale (at para 39), which he submitted binds the Tribunal:

> "The allowance exists because of the responsibilities of the deceased and the survivor towards their children. Those responsibilities are the same whether or not they are married to or in a civil partnership with one another. The purpose of

> the allowance is to diminish the financial loss caused to families with children by the death of a parent. That loss is the same whether or not the parents are married to or in a civil partnership with one another."

27. Mr Amos accepted that his submission had the consequence that the word "spouse" in section 39A would fall to be interpreted differently from the same word in section 36 in relation to bereavement payment to which (owing to the nature of the benefit) Baroness Hale's remarks cannot apply. We doubt that the draftsman would have intended a change of meaning. We agree with Ms Apps's submission that this passage of the judgment in *McLaughlin* must be read in context. Baroness Hale is here answering the question whether discrimination between married and unmarried applicants for widowed parent's allowance is a proportionate means of achieving the legitimate aim of privileging marriage (see para 38). That was a key question to be considered in the context of article 14 of the Convention and a key question in considering the compatibility of the relevant legislation with article 14. Nothing in this passage or in any other passage of *McLaughlin* deals with the grain of the legislation for the purposes of section 3 of the Human Rights Act as opposed to its Convention compatibility under section 4.

28. In our view, the grain of section 39A is that benefits should only be paid to a spouse married under English law, even where the benefit is indeed (following *McLaughlin*) to diminish the financial loss caused to families by the death of a parent. That is not to say that it should be so: after all, the respondent has conceded that the existing arrangements are in breach of the appellant's human rights and, by passing the Human Rights Act, Parliament made clear that human rights were to be respected in accordance with the terms of that Act. The issue is whether the courts may properly remedy the breach in this case.

29. There are three main reasons for understanding the grain in this way: the genesis of these provisions; the legal and policy considerations relating to marriage; and the legislator's intention as to conditions applicable to receipt of the benefit.

30. Before the changes made by the 1999 Act, bereavement benefits were only payable to widows. Benefit provision for widows dated back to the Widows', Orphans' and Old Age Contributory Pensions Act 1925, which provided a pension for all widows whose late husbands fulfilled the contribution conditions, whether or not they had children. Widowers were not eligible. We have not been taken to any material suggesting that, when the legislation referred to a "widow", it meant anyone other than a woman who had been in a lawful marriage terminated by the death of her husband. The adoption of "spouse" in place of "widow" in the 1999 reforms was gender-neutral terminology to reflect the extension of benefits to widowers as well as widows. The legislation appears to have proceeded, for approaching a century, on the footing that the benefits were payable only to those who had been married when their spouse died.

31. In the field of social security law, it is a matter for Parliament to decide who receives benefits and who does not. This Tribunal will ensure the fair and proper allocation of benefits within the law but will not grant socio-economic benefits that Parliament has decided to withhold. We have been directed to nothing in the legislative scheme which would persuade us that, by adopting the term "spouse" in the 1999 Act, Parliament

intended to grant bereavement benefit to those not validly married as opposed to intending to remedy historic discrimination between men and women.

32. The legal and policy considerations relating to marriage have been recently re-articulated in *Akhter and Khan*. In that case, the Court of Appeal considered an appeal against a decision that Ms Akhter was entitled to a decree of nullity under section 11 of the Matrimonial Causes Act 1973 (the "1973 Act"), which in turn would open the door to her seeking financial relief against Mr Khan. Ms Akhter and Mr Khan had entered into a Nikah in circumstances where it did not constitute a valid marriage under the 1949 Act and were aware of that but steps were never taken to go through a civil marriage ceremony compliant with English law.

33. The Court of Appeal concluded that the parties had gone through what it termed a "non-qualifying ceremony"[1] because the scope of section 11 of the 1973 Act was limited to situations which crossed a threshold of connection with the formalities prescribed by the 1949 Act, which the Nikah ceremony undertaken by Ms Akhter and Mr Khan did not do. In consequence no decree of nullity under section 11 of the 1973 Act could be made. In so doing, the Court expressed itself in broad terms.

34. At paras 8-15 of its judgment the Court reviewed the routes into marriage available via the 1949 Act. It noted (at paras 12-13) that the routes included both religious and civil routes and (relevant to the case before it and that before us) a "mixed route" where civil preliminaries precede (among other things) a religious ceremony in a place of religious worship registered for the solemnization of marriage. This route would be apt for use in the case of an Islamic religious ceremony.

35. The Court went on to explain:

> "9. A person's marital status is important for them and for the state. The status of marriage creates a variety of rights and obligations. It is that status alone, derived from a valid ceremony of marriage, which creates these specific rights and obligations and not any other form of relationship. It is, therefore, of considerable importance that when parties decide to marry in England and Wales that they, and the state, know whether what they have done creates a marriage which is recognised as legally valid. If they might not have done so, they risk being unable to participate in and benefit from the rights given to a married person.
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> 10. The answer to the question of whether a person is recognised by the state as being validly married should be capable of being easily ascertained. Certainty as to the existence of a marriage is in the interests of the parties to a ceremony and of the state. Indeed, it could be said that the main purpose of the regulatory framework … , since it was first established over 250 years ago, has been to make this easily ascertainable and, thereby, to provide certainty."

36. The Court developed this further at paras 28-30:

[1] Previous terminology had referred to such situations as a "non-marriage"

> "28. As referred to in paragraph 9 above, marriage creates an important status, a status 'of very great consequence', per Lord Merrivale P in *Kelly (orse. Hyams) v Kelly* (1932) 49 TLR 99, at p. 101. Its importance as a matter of law derives from the significant legal rights and obligations it creates. It engages both the private interests of the parties to the marriage and the interests of the state. It is clearly in the private interests of the parties that they can prove that they are legally married and that they are, therefore, entitled to the rights consequent on their being married. It is also in the interests of the state that the creation of the status is both clearly defined and protected. The protection of the status of marriage includes such issues as forced marriages and 'sham' marriages.
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> 29. As noted in *The Scoping Paper*[2], at [1.2], 'a wedding is a legal transition in which the state has a considerable interest'. This interest is reflected in the statutory system of regulation designed to ensure that both the parties and the state know what is necessary to contract and when a valid marriage has been contracted. As referred to below, the statutory regulation of the prescribed formalities required to effect a valid marriage was first introduced in 1753 to create certainty in response to the difficulties being caused by what were known as 'clandestine' marriages. Certainty remains in the public interest because, as again identified in *The Scoping Paper*, at [1.2], 'it should … be clear when [a marriage] has come into being'.
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> 30. Upholding the status of marriage, where possible, is also a matter of public policy. This can be seen, for example, from *Vervaeke (formerly Messina) v Smith* [1983] AC 145, in which it was held that the upholding of the status of marriage is a doctrine of English public policy law."

37. It is not necessary to set out here in detail how the Court reached the view after reviewing the authorities that there can be "ceremonies of marriage which are not within the scope of the 1949 Act at all" (and so, addressing the particular issue in *Akhter and Khan*, fall outside the scope of the 1973 Act). The contrary position was precluded by existing Court of Appeal authority, namely *Sharbatly v Shagroon* [2013] 1 FLR 1493, but the Court went on to give its own reasons for rejecting the contrary position:

> "61. Even if this was open to us, however, it seems to us that to accept this submission would be to open up a path which would create very considerable difficulties, similar to those which the regulatory system first introduced in 1753 has been designed to prevent.
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> 62. The present case concerns a religious ceremony and Mr Horton's submission would seem to require that all religious ceremonies, wherever and however performed, should be brought within the scope of the 1949 Act. That would clearly not be an acceptable dividing line especially as a marriage solemnized in approved premises can take any form (other than a religious service) the parties choose. It would then, equally, be questioned why any such ceremony wherever performed should not also be included within the scope of the 1949 Act. It

[2] The Law Commission, *Getting Married, A Scoping Paper* December 2015

> would clearly not be acceptable to exclude such ceremonies and to give them a different legal effect to a religious ceremony for that reason alone. The current legal position has been neatly summarised in *The Scoping Paper*, at [2.71], namely that: 'Faced with the prospect of effectively deregulating marriage … the courts developed the concept of the "non-marriage"'.
>
> 63. We would, therefore, have concluded that, to prevent the regulatory system being fundamentally undermined and in a manner which would be contrary to the need for certainty in the interests of the parties and in the public interest, we would have decided that there are some ceremonies of marriage which do not create even void marriages. In summary, in some cases the extent of non-compliance with the formal requirements stipulated under the 1949 Act means that the manner in which the marriage has been "solemnized" (to use the word from the 1949 Act, including s. 29), is such that the parties have not intermarried *under* the provisions of Part II or, when relevant, *according* to the rites of the Church of England."

38. In the present case, we are asked (in essence) to read section 39A so as to encompass a religious marriage not complying with the requirements of the 1949 Act. Mr Amos submitted that the law would be arbitrary and the rule of law undermined if we were to limit the definition of "spouse" by reference to the formalities of the 1949 Act. However, *Akhter and Khan* emphasises the state's interest in knowing who is, and who is not, married. That is a principle of long standing. It is not one which excludes people seeking a religious ceremony, whether Muslim or otherwise. The state enables people to choose a civil route or a religious route into marriage, and there is no basis for differentiating between them. The various routes to marriage mean that "it is not difficult for parties who want to be legally married to achieve that status" whether by a religious ceremony or otherwise (*Akhter and Khan*, para 12).

39. In our view, legal policy in relation to the value of marriage complying with legislative formalities is reflected in the draftsman's decision to use the word "spouse" in section 39A to provide one of the gateway conditions to receipt of the benefit. It forms part of the grain of the legislation.

40. The third indicator of the grain of the legislation is to be found in provisions as to when the benefit will not be, or will cease to be, payable. Section 36(2) and section 39A(5) address the circumstances in which bereavement payment and widowed parent's allowance (respectively) will not be payable. They each refer to a person who is (ex hypothesi) married to the deceased but at the time of the deceased's death is "living together as a married couple" with someone else. There is a clear distinction made by the legislator between the formal status of being married and the position of "living together as a married couple." Mr Amos's proposed reading of "spouse" in section 39A is in our view incompatible with this distinction.

41. There is provision for cessation of widowed parent's allowance in section 39A(4) which provides that "the surviving spouse shall not be entitled to the allowance for any period after she or he remarries or forms a civil partnership." Entitlement is lost when these formal steps are taken. It is far from obvious that Parliament would have intended

different levels of formality as regards marital status to have applied to accessing the benefit under section 39A(1) and to losing it under section 39A(4).

42. These, in our view, are powerful reasons for concluding that the grain of the 1992 Act, as followed by the draftsman in using the word "spouse" when making the amendments effected by the 1999 Act, is to make provision for people of either gender who have entered into a marriage compliant with the 1949 Act. Any "grain" there may have been in section 39A in terms of seeking to provide for children was limited to the families where the surviving parent was the "spouse" of the deceased, in the sense relevant to the present case, of having entered into a marriage valid under the 1949 Act. The principle has to be qualified to the extent that there are other established principles which may enable certain other marriages to be accepted as valid under the law of England and Wales, such as the recognition of foreign marriages valid according to the law of the parties' domicile and marriages which rely for their authority on the presumption of marriage. Neither of these qualifications applies in the present case.

43. Mr Amos submitted that the word "spouse" is not a technical term and should not be interpreted in a rigid way. He referred us to the Oxford English Dictionary definitions of "marriage" (the legally or formally recognised union of two people as partners in a personal relationship) and "spouse" (a husband or wife, or a person joined to another in a comparable legally recognised union). While the dictionary definitions cast light on the ordinary meaning of the words and may allow some flexibility, we are not persuaded that they are in themselves capable of dislodging what we regard as a fundamental feature of the legislation, which is that Parliament has restricted widowed parent's allowance – as a matter of legislative policy – to those who are married as a matter of English law.

44. Mr Amos referred us to the United Kingdom's international obligations. Article 60 of the Social Security (Minimum Standards) Convention 1952 stipulates that survivors' benefit should cover loss of support suffered by a widow or child as the result of the death of a breadwinner. Article 10(3) of the International Covenant on Economic, Social and Cultural Rights (1966) states that special measures of protection and assistance designed to be accorded to the family should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Mr Amos submitted that these international sources support the proposition that the purpose of widowed parent's allowance is child-focused such that the precise matrimonial status of the parental relationship is not a fundamental feature of widowed parent's allowance.

45. In our view, these international obligations cannot in themselves oust or modify the wording of the legislation. It is difficult to understand how they enable the Tribunal to go against the grain of the legislation as expressed by the wording of the relevant legislative provisions.

46. Mr Amos referred us to the Canadian Old Age Security Act 1985 as an example of social security legislation which (in his words) treats the essential meaning of spouse as being the public representation of being husband and wife, rather than legal formality. The Canadian position represents a different statute in a different jurisdiction. It does not assist.

47. In short, it is an ingrained feature of the legislation that Parliament expressly and intentionally provided a benefit to those who have been married as a matter of English law. It is not in our view possible to read the legislation in any other way. The remedy which Parliament has provided is in these circumstances a declaration of incompatibility which the appellant has not sought, and could not seek, from this Tribunal.

Underlying policy: the function of the Tribunal

48. Mr Amos emphasised that section 3 of the Human Rights Act has "an unusual and far-reaching character" (*Ghaidan v Godin-Mendoza*, para 30). It is the "prime remedial measure" of the Act and section 4 is "a last resort" (*Ghaidan v Godin-Mendoza*, para 46). Section 3 nevertheless concerns the particular task of interpreting legislation. The section is itself an expression of Parliament's intention in relation to that task but it does not permit the courts to effect changes in socio-economic policy that would otherwise fall to be made by Parliament.

49. The question of whether in contemporary society the formality of state or secular marriage procedures should no longer be a touchstone for widowed parent's allowance is a matter of policy. We read the passages that we have cited above from *Akhter and Khan* as a restatement of the state's interest in the regulation of marriage. The allocation of social security benefits to parents – even if those resources would be targeted at children – is suitable for legislative deliberation and not judicial decision.

50. The courts may declare the incompatibility of statutory provisions with Convention rights under section 4 of the Human Rights Act. They do not thereby usurp Parliament's legislative function in so far as it would fall to Parliament to determine the scope of any remedial legislation. Parliament's legislative function would, however, be usurped if section 3 permitted this Tribunal to bind the respondent by implying words into statute on issues which the Tribunal is ill-equipped to decide. In our view, we could not interpret section 39A in the way urged upon us by the appellant without crossing the divide between the interpretative function of the courts and matters of policy that are democratically entrusted to Parliament. The Rubicon would be crossed.

51. For these reasons, we uphold the FtT's decision and dismiss the appeal.

Authorised for issue **Mrs Justice Farbey**

on 26th May 2020 **Chamber President**

Upper Tribunal Judge Ward

Upper Tribunal Judge Church