Neutral Citation Number: [2024] EWCA Civ 613

Case No: CA-2023-001127

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
Upper Tribunal Judge Ward
UA-2020-001686-BB

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 June 2024

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE KING
and
LADY JUSTICE ELISABETH LAING

- -

Between:

MARGARET KELLY	**Appellant**
- and -	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Respondent**

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- -

Chris Buttler KC and Joshua Yetman (instructed by **Trafficking and Labour Exploitation Unit (ATLEU)**) for the **Appellant**
Julian Milford KC and Jen Coyne (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates: 6 and 7 March 2024
Written submissions: 11 and 14 March 2024

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Approved Judgment

This judgment was handed down remotely at 11.00am on 5 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. The Appellant, Ms Kelly, made a claim for bereavement benefits under sections 36 and 39B of the Social Security Benefits and Contributions Act 1992 ('the 1992 Act'). The Secretary of State refused that claim on the grounds that Ms Kelly was not married or in a civil partnership. She appealed. Her appeal was heard by the Upper Tribunal (Administrative Appeals Chamber) ('the UT') (Upper Tribunal Judge Ward) in June 2022.

2. This is an appeal from the UT's decision on two joined appeals, one of which was Ms Kelly's. The background is that after 2014 homosexual couples could enter a civil partnership, and could get married, but heterosexual couples could only get married. It has now been recognised that that position was discriminatory, and that has been remedied by legislation. Ms Kelly nevertheless asks this court to make a declaration that sections 36 and 39B of the Social Security Contributions and Benefits Act 1992 ('the 1992 Act') are incompatible with her Convention rights. Sections 36 and 39B have been largely repealed, but are still in force, pursuant to transitional provisions, and for very limited purposes, as I will explain.

3. Lewis LJ gave permission to appeal on three grounds. Ms Kelly abandoned grounds 2 and 3 in her skeleton argument for this appeal. Ground 1 is that because the UT was not able to make a declaration of incompatibility under section 4 of the Human Rights Act 1998 ('the HRA'), Ms Kelly has been left without an effective remedy despite 'a finding that section 36 and 39B of [the 1992 Act] discriminate against her on the basis of her different-sex sexual orientation, contrary to' article 14 of the European Convention on Human Rights ('the ECHR') read with article 8 of the ECHR. Lewis LJ interpreted this ground of appeal as an argument that this court should, on an appeal, make a declaration of incompatibility in circumstances when the court below had no power to do so.

4. For the reasons given in this judgment I have decided that the current legislation is not incompatible with Ms Kelly's Convention rights and that, if for any reason I am wrong about that, that this court should, nevertheless, not make a declaration of incompatibility.

The facts

5. Ms Kelly was in a long-term relationship with, but not married to, her male partner, Luke McCormick. He died on 14 December 2016. Her claim for bereavement benefit was received on 23 February 2017. It was refused on 3 March 2017.

6. Ms Kelly appealed to the First-tier Tribunal ('the F-tT'), which dismissed her appeal. The UT set aside the F-tT's decision. The F-tT again dismissed Ms Kelly's appeal, and she appealed to the UT again.

7. The UT noted that Ms Kelly could have got married '- in a civil ceremony if not in church - at any time from 2000, but chose not to for personal reasons'. As the UT noted, between 2005 and 2014, a same-sex couple could enter a civil partnership, and an opposite-sex couple could get married. There was a form of parity. After 2014, a same-sex couple could also get married, but an opposite-sex couple could not enter a civil partnership. In paragraph 119, it said that 'the evidence is sufficient to demonstrate that there was a real

risk that the appellants would (with their partners) have entered into civil partnership had that choice not been withheld from them'.

The UT's reasoning

8. In paragraph 98, the UT said that Ms Kelly's 'complaint (and the only way in which a viable discrimination complaint on this ground can be formulated) in essence is that she was denied the opportunity to meet the "spouse or civil partner condition" by whichever of those routes she preferred, when between 2014 and 2019 a same-sex couple would have had that choice'. The UT agreed with Mr Milford KC (who represented the Secretary of State in the UT) that in essence that was the same complaint as in *Steinfeld v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1 (*Steinfeld*). The claimants in that case also wanted, for personal reasons, to formalise their relationship, but not to get married. As the UT put it, 'Between 2014 and 2019 same-sex couples had a choice of ways to have their relationship formally recognised, a choice which was not open to opposite-sex couples'. The Secretary of State did not submit to the UT that that discrimination was justified (UT, paragraph 99).

9. The UT decided, among other things, and the Secretary of State did not dispute it, that there was discrimination on the grounds of sexual orientation between the claimants and same-sex couples, as found in *Steinfeld*.

10. The UT decided, rightly, that it had no jurisdiction to make a declaration of incompatibility. Though 'hesitant about defining the extent of a jurisdiction which [the UT] does not itself possess', and recognising that its observations would be obiter, it decided, having heard submissions on the question, that it was nevertheless 'appropriate to do so' (paragraph 101). The UT's view was that a court should not 'make a further declaration of incompatibility in respect of the incompatibility of article 14 ECHR with article 8…which would essentially mirror that made in *Steinfeld* which was considered (and subsequently acted upon by Parliament)' (paragraph 121). In paragraph 123, the UT made it clear that it was not expressing any view about how a higher court should exercise any discretion under section 4.

The legislative framework

The relevant provisions of the HRA

11. Section 1(1) of the HRA defines 'the Convention rights' as 'the rights and fundamental freedoms set out in (a) Articles 2-12 and 14 of the Convention, (b) Articles 1 to 3 of the First Protocol, and (c) Article 1 of the Thirteenth Protocol'. That definition does not include article 13, the right to an effective remedy. I assume that article 13 is omitted because Parliament considered that on and from commencement, the HRA was to be the source of any remedy for any breach of Convention rights, so that article 13 was superfluous in the domestic scheme. That assumption is confirmed by the carefully crafted remedial scheme for which the HRA in fact provides, to which I describe in paragraphs 13, and 15-20, below. That assumption is also supported by the reasoning of Lord Hope in *Brown v Stott* [2003] 1 AC 681 at page 35D-F. The other members of the Appellate Committee agreed with that part of his reasoning. It is also supported by the reasoning of Lord Nicholls (with whom the other members of the Appellate Committee agreed) in *Re S (Minors) (Care Order: Implementation of Care Plan* [2002] UKHL 10; [2002] 2 AC 291 (in particular, at paragraphs 60-64).

12. Section 2 deals with the interpretation of Convention rights. Section 3(1) creates an obligation to read primary legislation and subordinate legislation 'in a way which is compatible with Convention rights'.

13. In any proceedings in which a court decides whether a provision of primary legislation is compatible with a Convention rights, '[i]f the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility' (section 4(1) and (2)). Section 4(3) and (5) make provision for proceedings in which the issue is whether a provision of subordinate legislation is compatible with a Convention right. Section 5(5) defines 'court' for the purposes of section 5. The definition includes, in England and Wales, this court and the High Court. It does not include the UT. Section 4(6) provides that a declaration of incompatibility '(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made'.

14. The Crown is entitled to notice of any proceedings in which a court is considering whether to make a declaration of incompatibility (section 5(1)). In any such case, a Minister of the Crown, on giving the appropriate notice, is entitled to be joined as a party to the proceedings (section 5(2)).

15. Section 6 is headed 'Acts of public authorities'. Section 6(1) makes it unlawful to act in a way which is incompatible with a Convention right. Section 6(1) does not apply if 'as a result of one or more provisions of primary legislation, the authority could not have acted differently' (section 6(2)). A 'public authority' includes a court or tribunal, 'any person certain of whose functions are of a public nature', 'but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament' (section 6(3)). By section 6(6), an 'act' includes 'a failure to act', but does not include a 'failure to introduce in, or lay before, Parliament a proposal for legislation', or to 'make any primary legislation or remedial order'.

16. A person who claims that a person has acted (or proposes to act) in a way which is made unlawful by section 6(1) may bring proceedings in the appropriate court or tribunal, or rely on the Convention right or rights in any legal proceedings, but only if he is (or would be) a victim of the unlawful act (section 7(1)). 'Legal proceedings' include 'an appeal against the decision of a court or tribunal' (section 7(6)). By section 7(7), a person is the victim of an unlawful act only if he would be a victim for the purposes of article 34 of the Convention if the proceedings were brought in the European Court of Human Rights ('the ECtHR').

17. Section 7(11) gives the Minister who has power to make rules in relation to a particular tribunal, power 'to the extent that he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order tadd to (a) the relief or remedies which the tribunal may grant; or (b) the grounds on which it may grant any of them'.

18. Section 8 is headed 'Judicial remedies'. If a 'court' finds any act or proposed act of a public authority is or would be unlawful, 'it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate' (section 8(1)). 'Court' in section 8 includes a tribunal (section 8(6)). Damages may only be awarded by a court

which has power to award damages or to order the payment of compensation in civil proceedings (section 8(2)). Damages may only be awarded if, having taken various things into account, the court 'is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made' (section 8(3)). The court must take into account the principles applied by the ECtHR in relation to the award of compensation under article 41 of the ECHR (section 8(4)). Section 8(6) explains that 'damages' means 'damages for an unlawful act of a public authority' and 'unlawful' means 'unlawful under section 6(1)'.

19. Section 10 is headed 'Power to take remedial action'. It applies in two circumstances. One is if a provision of legislation has been declared under section 4 to be incompatible with a Convention right, and there is no scope for an appeal against that declaration (section 10(1)). 'If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility'.

20. Section 10(7) introduces Schedule 2 which makes further provision about remedial orders. A remedial order may contain 'such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate' (paragraph 1(1)(a)). It may 'be made so as to have effect from a date earlier than that on which it is made' (paragraph 1(1)(b)) and may 'make different provision for different cases' (paragraph 1(1)(d)). The power conferred by paragraph 1(1)(a) includes a power to amend primary legislation (including primary legislation other than that which contains the incompatible provision (paragraph 1(2)). Paragraph 2 makes provision for the procedure for making a remedial order. There is provision for any representations made about a draft order to be considered before the order is made (paragraph 3(2)).

21. Section 19(1) imposes a duty on the Minister of the Crown who is in charge of a Bill in either House, before the Second Reading of the Bill, either to make a statement to the effect that in his view the provisions of the Bill are compatible with Convention rights (as statement of compatibility) or a statement that although he cannot make a statement of compatibility, the government nevertheless wishes the House to proceed with the Bill.

The relevant social security legislation

The Social Security Contributions and Benefits Act 1992

22. Section 20(1)(ea) of the 1992 Act as in force on 5 April 2017 defined 'bereavement benefits' as comprising (i) bereavement payment, (ii) widowed parent's allowance and (iii) bereavement allowance. Section 36(1) of the 1992 Act entitled a person whose spouse or civil partner died on or after the appointed day to a bereavement payment if the conditions in section 36(2) were met. Section 39B made broadly similar provision in relation to bereavement allowance in a case in which there were no dependent children.

23. Section 39A is not the subject of the litigation in this case. The version of section 39A which was in force in Northern Ireland at the relevant time was section 39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992. That was the subject of a declaration of incompatibility in *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250 ('*McLaughlin*'). As in force in Northern Ireland at the time of the relevant death in that case, it conferred an entitlement to widowed parent's allowance ('WPA') on a person whose spouse or civil partner died on or after the appointed day if certain conditions were

met. One of those was that the surviving spouse or civil partner was entitled to child benefit in respect of a child or qualifying young person who met the conditions in section 39C(3). The rate was set in section 39C. As entitlement to WPA was tied to receipt of child benefit, that entitlement could last for up to 20 years.

24. Section 39A is still in force in England and Wales. It was amended, most recently, by article 5(2) of the Bereavement Benefits (Remedial) Order 2023, 2023 SI No 134 ('the Remedial Order'). Article 5(2), in short, added the words 'cohabiting partner' to 'spouse or civil partner' wherever those words occurred in section 39A. The Remedial Order came into force on 9 February 2023. The addition of the relevant words came into force on February 9 2023 but was to have effect from 30 August 2018, subject to transitional provisions specified in articles 2 and 3 of the 2013 Order.

25. 30 August 2018 happens to be the date of the declaration of incompatibility in *McLaughlin*. This was a deliberate choice, not a coincidence, as is clear from paragraph 7.3 of the Explanatory Memorandum to the Remedial Order. The Joint Committee on Human Rights had asked for a greater retrospective effect (from the date of the decision of the High Court in Northern Ireland in 2016) (see its reports printed on 3 November 2021 and 30 November 2022). It recognised that the Government was not obliged to remedy all historical discrimination in paragraph 56 of the first Report. In paragraph 12 of its Response updated on 15 December 2022, the Government explained why it did not accept the recommendation for an earlier effective date for the Remedial Order. The parties agreed, in notes after the hearing, that this material was admissible.

The Social Security Administration Act 1992

26. Part I of the Social Security Administration Act 1992 ('the SSAA') is headed 'Claims for and Payments and General Administration of Benefit'. Section 1 provided, subject to exceptions, that entitlement to benefits depended, among other things, on the making of a timely claim. Section 5 created a wide power to make regulations about claims and payments.

27. Section 3 of the SSAA was headed 'Late claims for bereavement benefit'. By section 3(1), section 3 applied where a person's spouse or civil partner has died, or might be presumed to have died, on or after the appointed day and the circumstances were that (a) more than 12 months had elapsed since the date of the death and (b) either (i) the body had not been discovered or identified, or the survivor did not know that fact, or (ii) less than 12 months had elapsed since the survivor first knew of the discovery and identification of the body. Where section 3 applied, then even if the time for making a claim had elapsed, in a section (3)(1)(b)(i) case, where a decision had been made under section 8 of the Social Security Act 1998 that the spouse had died or was presumed to have died, or in a section 3(1)(b)(ii) case, where the identification was made not more than 12 months before the survivor first knew of the discovery and identification, 'such a claim may be made or may be treated as made at any time before the period of 12 months beginning with the date on which that decision was made, or, as the case may be, the date on which the survivor first knew of the discovery and identification'. The reference to 'bereavement benefit' was a reference to bereavement support payment, or to WPA (section 3(5)).

28. Part II of the SSAA was headed 'Adjudication'. It provided for first instance decisions by the Secretary of State and by adjudication officers, and for a system of appeals. Sections 68 and 69 were grouped together under the heading 'Restrictions on entitlement to benefit following erroneous decision'. Section 68 was headed 'Restrictions on entitlement to benefit in certain cases of error' and section 69, 'Determination of questions on review following erroneous decisions'. The effect of those sections, in short, was that if a Social Security Commissioner or the court decided that a determination of an adjudicating authority was 'erroneous in point of law', that determination did not have retrospective effect on the entitlement to benefits of the individual claimant concerned, or of any other claimant.

The Social Security Act 1998

29. Section 1 of the Social Security Act 1998 ('the 1998 Act') transfers the functions of adjudication officers (among others) to the Secretary of State. Section 8(1) provides that the Secretary of State is to decide any claim for benefit, and with exceptions, 'any decision that falls to be made under or by virtue of a relevant enactment'. Sections 12-15 provide for appeals from decisions of the Secretary of State to the First-tier Tribunal and from the F-tT to the UT.

30. Section 27 of the 1998 Act makes provision which is similar to that made by sections 68 and 69 of the SSAA. Where the UT or the court determines that a decision of the Secretary of State was 'erroneous in point of law', then, in general, if the Secretary of State has, after that determination, to make a decision on a claim to benefit, or a decision whether to revise or supersede an entitlement to benefit, then, in so far as the decision relates to a period before the date of the determination, 'it shall be made as if the adjudicating authority's decision had been found by [the UT] or the court not to have been erroneous in point of law'.

The Pensions Act 2014

31. Section 30 of the Pensions Act 2014 ('the 2014 Act') created a new benefit, bereavement support payment ('BSP'). In all but a few transitional cases (see below) it replaced bereavement payment and bereavement allowance. As Holman J explained in paragraph 26 of *Jackson v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin); [2020] 1 WLR 1441 ('*Jackson*'), the higher rate of BSP replaced WPA. The principal difference between them was that 'WPA was, and still is, capable of providing an income stream for many years…' whereas BSP was 'of relatively short duration'. When section 30 was originally enacted, it provided that a person was entitled to BSP if that person's spouse or civil partner died. It provided for a higher rate to be paid if the applicant had children.

32. Section 30 of the 2014 Act was also amended by the Remedial Order. This was a response to the judgment in *Jackson* which was handed down on 7 February 2020. In that case, as in *McLaughlin*, a challenge was brought by a person who had co-habited, and had children, with the deceased, and had not been a spouse or civil partner. The Remedial Order also amended the provisions about higher rate BSP in line with the changes made to section 39A of the 1992 Act so as to enable a former co-habiting parent to claim BSP.

33. Section 31(5) introduces Schedule 16, which makes 'amendments to do with bereavement support payment'. Paragraphs 8 and 13 of Schedule 16 repeal sections 36 and 39B of the 1992 Act respectively.

34. Section 56(1) provided that the 2014 Act would come into force on such days as the Secretary of State might by order appoint, subject to some more detailed provisions in section 56. Section 56(8) gave the Secretary of State power, by order, to make 'transitional, transitory or saving provision in connection with the coming into force of any provision of' the 2014 Act.

Secondary legislation

Social Security (Claims and Payments) Regulations 1987, 1987 SI No 1968

35. The Social Security (Claims and Payments) Regulations 1987, 1987 SI No 1968 ('the 1987 Regulations') are made under sections 165A and 166(2) of the Social Security Act 1975, section 6(1) of the Child Benefit Act 1975, and sections 21(7), 51(1)(a) to (s), 54(1) and 84(1) of the Social Security Act 1986. They were in force until 5 April 2017. Regulation 2 of the 1987 Regulations defined 'bereavement allowance' as 'an allowance referred to in section 39B of 19 of [the 1992 Act'] and 'bereavement benefit' as 'a benefit referred to in section 20(1)(ea)' of the 1992 Act (see paragraph 22, above).

36. Regulation 19 of the 1987 Regulations prescribed the times for claiming various benefits by reference to columns one and two of Schedule 4, subject to the exceptions provided for in regulation 19. By regulation 19(2) and 19(3)(ga), the time limit for claiming bereavement benefit was three months 'beginning with any day on which, apart from satisfying the condition of making a claim, the claimant was entitled to the benefit concerned', subject to regulation 19(3A) and (3B). By regulation (3A), the time for claiming a bereavement payment within the meaning of section 36 of the 1992 Act is 12 months beginning with 'the day on which, apart from satisfying the condition of making a claim, the claimant is entitled to the benefit concerned'. Regulation 19(3B) provides that 'the time prescribed for claiming a bereavement benefit in respect of the day on which the claimant's spouse or civil partner has died or may be presumed to have died where (a) less than 12 months have elapsed since the day of the death, and (b) the circumstances are as specified in section 3(1)(b) of the Social Security Administration Act 1992 (death is difficult to establish) [see paragraph 27, above] is that day and the period of 12 months immediately following that day if the other conditions of entitlement are satisfied'.

37. Regulation 20 provided that subject to regulations 21-26B, benefit was to be paid 'in accordance with an award as soon as is reasonably practicable after the award has been made'.

The Pensions Act 2014 (Commencement No 10) Order 2017, 2017 SI No 297 ('the 2017 transitional provisions')

38. Article 3(1) of the Pensions Act 2014 (Commencement No 10) Order 2017, 2017 SI No 297 ('the 2017 transitional provisions') provided for the commencement of BSP on 6 April 2017, subject to articles 4 and 5. Article 3(2) provides that subject to articles 3 and 4, section 31(5) and Schedule 16 to, the 2014 Act come into force, to the extent that they were not already in force, on 6 April 2017.

39. Article 4 is headed 'Later commencement for abolition of bereavement payment and bereavement allowance'. Article 4(1) provides that section 31(5) of and Schedule 16 to the 2014 Act 'do not come into force in accordance with article 3(2) for a person to whom' article 4 applies. Article 4 applies to a person who, on 5 April 2017 was (a) entitled to a payment under section 36 or 39B of the 1992 Act, or (b) would have been entitled to such a payment if he had made a claim for it (article 4(2)). Article 4 ceases to apply to a person if (a) he was entitled to the benefit in accordance with paragraph (2)(a) and is no longer entitled to it, or he would have been entitled to a benefit in accordance with paragraph (2)(b) and they would no longer be entitled to that benefit if he made a claim for it. On the date when article 4 ceases to apply to a person, section 31(5) of and Schedule 16 to, the 2014 Act, come into force in relation to him to the extent that they are not already in force (article 4(4)).

40. Article 5 makes further transitional provision of a broadly similar kind, but its force was spent by the end of 12 months from 6 April 2017. There are therefore no people for whom sections 36 and 39B are now in force by virtue of article 5 of the 2017 transitional provisions. It follows that article 5 is not relevant to this appeal.

The legislation relating to civil partnerships and marriage
The Interpretation Act 1978

41. Section 5 of Interpretation Act 1978 ('the 1978 Act') enacts Schedule 1 to the 1978 Act which defines the terms listed in it, 'unless the contrary intention appears'. One such term is 'civil partnership'. That is defined as 'a civil partnership which exists by or under the Civil Partnerships Act 2004 (and any reference to a civil partner is to be read accordingly)'. That definition was inserted by paragraph 59 of Schedule 27 to the Civil Partnerships Act 2004 ('the CPA') with effect from 5 December 2005.

The Civil Partnerships Act 2004 ('the CPA')

42. As originally enacted, section 1(1) of the CPA provided that a civil partnership was 'a relationship between two people of the same sex ('civil partners')'. Section 3(1)(a) provided that two people were not eligible to be civil partners if they were not of the same sex. Section 1 was amended, among other things, by the Civil Partnership (Opposite-sex Couples) Regulations 2019, 2019 SI No 1458, with effect from 2 December 2019 ('the 2019 Regulations'). A civil partnership is now defined as 'a relationship between two people'. The bar on eligibility in section 3(1)(a) has been repealed.

The Marriage (Same Sex Couples) Act 2013

43. Section 1 (1) of the Marriage (Same Sex Couples) Act 2013 ('the 2013 Act') provided that 'Marriage of same sex couples is lawful'.

The arguments

44. Mr Buttler KC started with eight short points.
    i. By making civil partnerships available to homosexual couples, but not to heterosexual couples, sections 1 and 3 of the CPA discriminated between couples on the grounds of their sexual orientation.
    ii. Schedule 2 to the CPA applied that discrimination to social security benefits by means of amendments to the 1992 Act which relied on civil

partnerships as a gateway to benefits such as bereavement benefits. Mr Buttler accepted that this was direct discrimination. He abandoned any reliance on indirect discrimination.

iii. From 6 April 2017, when they were repealed and replaced by the Pensions Act 2014, sections 36 and 39B of the 1992 Act ceased to be relevant to claims made after that date.

iv. Nevertheless, sections 36 and 39B, which discriminated against Ms Kelly, continued in force by virtue of transitional provisions which applied to people who had made a claim before 6 April 2017 but had not received a payment. Those people are proper comparators for Ms Kelly, because, like her, they made a claim in time, but have not yet been paid.

v. *Steinfeld* was a decision about access to civil partnerships. It was not about access to benefits. The declaration of incompatibility in that case related to sections 1 and 3 of the CPA and not to Schedule 24 to the CPA (which inserted the relevant amendments in sections 36 and 39B of the 1992 Act).

vi. When Parliament remedied the discrimination identified in *Steinfeld*, there is no indication that it considered any remedies relating to access to benefits.

vii. The Secretary of State was wrong to argue that any declaration of incompatibility in this case would be the same as the declaration of incompatibility in *Steinfeld*. The declaration in this case was about access to benefits, not about access to civil partnerships, and related to different statutory provisions.

viii. He invited a comparison between this case and *McLaughlin*. By the time of the hearing in the Supreme Court, Parliament had removed the discrimination prospectively, yet the Supreme Court still made a declaration of incompatibility, because the legislation was still in force under transitional provisions. Parliament made a remedial order with retrospective effect. Parliament should be given the same opportunity in this case.

45. There were two relevant benefits: benefit payment and bereavement allowance.

46. Mr Buttler dealt with bereavement allowance first. Five points emerged from the statutory provisions.

i. Bereavement allowance is payable weekly for 52 weeks.

ii. The rate is set by section 39C; it is to be prescribed in regulations. On 6 April 2017, the rate was £112 per week.

iii. A condition of entitlement was that the applicant's spouse or civil partner had died.

iv. The time limit for applying was in regulation 19 of the 1987 Regulations. It was three months from the date of the relevant death, subject to extension in some cases.

47. He also made submissions explaining how bereavement payment worked. It is not necessary to summarise them.

48. He then submitted that the 2017 transitional provisions apply when the relevant death was on or before 6 April 2017. Their effect is that sections 36 and 39B continue to apply

to people in two classes; in short, where the death of the spouse or civil partner has not been discovered, and where a person has made an application, but because of some administrative oversight, the benefit has still not been paid to the applicant. They only cease to apply once those people are 'no longer entitled' to the benefit in question; that is, once the benefit to which they are entitled has been paid to them. Unless and until the benefit is paid, article 4 of the Order will continue to apply to them and they are entitled to rely on a statutory right to be paid. Those people are Ms Kelly's hypothetical comparators. The two hypothetical comparators in each case are entitled to a benefit which has not yet been paid. Ms Kelly applied for the benefits before April 2016 and but for the discrimination, she would have had a subsisting entitlement to payment. In other words, but for the discrimination, sections 36 and 39 would continue to apply to her.

49. On 12 December 2019, the CPA was amended to allow heterosexual couples to enter civil partnerships. Those amendments did not apply to sections 36 and 39B of the 1992 Act as they continued in force under the 2017 transitional provisions.

50. The discrimination occurred on 3 March 2017 when Ms Kelly's claim was refused. No further cases of discrimination could arise after 6 April 2017, because of the effect of the 2014 Act and the 2017 transitional provisions. Mr Buttler submitted, nevertheless, that the fact that discrimination had been remedied prospectively is not a bar to a declaration of incompatibility. He relied on *McLaughlin*. In that case, there was discrimination against unmarried parents. The appellant's claim was refused on 29 January 2014. By the time the appeal reached the Supreme Court, the discrimination in the statutory scheme had been remedied.

51. Mr Buttler accepted that the reasoning of Lord Hobhouse in *Wilson v First County Trust Limited (No 2)* [2003] UKHL 40; [2004] 1 AC 816, though obiter, was both persuasive and correct. If the legislation no longer exists, there is nothing on which a declaration of incompatibility can bite. But legislation exists if it is in force for any purpose. *McLaughlin* shows, further, that a declaration of incompatibility can be made even if no future cases of discrimination can arise. If this court accepted that there was discrimination in breach of article 14, a declaration of incompatibility would be appropriate in this case just as it was in *McLaughlin*. Mr Buttler showed us the remedial order which was made in *McLaughlin*. It had retrospective effect. In a similar way, it was for Parliament to decide how to remedy the discrimination in this case. He accepted that the effects of the discrimination in *McLaughlin* could continue for 20 years into the future after the refusal of the relevant claim.

52. The fact that only a small number of people might benefit from a declaration of incompatibility is not a reason not to make one; see, by analogy, the obiter reasoning in *R (Nicklinson) v Secretary of State for Justice* [2014] UKSC 38; [2015] AC 657 and the reasoning in *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467. The Remedial Order suggested that Parliament might also respond in this case with a retrospective remedy.

53. Mr Buttler then put the claim into the framework of article 14. The claim was within the ambit of Article 1 of Protocol 1 ('A1P1'). The relevant 'other status' was Ms Kelly's sexual orientation.

54. Ms Kelly is in a situation which is analogous to that of those people to whom the 2017 transitional provisions apply, because they all made a claim before April 2017 and all have not been paid. Those to whom the 2017 transitional provisions apply are entitled to payment because they were in civil partnerships. The reason Ms Kelly is not so entitled is because she was not in a civil partnership; and that was due to the discriminatory rule which prevented her from entering a civil partnership. There was an ostensibly neutral criterion (being married or in a civil partnership) which discriminated against heterosexuals. There was an analogy with *James v Eastleigh Borough Council* [1990] 2 AC 751. In that case, state retirement age was used as a proxy for entitlement to free entry to a swimming pool. It was held that that amounted to discrimination against men.

55. The difference in treatment was not a proportionate means of achieving a legitimate aim, for the reasons given in *Steinfeld*.

56. The discrimination in this case was not addressed in *Steinfeld*. Different rights were in issue; article 14 read with article 8 in *Steinfeld*, and article 14 read with A1P1 in this case. The two cases related to provisions in different statutes. *Steinfeld* said nothing about access to benefits. The focus of section 4(1) of the HRA is a particular provision of primary legislation and its incompatibility with a Convention right. It was not suggested that sections 36 of 39A of the 1992 Act should be amended in the process which led to the legislative changes which were made after the decision in *Steinfeld*.

57. Mr Milford pointed out that Mr Buttler's argument on this appeal was not the argument on which Ms Kelly had relied in the UT, but he did not suggest that this court should not consider it. Recognising that he had been put in some difficulty by the evolution of Ms Kelly's arguments, we gave him the opportunity, after the hearing, to lodge further written submissions. He did that, and Mr Buttler replied to them.

58. Mr Milford submitted that the real discrimination at issue in this case, as the Secretary of State and the UT had understood it, was that Ms Kelly could not enter a civil partnership and that, as a result, she could not get the benefits she had claimed. In substance, it was exactly the same complaint as in *Steinfeld*. Parliament had remedied that discrimination, and there was no possible remedy which the court could or should give to Ms Kelly. The complaint about sections 36 and 39B simply did not work. Either it was the same complaint as the complaint about discrimination against cohabitees which the UT had considered and dismissed (a decision which had not been appealed) or it was the same complaint as in *Steinfeld*. There was no third way. The first way of putting the complaint was that Ms Kelly suffered discrimination because she was a cohabitee and could not become a civil partner, though she wanted to. That complaint was dismissed by the UT, both on the grounds that Ms Kelly was not in an analogous position to her comparator, and because if there was any discrimination, the UT found that it was justified. If on the other hand, the complaint was based on the fact that Ms Kelly could not become a civil partner, it was precisely the same as the complaint in *Steinfeld*. That was a complaint that the claimant was heterosexual, and would have wanted to enter a civil partnership, but could not do so. Though nominally a complaint about sections 36 and 39B, it was in substance a complaint about access to civil partnerships, because the meaning of that phrase in those sections depended on the CPA. There was no remaining incompatibility in those sections to deal with.

59. The complaint as argued orally was that Ms Kelly would have liked to have become a civil partner in the past. That was not a complaint about section 36 or section 39B. The true complaint was about the consequences of past discrimination in the CPA. Ms Kelly was seeking to use a declaration of incompatibility as a way of getting the Government to consider whether or not to give damages for past discrimination because she was not able to be a civil partner at the relevant time. That was not an appropriate use of a declaration of incompatibility. Ms Kelly should instead make an application to the ECtHR.

60. The Supreme Court in *Steinfeld* was aware in general terms of the 'serious fiscal disadvantage' of the fact that civil partnerships were not available to heterosexual couples (see paragraphs 13 and 52 of the judgment of Lord Kerr, quoting paragraph 173 of the judgment of Briggs LJ in this court: [2017] EWCA Civ 81; [1981] QB 519).

61. If the complaint was the same as the complaint in *Steinfeld*, there were four reasons why there should be no declaration of incompatibility.

62. First, it is now common ground that the power conferred by section 4(1) is only available in relation to the present effect of legislation. Mr Milford referred to the opinion of Lord Hobhouse in *Wilson*. A declaration of incompatibility was available about the current state of the law, and was not available for a repealed provision. That was consistent with the purpose of a declaration of incompatibility, which was to invite Parliament to reconsider an existing provision. That was also the purpose of the power conferred by section 10.

63. The complaint was not, in substance, a complaint about a provision of current legislation. The CPA changed with effect from 2 December 2019. Section 2(1) of the 2019 Act gave the Secretary of State power by regulations to amend the CPA. That power was to be exercised by 31 December 2019 (section 2(2)). It was exercised by the making of the Civil Partnership (Opposite-sex Couples) Regulations 2019 (2019 SI No 1458). The upshot is that when the definition of 'civil partnership' in the CPA changed, the definition in Schedule 1 to the Interpretation Act meant that it changed, with effect from 2 December 2019, in any other enactment in which that phrase also appeared.

64. It was true that by the time of the decision in *McLaughlin*, the law had been changed, but the old law would 'remain relevant' for deaths before the 10 March 2017 cut-off date for a very long time (see paragraph 44 of the judgment).

65. Second, Ms Kelly did not want any current incompatibility in the legislation to be removed. She did not want a civil partnership; she wanted, instead, to be treated as though she had been in a civil partnership when she made her claim in 2017.

66. Third, in substance this claim was a re-run of *Steinfeld*. A further declaration of incompatibility would achieve nothing more than had already been achieved. It was already clear that the relevant provisions were incompatible with Convention rights between 2014 and 2019. Ms Kelly's remedy, if any, was to make an application to the ECtHR. She did not need a declaration of incompatibility in order to do that.

67. Fourth, the only reason for asking for a declaration of incompatibility was to persuade Parliament to remedy the admitted incompatibility in a different way from the way which

had already been chosen. Even, therefore, if it were open to this court to make a declaration of incompatibility, this would not be an appropriate way to exercise that power. He referred to the prisoners' votes case, *R (Chester) v Secretary of State for Justice* [2010] EWCA Civ 1439; [2011] 1 WLR 1436 (in this court) and [2013] UKSC 63; [2014] AC 271. *Chester* was a fortiori this case; if it was not appropriate to make a second declaration of incompatibility after a first declaration of incompatibility which had been followed by no remedial action, it could not be appropriate to make a second declaration of incompatibility when the first such declaration had been followed by remedial action.

68. In his first note after the hearing, Mr Milford submitted that the 2017 transitional provisions did not keep sections 36 and 39B in force because the period for which a person was 'entitled' to either benefit was not extended as a result of the failure to pay the benefit. That question was separate from the question whether the Secretary of State would still be obliged to pay the benefit to a person who had met the entitlement conditions and had made a valid claim. That meant that the provisions could only be in force now in the case of an as-yet undiscovered death, which was not a remotely likely prospect. Thus the period of entitlement was not extended by the 2017 transitional provisions. Regulation 19 of the 1987 Regulations (see paragraph 36, above) nevertheless permitted the payment of any benefit after that period of entitlement had lapsed.

69. In his first note in reply, Mr Buttler contended that there were two flaws in Mr Milford's analysis. First, it was contrary to the plain language of article 4 of the 2017 transitional provisions. 'Entitled' means 'entitled'. Second, the entitlement to a bereavement payment is a one-off entitlement. Even if Mr Milford's argument worked for bereavement allowance, it could not work for bereavement payment. The only sensible reading was that any entitlement continued until the claimant received a payment. The Secretary of State did not apparently dispute that sections 36 and 39B were still in force in relation to undiscovered deaths.

70. Mr Milford told us that the Secretary of State was not aware of anyone to whom either limb of the 2017 transitional provisions applied. It was vanishingly unlikely that there was anyone whose partner had died before 6 April 2017 and who still did not know whether or not he or she had died. If sections 36 and 39B are still in force Mr Milford submitted that it was in force in a 'completely theoretical' way. It could in theory be in force for ever, but it was necessary to have a practical approach.

71. In any event, it was not appropriate to compare Ms Kelly with a person in such a position, or a person who was subject to an administrative error lasting seven years. The reason for non-payment in each case was a material difference. Ms Kelly was not paid because of the legal provisions which were in force at the material time, and it was not the purpose of the HRA to undo that effect. The only correct comparator for this purpose was a homosexual who was in a civil partnership and was able to claim the benefits for that reason. That was, in effect, the comparison in *Steinfeld*. The argument did not work, because Ms Kelly could not point to similar circumstances, a different 'status' and different treatment.

72. Further, even if sections 36 and 39B were still in force, any remaining incompatibility was removed in 2019: there was, by virtue of section 1 of the 1978 Act, nothing to which a declaration of incompatibility could attach. Ms Kelly's real complaint was not about

sections 36 and 39B but was about the consequences of not being able to be in a civil partnership at the relevant time.

73. *McLaughlin* was distinguishable. Section 39A of the 1992 Act was still in force because of the length of time for which the benefit is payable (up to 18 years) (as explained in paragraphs 43 and 44 of the judgment of the Supreme Court).

74. In his reply Mr Buttler agreed that this case was about *Steinfeld* discrimination. The historic incompatibility of sections 36 and 39B was 'baked in' by the 2017 transitional provisions. That was not resolved by prospective amendments in 2019. The discrimination was not touched by those amendments.

75. He accepted that if, in response to *Steinfeld*, Parliament had considered the position of those affected by the 2017 transitional provisions, it might be inappropriate to make a declaration of incompatibility, because it would be pointless. But it was clear from paragraph 62 of 'Implementing Opposite-Sex Civil Partnerships: Next Steps' (July 2019) that the Government, and therefore Parliament, had not considered the position before 6 April 2017 for any benefit. If a declaration of incompatibility were made, Parliament might decide to do nothing: but that decision was for Parliament and not for the courts.

76. There was current discrimination between a civil partner who made a claim before 4 April 2017 and who had not been paid, and Ms Kelly, who had made a claim, and had not been paid because of the discrimination on grounds of sexuality between her and the comparator. He accepted that 'it was becoming less likely' that there were still any comparators (that is, people to whom the 2017 transitional provisions applied. The reason why those provisions did not apply to Ms Kelly was the breach of article 14.

Discussion

77. There are two main issues.
    i. Is there discrimination for the purposes of article 14 between Ms Kelly and her proposed comparator?
    ii. If so, is a declaration of incompatibility about sections 36 and 39B of the 1992 Act appropriate?

Discrimination

78. The parties agree that four questions are raised by an article 14 claim (see, for example, paragraph 15 of *McLaughlin*). As Baroness Hale said in that paragraph, 'these are not rigidly compartmentalised'.
    i. Do the circumstances fall within the ambit of a Convention right?
    ii. Has there been a difference in treatment between two persons who are in an analogous situation?
    iii. Is that difference of treatment on the ground of one of the characteristics listed in article 14, or 'other status'?
    iv. Is there an objective justification for the difference in treatment?

79. The circumstances of this case are clearly within the ambit of A1P1, and also within the ambit of article 8. I do not consider that Ms Kelly is in a situation which is analogous with that of the two comparators drawn from article 4(2) of the 2017 transitional provisions. First, she had made a claim and knew that it had been refused, unlike the

person to whom article 4(2)(a) applies. Second, she knew when her partner had died, unlike the potential claimant to whom article 4(2)(b) applies. Moreover, unlike both those types of claimant, she had a statutory right of appeal against the refusal of her claim, which she exercised.

80. I accept that Ms Kelly and those two types of claimant have been treated differently, because sections 36 and 39B have been kept in force for them and not for her. I do not consider that the real reason for the difference in treatment is that those claimants are homosexual and Ms Kelly is heterosexual. The difference in treatment arises because of their different circumstances. During the period after the repeal of sections 36 and 39B for most purposes, there was uncertainty for the two comparators, for different reasons, about whether they could make a claim at all, or about whether the claim they had made would be paid. There was and is no such uncertainty for Ms Kelly. She made a timely claim, and knew about the fate of that claim, before the provisions were almost entirely repealed.

81. In any event, that difference in treatment is justified because, unlike Ms Kelly, those two types of claimant either have not made a claim because they did not know that they could make a claim, or have made a claim, and do not yet know its outcome. In both those cases, there is a cogent objective justification for continuing the statutory provisions in force, so that those claimants can, either, make a claim and receive a decision on it (once they realise that their partner has died) or can eventually receive a decision on their claim, once the Secretary of State gets round to dealing with it. That reasoning does not apply to Ms Kelly, because she has made a claim, has received a decision on it, and has exercised her right of appeal.

Should this court exercise its discretion to make a declaration of incompatibility?

82. If I am wrong, and there is discrimination against Ms Kelly, and it is not justified, I nevertheless consider that it would not be appropriate for this court to exercise its power to make a declaration of incompatibility. There are three main reasons.

83. First, Ms Kelly's claim for bereavement benefit was refused because she was not in a civil partnership with her partner. They could not enter a civil partnership at the relevant time because they were a heterosexual couple. I will assume that it is likely that had they been able to enter a civil partnership, they would have done. The complaint (that her claim was refused) was caused by the unlawful discrimination identified in *Steinfeld*. Had that discrimination been remedied before the death of her partner, she would have received the benefits which she claimed. I therefore accept Mr Milford's submission that the real substance of complaint in this case is the discrimination which was identified by the declaration of incompatibility in *Steinfeld*. Ms Kelly suffered discrimination contrary to article 14 when her claim was refused in circumstances where a claim by her obvious comparator, the surviving homosexual partner of a dead civil partner, would have succeeded. Moreover, that discrimination was in the past. I also accept that any relevant discrimination has now been remedied by the amendments made to the CPA since *Steinfeld*, in response to the declaration of incompatibility in that case. Those amendments, through the medium of Schedule 1 to the 1978 Act, have fed through into the current legislation. To make a further declaration of incompatibility in relation to two statutory provisions which are clinging onto the statute book, if at all, by the slenderest of threads, would not be an appropriate use of the power, when, in substance, Parliament

and the Secretary of State are aware of the real past incompatibility which underlies this complaint, and have remedied it.

84. Second, if the reasons why I would have held that any discrimination is justified somehow do not amount to justification they are, nevertheless, relevant to the exercise of the section 4(1) power. The discrimination identified in *McLaughlin* and in *Jackson* was discrimination within the ambit of article 8, which had an effect on children, who were not responsible for the nature of their parents' relationship, and the issue concerned co-habitees, not those who could not, but would have wanted to, enter a civil partnership. That discrimination was not, therefore, identical to the real discrimination in this case (that is, the *Steinfeld* discrimination). It was, nevertheless, analogous, and had analogous, but more wide-ranging effects. The Remedial Order was an opportunity to make legislative changes with retrospective effect in such an analogous case. The principal extent of the retrospective provision was, first, as Mr Buttler pointed out, that it applied to deaths before 6 April 2017, and that it applied to benefits which would have been paid from 30 August 2018, that is, the date of the declaration of incompatibility in *McLaughlin*. So Parliament has already considered, in broadly analogous circumstances, whether or not, and if so, to what extent, to give a retrospective remedy for discrimination which is similar to the past discrimination suffered by Ms Kelly. It was prepared to go no further back, for payment purposes, than the date of the declaration of incompatibility. That being so, I do not consider it remotely likely, that if a declaration of incompatibility were made in this case, that the Government or Parliament would respond with a legislative remedy which would have retrospective effect of the kind which Ms Kelly seeks. Having read, in draft, the concurring judgment of Underhill LJ, I make clear that he is right about the way in which this conclusion is to be understood (see paragraph 95, below).

85. That point is reinforced by sections 68 and 69 of the 1992 Act (now repealed) and by section 27 of the SSAA. This is a statutory context in which Parliament has made a deliberate choice that a determination by a court or tribunal that a decision in an individual claimant's case was erroneous in point of law should not have any retrospective effect, either, on his past entitlement to benefits, or on the past entitlements of any other claimant. The refusal of Ms Kelly's claim was not, of course, 'erroneous in point of law'. But section 27 is part of the statutory context. If, in this statutory scheme, an acknowledged legal error does not lead to a retrospective correction of benefits, I do not consider it remotely likely that a declaration of incompatibility now would prompt the relevant authority to give a retrospective remedy in relation to deaths before 6 April 2017, or Ms Kelly's claim. Such a remedy would not cohere with the statutory scheme.

86. The third point is connected with the second. A premise of ground 1 is that Ms Kelly is entitled to what she describes as an 'effective remedy' for the past discrimination which she has suffered. In substance, the discrimination for which she wants a remedy is the real, past, discrimination in this case, rather than the ghostly theoretical discrimination on which she now relies as the basis of her application for a declaration of incompatibility. I do not consider that there is any support in the HRA for the contention that Ms Kelly is entitled to 'an effective remedy', in the sense in which she uses that phrase, whether for that past discrimination, or for the faint current version on which she now relies. That being so, I do not consider it likely that a declaration of incompatibility would prompt a legislative response of the kind which Ms Kelly seeks. It follows that

there would be no purpose in making one. I repeat the last sentence of paragraph 84, above.

87. There are two reasons.

i. Article 13, the right to an effective remedy, is not one of the 'Convention rights' for the purposes of the HRA.

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

88. One evident purpose of the HRA is to encourage those who construe legislation, where possible, to construe it compatibly with Convention rights (section 3). A second evident purpose is to enable the court, in appropriate cases, to bring a legislative incompatibility to the attention of Parliament and of the executive (section 4). Another is to encourage public authorities not to act incompatibly with Convention rights (section 6).

89. But it is clear from section 4, and from its relationship with sections 6 and 10, that Parliament or the executive ultimately decides what legislative consequences should flow from a declaration of incompatibility. So even when a declaration has been made, it does not affect the continuing validity of the relevant legislation and does not even bind the parties to it (section 4(6)). That means that even after a declaration of incompatibility, the relevant public authority remains bound by the incompatible legislation, and does not act unlawfully if it continues to apply that legislation. Moreover, section 6(6) makes it clear that it is not unlawful either, to fail to make proposals for legislation, or to fail to make any primary legislation or a remedial order.

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

91. An important feature of this case is that Ms Kelly is entitled to the remedies conferred by the HRA, but only to those remedies. She did not claim HRA damages in her appeal, and it is by no means clear that, even if she had, damages would have been necessary to give her 'just satisfaction' beyond that provided by a declaration, or that they would have been available, even if they had been necessary. Our attention was not drawn to any relevant rule made under section 7(11) in the context of social security which would have enabled the F-tT to award Ms Kelly compensation for a past breach of her Convention rights. The

reason why, no doubt, is that in this statutory context (see paragraphs 28 and 30, above), it is inconceivable that such a rule would have been made. In the light of that carefully constructed remedial scheme, it would not be appropriate for this court to make a declaration of incompatibility as a (vanishingly tiny) back door to compensation for past discrimination when Ms Kelly has not claimed any such compensation and when, in any event, she would not have been entitled to it if she had claimed it.

Conclusion

92. For those reasons, I have reached two conclusions.
    i. I do not consider that sections 36 and 39B, to the ghostly extent to which they are still in force, discriminate against Ms Kelly contrary to article 14 read with A1P1 or with article 8.
    ii. If for any reason that conclusion is wrong, I do not consider that it would be appropriate for this court to exercise its power to make a declaration of incompatibility.

Lady Justice King

93. I agree.

Lord Justice Underhill

94. The difficulty faced by Ms Kelly in seeking a declaration of incompatibility on the basis of the UT's decision that the unavailability of opposite-sex civil partnerships gave rise to a breach of her article 14 rights is that that state of affairs has already been the subject of such a declaration by the Supreme Court in *Steinfeld.* Mr Buttler sought to circumvent that difficulty by relying on a different characterisation of the discrimination which she suffered, focusing on the effect of sections 36 and 39B of the 1992 Act. For the reasons given by Elisabeth Laing LJ at paras. 79-81 above, I agree that those terms gave rise to no breach of Ms Kelly's article 14 rights. It follows that this appeal falls to be dismissed.

95. I also agree with Elisabeth Laing LJ that even if the terms of sections 36 and 39B of the 1992 Act did give rise to a breach of Ms Kelly's rights, in the particular circumstances of this case it would not be appropriate to make a declaration of incompatibility under section 4. My reasons broadly correspond to hers, but I will express them shortly in my own words. Although we are proceeding on the assumption that sections 36 and 39B can be analysed as giving rise to a distinct breach of article 14, that breach is a consequence of the primary breach consisting of the unavailability of civil partnerships for opposite-sex couples. Parliament has already considered, in response to the declaration of incompatibility made in *Steinfeld*, what changes to the law should be made to remedy that breach; and it has done so, unsurprisingly in view of the scheme of the 1998 Act, without providing for any compensation for those affected by its past consequential impacts. I do not believe that it would be appropriate for this Court to make a declaration the only purpose of which could be to encourage the Government and Parliament to reconsider that decision. I prefer to express it that way rather than, as Elisabeth Laing LJ does at paras. 84 and 86, in terms of whether they would be likely to respond to any such encouragement. Though what she says could not be misunderstood in context, it is worth making clear that if a court believes that a declaration should otherwise be made it should not be deterred by a belief that the Government or Parliament is unlikely to do anything in response.