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**La Corte Suprema del Regno Unito ritiene che l'obbligo interpretativo di cui alla sezione 3 dell'Human Rights Act 1998 non consenta ai Tribunali di leggere un'eccezione alla condizione del contributo nella legge sulle Pensioni del 2014, poiché i Tribunali devono rispettare i confini tra legalità e processo politico e non sostituire il proprio punto di vista a quello del Parlamento.**

**(Supreme Court of the United Kingdom, 20 Novembre 2025, 42)**

Contesto del ricorso

Il presente ricorso riguarda una richiesta di indennità di sostegno in caso di lutto ("BSP"), una prestazione previdenziale non soggetta a verifica dei mezzi finanziari che fornisce un aiuto economico alle persone il cui coniuge o partner è deceduto. La BSP sarà corrisposta al coniuge o al partner superstite solo se sono soddisfatte le condizioni specificate nella legge sulle pensioni del 2014 ("la legge del 2014"). Tra queste figura la "condizione contributiva" descritta nelle sezioni 30 e 31, che richiede che il coniuge o il partner deceduto abbia versato i relativi contributi previdenziali per almeno un anno fiscale durante la sua vita lavorativa.

Il convenuto, il sig. Jwanczuk, ha presentato domanda di BSP a seguito del decesso della moglie, Suzanne Jwanczuk. La sig.ra Jwanczuk soffriva di una malattia degenerativa progressiva che la rendeva gravemente disabile. Durante la sua vita, la sig.ra Jwanczuk non ha mai svolto un'attività lavorativa e non ha mai versato i relativi contributi previdenziali. La richiesta di BSP del sig. Jwanczuk è stata quindi respinta perché non era soddisfatta la condizione contributiva. Il rifiuto è stato confermato in una decisione di riesame.

Il sig. Jwanczuk ha impugnato tale decisione mediante ricorso giurisdizionale. Egli ha sostenuto che sua moglie non era in grado di lavorare a causa della sua disabilità e che l'applicazione della condizione contributiva in tali circostanze costituiva una discriminazione illegittima in violazione dell'articolo 14, in combinato disposto con l'articolo 1 del Primo Protocollo ("A1P1") alla Convenzione europea dei diritti dell'uomo ("la Convenzione"). Il sig. Jwanczuk si è basato sulla decisione nella causa O'Donnell contro Department for Communities [2020] NICA 36 ("O'Donnell"). In tale causa, la Corte d'appello dell'Irlanda del Nord ha ritenuto che la condizione contributiva prevista dalla legislazione pensionistica dell'Irlanda del Nord costituisse una discriminazione illegittima nei confronti del coniuge o del partner superstite di una persona deceduta, che non era in grado di lavorare a causa della propria disabilità. Le disposizioni legislative pertinenti dell'Irlanda del Nord erano sostanzialmente identiche a quelle contenute negli articoli 30 e 31 della legge del 2014.

La richiesta del sig. Jwanczuk è stata accolta dall'Alta Corte e dalla Corte d'appello dell'Inghilterra e del Galles. Entrambe le corti hanno ritenuto di dover seguire la sentenza O'Donnell, a meno che non fosse chiaramente errata o vi fossero motivi sufficientemente convincenti per discostarsene. Il ricorso del Segretario di Stato alla Corte Suprema solleva quindi due questioni principali. In primo luogo, come dovrebbero trattare le Corti d'appello di ciascuna giurisdizione del Regno Unito le precedenti decisioni dell'altra sull'effetto di una legislazione simile o sostanzialmente

identica. In secondo luogo, se la condizione del contributo costituisce una discriminazione illegittima nei confronti del sig. Jwanczuk.

Sentenza

La Corte Suprema accoglie all'unanimità il ricorso del Segretario di Stato. Lord Reed e Lady Simler emettono una sentenza congiunta, con cui concordano gli altri membri della Corte.

Motivi della sentenza

**Questione 1**: In che modo i tribunali d'appello di ciascuna giurisdizione del Regno Unito devono trattare le precedenti decisioni degli altri tribunali?

La Corte Suprema ritiene che la risposta a questa domanda sia regolata da norme di prassi basate sulla cortesia e sul buon senso, e non dal diritto dei precedenti [59]-[61], [92]. Ciò significa che le decisioni di qualsiasi Corte d'appello dell'Inghilterra e del Galles, della Scozia e dell'Irlanda del Nord dovrebbero essere trattate come autorità persuasiva quando una questione giuridica simile si presenta in una delle altre giurisdizioni del Regno Unito [61], [71], [100]. Tuttavia, il peso da attribuire a tali decisioni dipende da una serie di fattori e comporta l'esercizio del giudizio [61], [93].

I tribunali hanno adottato un approccio rigoroso in relazione alle decisioni riguardanti l'interpretazione della legislazione fiscale. Ciò riflette le caratteristiche particolari della legislazione fiscale, in particolare l'importanza costituzionale ed economica dell'uniformità in tutto il Regno Unito [72]-[77], [96]. L'approccio alle decisioni relative all'interpretazione della legislazione su questioni diverse dalla fiscalità non è così rigido. Le Corti d'appello del Regno Unito dovrebbero trattare le decisioni reciproche con grande rispetto, poiché non è auspicabile che vi siano decisioni contrastanti sull'interpretazione di disposizioni che dovrebbero essere applicate allo stesso modo in più di una giurisdizione del Regno Unito [100].

Tuttavia, le Corti d'appello non sono tenute a seguire decisioni che ritengono errate [101]. Sebbene la coerenza tra le giurisdizioni del Regno Unito sia importante, è ancora più importante che le disposizioni di legge siano interpretate correttamente [94]. Inoltre, l'importanza pratica di un'interpretazione coerente dipende in una certa misura dalla natura della disposizione in questione [95]. Le Corti d'appello non sono tenute a individuare una ragione convincente o circostanze eccezionali per giustificare una deroga alla precedente decisione di un'altra corte d'appello del Regno Unito. Piuttosto, dovrebbero spiegare chiaramente perché ritengono errata la precedente decisione, indicare quella che ritengono essere la decisione corretta e concedere l'autorizzazione a ricorrere in appello alla Corte Suprema, in modo che la divergenza di opinioni possa essere risolta senza indebiti ritardi [101].

Nel caso in esame, la Corte d'appello dell'Inghilterra e del Galles avrebbe dovuto discostarsi dalla decisione nella causa O'Donnell se la riteneva errata. In effetti, la Corte d'appello aveva buoni motivi per farlo. In primo luogo, il Segretario di Stato ha scelto di non modificare la politica BSP per l'Inghilterra e il Galles alla luce della decisione nella causa O'Donnell, indicando che la coerenza non era considerata una questione di importanza pratica prevalente. In secondo luogo, la Corte d'appello dell'Inghilterra e del Galles poteva avvalersi della sentenza della Corte suprema nella causa R (su richiesta di SC) contro il Segretario di Stato per il lavoro e le pensioni

[2021] UKSC 26, che invece non era ancora stata emessa al momento della decisione nella causa O'Donnell. In terzo luogo, il rifiuto di seguire la sentenza O'Donnell non avrebbe causato gravi difficoltà; infatti, avrebbe mantenuto lo status quo [102]-[105].

**Questione 2:** La condizione relativa al contributo costituisce una discriminazione illegittima nei confronti del sig. Jwanczuk, in violazione dell'articolo 14 in combinato disposto con l'articolo 1 del Protocollo aggiuntivo alla Convenzione?

L'articolo 14 richiede che i diritti sanciti dalla Convenzione siano garantiti senza discriminazioni illegittime basate su «sesso, razza, colore, lingua, religione, opinioni politiche o di altro genere, origine nazionale o sociale, appartenenza a una minoranza nazionale, proprietà, nascita o altra condizione» [25]. La Corte Suprema conclude che il sig. Jwanczuk ha «altra condizione» per i seguenti motivi.

In primo luogo, la disabilità è riconosciuta come una «altra condizione» rilevante. La Corte europea dei diritti dell'uomo («la Corte europea») ha sottolineato la necessità di prevenire la discriminazione nei confronti delle persone con disabilità e di promuovere la loro piena partecipazione alla società. Infatti, la disabilità è stata spesso trattata come un motivo "sospetto" di discriminazione, che richiede un esame particolarmente rigoroso delle ragioni addotte per giustificare una differenza di trattamento [106]-[108]. In secondo luogo, la disabilità è stata un fattore determinante nel rifiuto del BSP al sig. Jwanczuk, che era associato alla sig.ra Jwanczuk attraverso il suo matrimonio con lei. La discriminazione associativa è stata da tempo riconosciuta in questo contesto [111]-[112].

In terzo luogo, la Corte suprema respinge l'argomentazione del Segretario di Stato secondo cui lo status del sig. Jwanczuk è troppo soggetto a cambiamenti per poter beneficiare dell'articolo 14 [113]-[117]. Infine, la Corte suprema è convinta che lo status richiesto sarebbe riconosciuto dalla Corte europea e che non vi siano obiezioni di principio o costituzionali al riguardo [118].

Il Segretario di Stato riconosce giustamente che, in linea di principio, la decisione di rifiutare il BSP rientra nell'ambito di applicazione dell'articolo A1P1, che tutela il diritto al pacifico godimento dei beni. Anche le prestazioni previdenziali non contributive possono essere considerate beni ai fini del presente articolo [28], [119].

Con il rifiuto del BSP, il sig. Jwanczuk è stato trattato allo stesso modo di qualsiasi altro vedovo con un coniuge deceduto che non ha versato contributi previdenziali. Egli denuncia una discriminazione per il mancato trattamento differenziato della sua situazione a causa della disabilità della moglie deceduta. Una violazione dell'articolo 14 può verificarsi quando, senza una giustificazione sufficiente, non si tratta in modo differenziato persone che si trovano in situazioni materialmente diverse [119].

In questo caso, la Corte Suprema conclude che la mancata eccezione alla condizione contributiva può essere giustificata, applicando il criterio stabilito nella causa Bank Mellat contro HM Treasury (n. 2) [2013] UKSC 39 [121]. La condizione contributiva ha tre obiettivi, vale a dire: (i) incoraggiare le persone a lavorare per versare i contributi necessari per ottenere prestazioni contributive come il BSP, riducendo lo stigma legato alla richiesta di prestazioni; (ii) semplificare il sistema previdenziale per ridurre i costi amministrativi e la complessità; e (iii) garantire una maggiore certezza affinché gli individui comprendano a cosa hanno diritto e siano in grado di pianificare il loro futuro finanziario [128]-[134], [157].

Tutti e tre questi obiettivi sono legittimi e razionalmente connessi all'imposizione della condizione contributiva, che è giustificata e garantisce un giusto equilibrio tra i diritti delle persone interessate dalla misura e gli interessi della collettività nel suo complesso [137]. Al Parlamento dovrebbe essere concesso un ampio margine di discrezionalità in casi come questo, che riguardano scelte politiche relative all'assegnazione di risorse pubbliche scarse. Si può ritenere che il Parlamento abbia scelto di non prevedere un'eccezione per coloro che, a causa della loro incapacità lavorativa, non sono in grado di soddisfare la condizione del contributo. Tale decisione è stata frutto di un giudizio politico e i tribunali dovrebbero essere molto cauti nel sostituire il proprio punto di vista a quello del Parlamento [138]-[153].

La conclusione della Corte Suprema secondo cui la condizione del contributo è giustificata rende accademica la questione del rimedio. Per completezza, la Corte ritiene tuttavia che l'obbligo interpretativo di cui alla sezione 3 dell'Human Rights Act 1998 non consenta ai tribunali di leggere un'eccezione alla condizione del contributo nella legge del 2014 [154]-[159].

Di conseguenza, la Corte Suprema accoglie il ricorso del Segretario di Stato. Il sig. Jwanczuk non ha diritto al BSP perché non soddisfa il requisito contributivo. Questo risultato può sembrare severo, e la Corte Suprema non sottovaluta la vulnerabilità delle persone che si trovano nella posizione della sig.ra Jwanczuk né le difficoltà che devono affrontare le loro famiglie. Tuttavia, i tribunali devono rispettare i confini tra legalità e processo politico [140], [160].

I riferimenti tra parentesi quadre rimandano ai paragrafi della sentenza.

***


**Michaelmas Term**
**[2025] UKSC 42**

*On appeal from: [2023] EWCA Civ 1156*

**JUDGMENT**

**R (on the application of Jwanczuk) (Respondent) *v* Secretary of State for Work and Pensions (Appellant)**

before

**Lord Reed, President Lord Lloyd-Jones Lady Rose**

**Lord Richards Lady Simler**

**JUDGMENT GIVEN ON**

**20 November 2025**

**Heard on 11 and 12 March 2025**

*Appellant*

Sir James Eadie KC
Zoe Gannon

(Instructed by Government Legal Department)

*Respondent* Ben
Jaffey KC Tom
Royston

(Instructed by Public Law Project)

**LORD REED AND LADY SIMLER (with whom Lord Lloyd-Jones, Lady Rose and Lord Richards agree):**

## 1. Introduction

1. There are two main issues raised by this appeal. The first concerns the lawfulness of a condition imposed for receipt of a Bereavement Support Payment ("BSP") by the Pensions Act 2014 ("the 2014 Act"). BSP is a non-means-tested contributory benefit directed at assisting with additional expenditure typically associated with a spouse or partner's bereavement. It is payable to the surviving spouse or partner of a person who dies on or after 6 April 2017 but only if "for at least one tax year during the deceased's working life … he or she actually paid" relevant national insurance contributions. We refer to this as "the contribution condition" as defined by section 31(1) of the 2014 Act.

2. The second issue raises an important constitutional question as to the approach of the senior courts (the High Court and the Court of Appeal) of England and Wales to decisions of the Northern Ireland Court of Appeal (and vice versa), on an identical question about the meaning and effect of United Kingdom legislation that applies in both jurisdictions, or legislation which is distinct but in identical terms. It arises because the Northern Ireland Court of Appeal held in an earlier case that the contribution condition in the equivalent Northern Irish provision for BSP unlawfully discriminated against the surviving spouse or partner of a person who through disability was unable to work throughout his or her working life and thereby satisfy the contribution condition; and the lower courts in this case concluded that they should not depart from that decision. Though resolution of this second issue has no practical effect on this court's approach to the substantive issues raised by the appeal, it is important to set the correct approach for those courts to take. There is no doubt that decisions of courts of co-ordinate jurisdiction should be accorded great respect in this situation, but the question is whether the threshold set by the Court of Appeal in this case (the decision of the other appellate court must be clearly wrong or there must be compelling reasons to depart from it in an exceptional case) is too high.

3. The respondent to this appeal is Daniel Jwanczuk who was born in January 1977. His wife, Suzanne Jwanczuk, known as Suzzi, was born in 1974 and had a progressive degenerative condition called Ullrich congenital muscular dystrophy that meant she was severely disabled. She and the respondent had known each other since they were children. They fell in love and started living together as young adults. They married in 2005. Although Mrs Jwanczuk had hopes of going into paid employment, at least in the earlier stages of her illness, she never did so. The respondent cared for her until her death on 20 November 2020, when she was just 45 years old. His witness statement describes their relationship and her courageous struggle to make the most of her life despite her disability.

4. Following Mrs Jwanczuk's death, which was devastating in terms of its personal impact on the respondent, and had a serious financial impact on him because the household no longer received her incapacity benefit and he no longer received a carer's allowance, the respondent applied for but was refused BSP by letter dated 8 December 2020. He met the conditions for entitlement to BSP other than the contribution condition in section 31(1) of the 2014 Act because, during her working life, Mrs Jwanczuk was never in employment or self-employment and never paid any relevant national insurance contributions. Mrs Jwanczuk was in receipt of incapacity type benefits and the respondent's evidence is that she wanted to work but never could because of her disability. That refusal was maintained in a reconsideration decision dated 6 October 2021. It meant that the respondent did not receive BSP in the total amount of £4,300.

5. The factual question whether Mrs Jwanczuk was unable to work throughout her working life because of her disability has not been decided, and that issue will be resolved, if necessary, in the First-tier Tribunal (where an appeal is presently stayed).

6. These proceedings (challenging the lawfulness of the refusal of BSP in the respondent's case) raise the question whether the application of the contribution condition unlawfully discriminates against him, contrary to article 14 read with article 1 of the First Protocol ("A1P1") to the European Convention on Human Rights ("the Convention") and if so, whether it is possible to read the 2014 Act in a way that disapplies the contribution condition. The respondent's case is that applying the contribution condition in his case involves treating Mrs Jwanczuk (and the respondent by association) in the same way as persons who are not severely disabled and simply chose never to work or make national insurance contributions. Unlike those others, Mrs Jwanczuk had no such choice by virtue of her severe disability and that should reasonably have been accommodated by making an exception to the contribution condition in her case. An exception of this kind can be read into the legislation, disapplying the contribution condition in circumstances like these.

7. Both courts below accepted the respondent's case. In doing so Kerr J in the High Court ([2022] EWHC 2298 (Admin); [2023] 1 WLR 711) followed the decision of the Northern Ireland Court of Appeal (Morgan LCJ, Stephens LJ and O'Hara J) in *O'Donnell v Department for Communities* [2020] NICA 36; [2021] NI 490 ("*O'Donnell*"). The Northern Ireland Court of Appeal held that the contribution condition in section 30 of the Pensions Act (Northern Ireland) 2015 ("PANI 2015") discriminated against the surviving spouse or partner of a person who through disability was unable to work throughout his or her working life – this was indirect associative discrimination – and that discrimination could not be justified. It held however that section 30(1) of the PANI 2015 could be read in a Convention-compliant way by treating the contribution condition as met if the deceased was unable to comply with it throughout her working life due to disability.

8. On appeal from Kerr J in this case, the Court of Appeal ([2023] EWCA Civ 1156; [2024] KB 275) considered that it should follow *O'Donnell* unless it was clearly wrong or a sufficiently compelling reason was shown for departing from it. On that basis, and despite expressing doubts about certain aspects of the decision, the Court of Appeal did not express a concluded view on the arguments of the Secretary of State in relation to questions of justification and compatibility because it did not believe that the case came close to being a case of the exceptional kind where it would be right to depart from *O'Donnell*.

9. This is an appeal against that decision with permission granted by the Supreme Court.

## 2. The grounds of appeal

10. The Secretary of State for Work and Pensions ("the Secretary of State") advances four grounds of appeal. The first ground contends that the Court of Appeal should have departed from *O'Donnell* if, on its own analysis of the evidence and arguments, it considered that the contribution condition was compatible with the Convention. As we have said, although academic in this court, this ground raises an important question of constitutional principle.

11. The remaining grounds concern the lawfulness of the contribution condition and any remedy.

12. Ground two challenges the Court of Appeal's decision that the claimed status of the respondent, as a surviving spouse of a deceased partner who was unable to work during her whole working life as a result of her disability, was a valid "other status" for the purposes of a discrimination claim under article 14.

13. Ground three concerns the question of justification of the contribution condition and the intensity of the scrutiny to be applied when deciding that question. The Secretary of State contends that the correct test, recognising the respect due to Parliament's legislative judgements in this context, is whether the scheme was manifestly without reasonable foundation. Applying that test, the scheme reflects Parliament's legislative policy judgement that BSP should only be available to the spouses of those who have actually paid national insurance contributions. This rewards work. It sets a bright line creating legal certainty and a workable rule. It is not manifestly without reasonable foundation.

14. Ground four, if it arises, concerns a challenge to the decision that the appropriate remedy for the alleged unlawfully discriminatory treatment in this case was to read down

section 31(1) of the 2014 Act relying on section 3 of the Human Rights Act 1998 ("the HRA"). The Secretary of State contends that if the legislation is incompatible with article 14, the appropriate remedy is a declaration of incompatibility under section 4 of the HRA: reading in words that create a separate exception to grant the benefit to those who did not work, goes against the grain of the legislation and the choice of how to rectify any incompatibility should have been left to Parliament.

## 3. The legislative context

*(i) Bereavement Support Payment (BSP)*

15. BSP was introduced in Great Britain by the 2014 Act. In Northern Ireland the equivalent benefit was introduced by the Northern Ireland Assembly in the PANI 2015 (classified as subordinate legislation by the HRA).

16. It is important to note that the purpose of BSP is not to provide support to the carers of disabled individuals, nor is it intended to meet the basic needs of the spouses, civil partners or partners of the deceased. Support with living costs following bereavement is provided through other social security benefits such as contributory Jobseeker's Allowance, Employment and Support Allowance, Universal Credit, Child Benefit, or Housing Benefit, depending on the circumstances.

17. The relevant provisions of the 2014 Act provide so far as material as follows: "**30**

> **Bereavement support payment**
>
> (1) A person is entitled to a benefit called bereavement support payment if – (a) the person's spouse, civil partner or cohabiting partner dies, (aa) … (b) the person is under pensionable age when the spouse, civil partner or cohabiting partner dies, (c) the person is ordinarily resident in Great Britain … when the spouse, civil partner or cohabiting partner dies, and (d) the contribution condition is met (see section 31). …
>
> (2) The Secretary of State must by regulations specify – (a) the rate of the benefit, and (b) the period for which it is payable.
> …"

"**31 Bereavement support payment: contribution condition and amendments**

(1) For the purposes of section 30(1)(d) the contribution condition is that, for at least one tax year during the deceased's working life –

(a) he or she actually paid Class 1 or Class 2 national insurance contributions, and (b) those contributions give rise to an earnings factor (or total earnings factors) equal to or greater than 25 times the lower earnings limit for the tax year.

(2) For earnings factors, see sections 22 and 23 of the Social Security Contributions and Benefits Act 1992.

(3) For the purposes of section 30(1)(d) the contribution condition is to be treated as met if the deceased was an employed earner and died as a result of –

(a) a personal injury of the kind mentioned in section 94(1) of the Social Security Contributions and Benefits Act 1992, or

(b) a disease or personal injury of the kind mentioned in section 108(1) of that Act.

(4) In this section the following expressions have the meaning given by section 122(1) of the Social Security Contributions and Benefits Act 1992 – 'employed earner', 'lower earnings limit', 'tax year', and 'working life' …"

18. Sections 29 and 30 of the PANI 2015 are in materially identical terms to sections 30 and 31 of the 2014 Act and, in particular, section 30 of the PANI 2015, which defines the contribution condition, is in the same terms as section 31 of the 2014 Act.

19. It is unnecessary to explain all the references in section 31 to terms defined in the Social Security Contributions and Benefits Act 1992 ("the 1992 Act") and sufficient for our purposes to note that "working life" in section 31(1) begins in the tax year in which the person in question attains the age of 16; an "earnings factor" in subsection (2) is a concept adopted by the 1992 Act in order to provide a common basis for measuring

earnings; and the "lower earnings limit" is a weekly figure set each year. (In 2022/23 it was set at £123 per week).

20. The contribution condition in section 31(1) of the 2014 Act is modest. Most recipients will meet it through the actual payment of national insurance contributions in any single tax year of a person's working life (since 1975) based on earnings of about £3,000. In practice this could be achieved by a person working for around two months full time on the minimum wage at any point in the whole of a working lifetime.

21. To qualify for BSP the contributions must be "actually paid": the deceased partner must pay Class 1 (these are made by employed earners) or Class 2 (made by the self- employed) contributions. The only exception is the industrial diseases/injuries exception in section 31(3) of the 2014 Act, discussed below. Other contributions, such as Class 3 (which are voluntary) do not count for BSP purposes. Likewise, although the national insurance system provides for people who are not actually paying national insurance contributions to receive "national insurance credits" which count towards some benefit entitlements in some circumstances (including where the person in question is in receipt of disability benefits, is unemployed, is a carer or in training), national insurance credits do not count toward BSP because of the requirement in section 31(1) of the 2014 Act that national insurance contributions must have been actually paid.

22. As just indicated, there is only one express exception to the BSP contribution condition. Section 31(3) of the 2014 Act provides that the condition is deemed to have been met if the deceased was employed and dies as a result of industrial injury or disease (defined in sections 94 and 108 of the 1992 Act). Given the modest level of contribution required to qualify in the first place, this provision is likely to have only a limited practical effect where, for example, the death occurs very early in the deceased's working life.

23. BSP is paid to the deceased person's spouse or civil partner (and in the case of couples with children, to the cohabiting partner). It is set at one of two rates depending on whether the survivor is responsible for children. A person is entitled to BSP only before they reach pensionable age. (The respondent contrasts this nominal contribution condition with the other contributory benefit established by the 2014 Act, namely the minimum of ten qualifying years required to receive a reduced pension, and the minimum of 35 qualifying years required to receive the full amount, but without any requirement for actual paid contributions: see section 2 of the 2014 Act).

*(ii) The Human Rights Act 1998 and the European Convention on Human Rights*

24. Section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. This is subject to exceptions which are not material for present purposes.

25. This case concerns a claim of unlawful discrimination. Article 14 requires the Convention rights to be secured without unlawful discrimination. The premise of a discrimination claim under article 14 is a difference of treatment relating to the enjoyment of Convention rights and freedoms "on any ground" specified in article 14 which provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

26. The ground relied on by the respondent in this case is the ground of "other status".

27. It is not necessary to show a breach of another Convention right in order to establish an article 14 discrimination claim, because in that case article 14 would add nothing to the protection given by those rights. Rather the requirement that an allegation of breach of article 14 must relate to the "enjoyment of the rights and freedoms" in the Convention has been interpreted as meaning that the complaint must fall within the ambit or subject matter of another Convention right.

28. The respondent's original discrimination claim relied on article 14 read together with A1P1 and/or article 8 of the Convention. The Secretary of State has accepted in these proceedings that, in principle, a decision to refuse BSP is a decision on a matter within the ambit of A1P1, it being well established that even non-contributory social security benefits can be "possessions". By contrast the relevance of article 8 is contested by the Secretary of State on the basis that the non-payment of BSP will not have consequences of the kind which are required to bring a claim within the ambit of article 8: see *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449, per Lord Reed at paras 79-80. Since neither side suggests that anything would be added if the refusal of BSP is also regarded as being within the ambit of article 8, it is unnecessary to consider article 8 further.

29. A1P1 provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

30. Although not spelt out in article 14, it plainly embraces both direct and indirect discrimination. Strasbourg case law has also held that such discrimination can occur not only where people in the same situations are treated differently but also where people in different situations are treated alike. This is known as "*Thlimmenos* discrimination" following the principle established in *Thlimmenos v Greece* (2001) 31 EHRR 15. This was explained by Lord Reed PSC in an important decision to which we shall make further reference below, *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223 (we shall refer to it as "*SC*") at para 48 of his judgment as follows:

> "article 14 may impose a positive duty to treat individuals differently in certain situations … *Thlimmenos v Greece* … illustrates the nature of the discrimination in such cases. The applicant had received a criminal conviction as a result of his refusal, for religious reasons, to wear a military uniform. He was refused admission to the profession of chartered accountant because he had been convicted of a serious crime. Since his conviction did not imply any dishonesty or moral turpitude which might render a person unsuitable to enter the profession, the court held that 'there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony' (para 47). The discrimination lay in not introducing an exception to a general rule."

31. Again, although not spelt out in article 14, it is well-established that some differential treatment in the way in which states guarantee Convention rights is lawful. Thus, in the *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252 the European Court of Human Rights held that the principle of equality of treatment is violated if there is no reasonable and objective justification for the difference of treatment involved.

32. It follows as Lord Reed set out in *SC* at para 37, that the following issues arise in an article 14 case:

> "(1) 'The court has established in its case law that only differences in treatment based on an identifiable characteristic,

or "status", are capable of amounting to discrimination within the meaning of article 14.'

(2) 'Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of people in analogous, or relevantly similar, situations.'

(3) 'Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'

(4) 'The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.'"

33. Since the discrimination relied on here is *Thlimmenos* discrimination, article 14 may impose a positive duty to treat individuals differently in certain situations, by introducing an exception to an otherwise general rule in their case.

34. Section 3 of the HRA sets out the obligation to interpret legislation as follows: "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".

35. Section 4 of the HRA empowers the court, where it is satisfied that a provision of primary legislation is incompatible with a Convention right, to make a declaration of that incompatibility.

## 4. The decision of the Northern Ireland Court of Appeal in *O'Donnell*

36. Pauline O'Donnell was unable to work throughout her "working life" due to a substantial neurological disability. She did not satisfy the contribution condition for BSP in sections 29(1)(d) and 30(1) of the PANI 2015 because she had not paid the necessary national insurance contributions. She died aged 41 leaving her husband and their four children. Mr O'Donnell's request for BSP was refused by the Department for Communities ("the DfC") and he appealed to the Social Security Tribunal in Northern Ireland. The tribunal adjourned the appeal and referred to the Northern Ireland Court of

Appeal the question whether sections 29 and 30 of the PANI 2015 were compatible with article 14 read with article 8 and A1P1 of the Convention.

37. The decision of the Northern Ireland Court of Appeal in *O'Donnell* pre-dated the judgment of the Supreme Court in *SC*. The court adopted the approach set out in *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; [2019] 1 WLR 3289 (at para 136) ("*DA*") to the analysis of an article 14 complaint. Answering the four questions identified in *DA*, the court held:

(i) the subject matter of the complaint fell within the ambit of both article 8 and A1P1 of the Convention (paras 84-86).

(ii) The ground on which the complainant had been treated differently from others was an "other status" for the purposes of article 14: the court accepted that the fact that Mr O'Donnell was "the spouse of a deceased who was severely disabled so that she was unable to work and therefore unable to pay [national insurance contributions]" was a status for the purpose of article 14, and regarded this "indirect associative status" as the ground of the difference in treatment complained of (paras 87-89).

(iii) The deceased (who could neither work because of disability nor meet the contribution condition) was treated in the same way as other people (who were not disabled) who could work and who could meet the contribution condition but did not do so. This was a failure to treat differently persons whose situations are significantly different (paras 90-91).

(iv) The similarity in treatment did not have an objective and reasonable justification, in other words, it did not pursue a legitimate aim and/or the means employed did not bear a reasonable relationship of proportionality to the aims sought to be realised (paras 92-100).

38. In addressing justification, the court considered the evidence set out in witness statements of Una McConnell, a senior civil servant in the Social Security Policy and Legislation Division of the DfC and her counterpart in England and Wales, Helen Walker, Deputy Director (Life Events and Disadvantage) in the Labour Market, Families and Disadvantage Directorate within the Department for Work and Pensions ("the DWP") (the latter having been filed in a different case concerning a different BSP issue: *R (Jackson) v Secretary of State for Work and Pensions* [2020] EWHC 183 (Admin); [2020] 1 WLR 1441). The court concluded that the core rationale of the contribution condition, namely incentivising and rewarding work, could not justly be applied to people who were permanently unable to work due to disability; and that failing to make an exception for that specific group of people is disproportionate:

> "98. ... the policy in its application to those who through disability are unable to work throughout their working life is manifestly without reasonable foundation. It is just not reasonable to suggest that one can incentivise a severely disabled person to work if through their disability they cannot work. Alternatively, to put it another way, that is manifestly without reasonable foundation. Furthermore, one cannot make work pay if through disability the individual cannot work. There is no stigma attached to credits of national insurance if a person is disabled. No one is going to think worse of a disabled person who can never work if they do not do so and receive credits rather than making payments. The contributory principle for BSP is extremely modest and that extremely modest application of the principle is not undermined by an exception being made in relation to those who through disability cannot contribute throughout their working life. An exception would simply amount to recognition that those who cannot contribute should not be excluded. That does [not] undermine the close relationship between the contribution condition and employment merely recognising that the severely disabled are at a substantial disadvantage if they cannot work throughout their working life. It is entirely possible to make an exception without undermining the contributory principle… a less intrusive measure could have been used without unacceptably compromising the achievement of the objective. That less intrusive measure was to create an exception for those never able to work through disability and therefore never able to pay Class 1 or Class 2 National Insurance Contributions. In answer to the fourth question, the severity of the measure's effect on the associated rights of the persons whose deceased spouse or civil partner was never able to work through disability was clearly disproportionate to the likely benefits of the impugned measure."

39. The remedy adopted by the court was to apply section 3 of the HRA to read down the contribution condition in section 29(1)(d) of the PANI 2015 so that it is "treated as met if the deceased was unable to comply with section 30(1) throughout her working life due to disability" (para 102).

40. The UK Government was not a party to *O'Donnell*, although HM Attorney General was formally notified of the case by the Northern Ireland Court of Appeal and was entitled to be a party (see Northern Ireland Act 1998, Schedule 10, paras 5-6). Instead, the Secretary of State co-operated with the DfC in Northern Ireland on its presentation of the *O'Donnell* case (pursuant to the terms of the Concordat between the DWP and the DfC, dated June 2018).

41. The DfC did not seek permission to appeal the decision in *O'Donnell* requiring the contribution condition for BSP to be treated as met by people unable to work throughout their working life because of disability. Instead, it published guidance dated March 2021, entitled "Bereavement Support Payment – satisfaction of contribution conditions where the deceased was unable to work due to disability", for decision-makers in Northern Ireland. The guidance states:

> "8. Although there is no one benefit which would definitively prove a person could not have worked throughout their entire working life where a system check shows the deceased spouse or civil partner had continuous entitlement to Invalidity Benefit, Incapacity Benefit and/or Employment & Support Allowance throughout their working life the decision maker can allow the claim for Bereavement Support Payment on the basis that the contribution conditions are treated as met. Provided there are no gaps in entitlement to these benefits an award can be made without contacting the claimant or obtaining further evidence."

42. The guidance also explains that the absence of a claim to any of these benefits does not conclusively prove that the deceased was able to work. Further, it says that the absence of any entitlement to Jobseeker's Allowance or Unemployment Benefit and the absence of any paid national insurance contributions by the deceased spouse or civil partner is not conclusive proof of an inability to work throughout their entire working life due to disability. It goes on to explain how to assess a claimed lifelong inability to work in cases where there are no records of continuous entitlement to an incapacity type benefit, making the point that there might be various reasons why they were unable to work but did not claim benefits. The guidance recognises that some claimants may not be able to provide supporting evidence on this question, such as medical records, in which case the decision- maker would have to assess the claimant's statement (which may be the only evidence available) "on its merits".

## 5. The judgments below in the respondent's case

43. As we have said, Kerr J upheld the respondent's claim that the contribution condition unlawfully discriminates against the partners of those who were unable to work for their whole working life by reason of disability, contrary to A1P1 read with article 14.

44. Kerr J recognised that he was not formally bound by *O'Donnell* and was required to consider the arguments afresh. But upon doing so, he agreed with the reasoning in *O'Donnell*. He also said, "Human rights should, if possible, have the same content throughout the UK. If *O'Donnell* is not distinguishable, I would not depart from it unless

persuaded that it is clearly wrong, which I would find only with great diffidence" (para 47). The evidence before Kerr J from the Secretary of State included a witness statement from Helen Walker and he concluded that the evidence before him and the Northern Ireland Court of Appeal was materially the same, and the two cases could not be distinguished on the facts (paras 95 and 96).

45. Adopting the same approach to the analysis as the Northern Ireland Court of Appeal had taken, he held:

(i) It was common ground that the respondent's claimed entitlement to BSP came within the ambit of A1P1 (para 76) and since that was sufficient to engage article 14 it was unnecessary to decide whether it also came within the ambit of article 8.

(ii) The claimed status was "being the spouse of a deceased person who was severely disabled so that she was unable to work and therefore unable to pay Class 1 or Class 2 national insurance contributions". Kerr J rejected the Secretary of State's argument that this claimed status was too vague to qualify because it is not possible to determine objectively who is within the class (paras 80-82).

(iii) He agreed with the Northern Ireland Court of Appeal that there was *Thlimmenos* discrimination because the respondent (and Mr O'Donnell) was being treated in the same way as other people whose deceased partner's failure to meet the contribution condition was a result of choice rather than disability (paras 83- 85).

(iv) As for justification, Kerr J adopted the reasoning of the Northern Ireland Court of Appeal, applying the manifestly without reasonable foundation test. He found that the aims relied on by the Secretary of State were: first, to make work pay, and therefore for BSP to form part of the contributory principle or insurance aspect of benefits, and reduce stigma for those claiming; second, to simplify the benefit system to ensure that administrative cost and complexity is reduced, by applying a straightforward "bright line" rule by reference to easily available records; and third, to ensure greater certainty in relation to the benefits system for those considering their entitlement. He recorded it as common ground that these aims were sufficiently important to justify the limitation of a protected right and there was a rational connection between them and BSP. However, Kerr J concluded that the treatment of the respondent had not been shown to be justified, for the reasons given by the Northern Ireland Court of Appeal in *O'Donnell* at paras 98-100 (see paras 86-97).

(v) Kerr J addressed the question of remedy at para 99 holding that it is possible to interpret section 31 of the 2014 Act so as to include substantially the same exception as that adopted by the Northern Ireland Court of Appeal in *O'Donnell*.

46. The Court of Appeal (Underhill, Elisabeth Laing and Falk LJJ) upheld Kerr J's decision. Underhill LJ gave the leading judgment with which the other members of the court agreed.

47. In relation to the correct approach of the courts to differing from the decision of the Northern Ireland Court of Appeal in *O'Donnell*, the Court of Appeal set out its reasoning at paras 41-50 and 105. The judgment explained the "rule of practice" established in *Abbott v Philbin (Inspector of Taxes)* [1960] Ch 27 and concluded in summary that (para 44) "it will require more than mere disagreement with the decision of the first court to justify a refusal by the second court to follow it" and at para 50 that "I do not believe that Kerr J made any error of law in deciding that he should follow *O'Donnell* unless it was clearly wrong". Underhill LJ explained at para 51:

> "To the extent that it is clear that a particular issue before us was directly considered in *O'Donnell* our primary focus should be on whether a sufficiently compelling reason has been shown why we should not follow it, although if we have serious doubts about its correctness, albeit falling short of that standard, it will be appropriate for us to express them."

Having reached that conclusion, the Court of Appeal followed the decision in *O'Donnell*.

48. In relation to the question whether the respondent has an "other status", Underhill LJ held that being the spouse of a deceased person who was severely disabled, unable to work throughout her working life, and therefore unable to meet the contribution condition, was a relevant "other status" for the purposes of article 14 of the Convention. It was capable of a rational evaluation of objectively established facts and therefore objectively determinable (paras 52-57). He rejected the complaint that this status was too uncertain to constitute a valid status (paras 61-64).

49. In relation to justification, Underhill LJ expressed doubts about the correctness of the decisions of the Northern Ireland Court of Appeal in *O'Donnell* and Kerr J in the High Court (paras 101-105) but concluded that those doubts were not sufficient to mean that the Court of Appeal should depart from the Northern Ireland Court of Appeal's decision.

50. Similarly in relation to remedy, Underhill LJ set out his reasoning as to why the remedy under section 3 of the HRA was available (paras 106-110), and at paras 109-110

he expressed doubts as to the conclusions of the Northern Ireland Court of Appeal, stating at para 110, "It seems to me, therefore, that the conclusion that a remedy is available under section 3 is, with respect, less straightforward than the Northern Ireland Court of Appeal and Kerr J appear to have believed". Ultimately however, the Court of Appeal decided not to state a concluded view on this question and again followed the decision of the Northern Ireland Court of Appeal in *O'Donnell*.

## 6. The background to the introduction of BSP

51. Helen Walker explains in her witness statement in these proceedings that bereavement benefits have a long policy tradition in the United Kingdom dating back to the early 1900s and that, throughout this period, entitlement to these benefits has been conditional, though the exact nature of the conditions has varied. Immediately prior to the introduction of the 2014 Act, there were three different bereavement benefits available: Bereavement Payment, Widowed Parent's Allowance, and Bereavement Allowance. These benefits were introduced by sections 54 and 55 of the Welfare Reform and Pensions Act 1999, inserting new sections 36, 39A and 39B into the 1992 Act. The contribution conditions and entitlement to these three benefits were complex. (There is an account of the history of these benefits going back to 1925 in Lady Hale's judgment in *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250, at paras 4-12. For present purposes it is unnecessary to go into the detail of that history.)

52. In 2011, the Government decided to review bereavement benefits. Lord Freud led the review (as Parliamentary Under-Secretary for Welfare Reform from May 2010 to May 2015, and then as Minister of State for Welfare Reform from May 2015 to December 2016).

53. In December 2011, a single joint consultation document was published by the DWP and the Northern Irish Department for Social Development (the predecessor to the DfC) entitled "Bereavement Benefit for the 21st Century" (2011) (Cm 8221). The proposals for reform included the simplification of the contribution condition by basing full payment on a single year of national insurance contributions. Comments were invited on the proposed new contribution condition. Following the consultation, the Government published a response to it in July 2012 (Cm 8371), noting that concern had been expressed about exclusion from coverage of those "who had been unable to work due to illness or disability" due to the contribution condition. The response summarised the concerns raised as follows:

> "Where concerns were raised about the proposed changes to contribution conditions, these mainly focused on the exclusion from coverage of those who had not paid enough National Insurance contributions, including:

> • Those who had supported the home rather than being in paid employment;
>
> • Those who had been unable to work due to illness or disability [emphasis added];
>
> • Those who had recently left full-time education."

54. The contribution condition was explained in the response in the following terms:

> "Simplifying entitlement conditions
>
> The Government recognises the important role that the contributory principle plays in people's experience of accessing benefits by creating a sense of entitlement that removes the stigma often associated with claiming means-tested benefits. Yet at the same time, bereavement benefits are paid in the event of the premature death of a working-age spouse or civil partner. Expecting a complete National Insurance record in such circumstances is clearly inappropriate.
>
> The Government is striking a balance between these two issues, whilst seeking to make contribution conditions easy to understand, by basing contribution conditions for the Bereavement Support Payment on the existing Bereavement Payment. This will mean that people will be entitled to receive the full payment as long as their late spouse or civil partner paid National Insurance contributions at 25 times the Lower Earnings Limit for any one year prior to their death.
>
> National Insurance credits and Class 3 National Insurance contributions will not count towards entitlement."

## 7. The effect of judgments in different UK jurisdictions (ground 1)

55. The issue as to the effect of judgments of appellate courts in the different jurisdictions of the United Kingdom is, from one perspective, a relatively narrow one, and concerns only a rule of practice. No party to these proceedings suggests that such judgments are formally binding. The question in dispute is only as to the weight which

should be attached to them. Nonetheless, the issue is one of considerable practical importance. There is a major difference between treating a judgment with respect and treating it as one which should be departed from only in exceptional circumstances.

56. English law has a well-developed doctrine of precedent, developed by the courts as part of the common law. Its rationale, and its most fundamental features, were explained by Lord Neuberger in *Willers v Joyce (No 2)* [2016] UKSC 44; [2018] AC 843,
para 4:

> "In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known stare decisis, is fundamental. Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence, clarity and predictability. Cross and Harris in their instructive *Precedent in English Law*, 4th ed (1991), p 11, rightly refer to the 'highly centralised nature of the hierarchy' of the courts of England and Wales, and the doctrine of precedent is a natural and necessary ingredient, or consequence, of that hierarchy."

57. As those observations indicate, and as Lord Neuberger went on to explain, the doctrine is seen in its simplest and most familiar form when applied to the hierarchy of courts. Under English law, for example, circuit judges are bound by decisions of High Court judges, the Court of Appeal and the Supreme Court. High Court judges are bound by decisions of the Court of Appeal and the Supreme Court. The Court of Appeal is bound by decisions of the Supreme Court. The position is more nuanced when it comes to courts of coordinate jurisdiction. For example, the Supreme Court can depart from its own previous decisions in circumstances where it is appropriate to invoke the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, but it has emphasised that, because of the importance of the role of precedent and the need for certainty and consistency in the law, it should be very circumspect before accepting an invitation to do so: *Knauer v Ministry of Justice* [2016] UKSC 9; [2016] AC 908, para 23. On the other hand, the Court of Appeal is bound by its previous decisions, subject to limited exceptions: *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, 729-730, approved by the House of Lords in *Davis v Johnson* [1979] AC 264.

58. Scotland and Northern Ireland have distinct legal systems from that of England and Wales, with distinct hierarchies of courts. The final appeal to the Supreme Court, where it exists, is the only common element, apart from tribunals whose jurisdiction extends to the whole of the United Kingdom, such as employment tribunals, or to the whole of Great Britain, such as the First-tier Tribunal (Social Entitlement Chamber) in social security and child support cases. Each legal system has its own rules in relation to

precedent, which sometimes differ from those of English law. For example, the principles which apply under English law to the Court of Appeal, as set out in *Young v Bristol Aeroplane Co Ltd*, do not apply under Scottish law to the Inner House of the Court of Session or the High Court of Justiciary, which can review their own previous decisions, and sit in an enlarged constitution when they wish to do so.

59. A fundamental feature of the common law rules of precedent in each of the United Kingdom's legal systems is that they are concerned only with the effect of decisions taken by courts within that legal system's hierarchy of courts. An English court, for example, cannot be bound to follow a decision of a Scottish court, or vice versa. This was explained with great clarity by Laws LJ in *Marshalls Clay Products Ltd v Caulfield* [2004] EWCA Civ 422; [2004] ICR 1502, in rejecting an argument that the Employment Appeal Tribunal sitting in London (and also, by implication, the Court of Appeal) was obliged by law to follow a decision of the Inner House on the interpretation of employment legislation. In a judgment with which Judge LJ and Charles J agreed, he said (para 32):

> "The rules of precedent or stare decisis cognisable here are given by the common law. … They include refinements which teach where the edge of precedent is to be found, so that often the earlier decision can be distinguished. I need not go into those. The essence is that precedent confines the very power of the courts subject to it. It is not a rule of discretion or comity or anything of the kind. It is therefore of necessity a doctrine whose reach is limited to the jurisdiction in which the courts in question operate. The House of Lords is no exception; by statute its writ runs to three jurisdictions, and accordingly it binds the lower courts within each of those jurisdictions. Statute might also extend the scope of precedent, as was done by the European Communities Act 1972, part of whose effect is to give binding force over the national courts to decisions of the European Court of Justice (in matters within the latter's proper competence). … But it is at least clear, and here is the point on this part of the case, that it would be a constitutional solecism of some magnitude to suggest that by force of the common law of precedent any court of England and Wales is in the strict sense bound by decisions of any court whose jurisdiction runs in Scotland only or – most assuredly – vice versa. Comity and practicality are another thing altogether. They exert a wholly legitimate pressure."

60. Although decisions of courts in another jurisdiction do not normally fall within the scope of the doctrine of precedent, they may nonetheless influence a court's decision for a variety of reasons, more than one of which may apply in any particular case. Without attempting an exhaustive list, in the first place their reasoning on a point of law may be

found to be convincing, and may therefore be adopted. For example, this court not infrequently cites decisions of the Supreme Court of Canada and the High Court of Australia where their reasoning has been found to be persuasive; but they are not, of course, binding precedents. Secondly, considerations of comity may exert pressure on a court, as Laws LJ put it, to follow the decision of a court in another jurisdiction. For example, the Inner House and the Court of Appeal will naturally treat each other's judgments with great respect. Thirdly, in cases concerned with the interpretation of international conventions, courts will be influenced by the fact that it is important that their interpretation should be the same, so far as possible, in all contracting states: see, for example, *Sidhu v British Airways plc* [1997] AC 430. Fourthly, as Laws LJ acknowledged, considerations of practicality may exert pressure on a court in one jurisdiction to follow a decision of a court in another jurisdiction. That is illustrated by the case of *Marshalls Clay Products Ltd v Caulfield* itself, where Laws LJ said that "As a matter of pragmatic good sense the employment tribunal and the Employment Appeal Tribunal in either jurisdiction will ordinarily expect to follow decisions of the higher appeal court in the other jurisdiction (whether the Court of Session or the Court of Appeal) where the point confronting them is indistinguishable from what was there decided" (para 31).

61. Accordingly, as a matter of practice based on comity and good sense, rather than on legal rules of precedent, decisions of any of the appellate courts of England and Wales, Northern Ireland or Scotland will be treated as having persuasive authority when a similar legal point arises in one of the other jurisdictions. The weight which is attached to them will generally depend, in the first place, on how convincing the reasoning is found to be. Where practical problems are liable to result if the earlier decision is not followed, those will also be a relevant consideration. This general approach is familiar in areas of the common law where similar principles apply in each jurisdiction: see, for example, *Webb v Times Publishing Co Ltd* [1960] 2 QB 535, 555-556, where Pearson J considered the persuasive effect of decisions of the Court of Session in the context of the law of defamation. The question which arises in this appeal is whether greater weight should be given to a decision, and if so, how much weight, where it concerns the interpretation or application of a statutory provision which applies in more than one jurisdiction, or where, as in the present appeal, distinct but identical statutory provisions apply in different jurisdictions.

62. In relation to this question, the practice of the courts has varied to some extent. It may be helpful to consider the differences, and the factors which have influenced practice, particularly in relation to different areas of the law.

63. It is clear, in the first place, that no strict obligation to follow decisions of courts of coordinate jurisdiction has been recognised by the Scottish or English courts in relation to criminal statutes applying across the United Kingdom. The point can be illustrated by cases concerned with the interpretation of legislation governing road traffic offences. There are examples of the High Court of Justiciary declining to follow decisions of the

Court of Appeal and the Divisional Court: see, for example, *Milne v McDonald* 1971 JC

40 (declining to follow *Butler v Easton* [1970] RTR 109, a decision which was subsequently overruled by the House of Lords). There are also examples of the Court of Appeal declining to follow decisions of the High Court of Justiciary: see, for example, *R v MacDonagh* [1974] QB 448 (declining to follow *Ames v MacLeod* 1969 JC 1; the High Court of Justiciary in turn declined to follow *R v MacDonagh* in *McArthur v Valentine* 1990 JC 146). The High Court of Justiciary has also declined to follow decisions of the House of Lords: see, for example, *Ritchie v Pirie* 1972 JC 7 (declining to follow *Rowlands v Hamilton* [1971] 1 WLR 647, a decision which revealed – or created – a loophole which was subsequently closed by a legislative amendment). In that case, the court acknowledged that it was unfortunate if different interpretations were to be given to the same United Kingdom statute by the courts in Scotland and England, but added that it was also unfortunate that the relevant Scottish case law had not been before the House of Lords when *Rowlands v Hamilton* was argued and decided.

64. This approach to criminal statutes reflects the fact that there are two apex courts in the United Kingdom in relation to criminal law: the High Court of Justiciary in respect of Scotland, and the Supreme Court in respect of the rest of the United Kingdom. Neither can bind the other except in relation to devolution and compatibility issues, where the Supreme Court is, by statute, given the final say. Neither has regarded itself as being under any obligation to follow the decisions of the other if it considers them to be wrong. The same applies as between the High Court of Justiciary and the Court of Appeal, and would in principle also apply in relation to the Northern Ireland Court of Appeal.

65. Nevertheless, the importance of adopting a common approach to the same provisions, where that is possible, is well recognised. For example, in *Ludriecus v Thomson* [2008] HCJAC 65; 2009 JC 78, Lord Reed said (para 18):

> "Where the provision is one which appears in a UK statute, and which has previously been interpreted by appellate courts in the other jurisdictions of the United Kingdom, this court will also treat those interpretations with great respect, since it is undesirable that there should be conflicting decisions on the interpretation of a provision which is intended to apply in the same way throughout the United Kingdom."

In *Barclay v Richardson* [2012] HCJAC 168; 2013 JC 181, where the High Court of Justiciary decided to follow the decision of the House of Lords in *Cracknell v Willis* [1988] AC 450, Lord Eassie said that a decision of the House of Lords on the construction of a statute creating the same criminal offences throughout Great Britain "is of course very highly persuasive in this jurisdiction" (para 33). There was, however, no suggestion that the court was obliged to follow it, and it decided to do so, by a bare majority, only

after concluding that the reasoning and conclusion reached by the House of Lords were correct.

66. Accordingly, this is a context in which considerations of comity and practicality strongly encourage the adoption of a common approach, but the Scottish and English courts will nevertheless diverge where they are unable to accept the correctness of each other's decisions. The adoption of this approach has not caused practical problems in the administration of the criminal law, possibly because differences of interpretation have in practice occurred only in relation to relatively technical questions. Although motorists might be surprised to learn that the interpretation given to some detailed aspects of the Road Traffic Acts changes when they drive across the border between Scotland and England, they do not plan their behaviour on the basis of one interpretation or the other. The prospect that an English motorist in Scotland, familiar with *Rowlands v Hamilton*, might have believed that the consumption of several quick whiskies after an accident would render him immune from prosecution for drink driving is a remote one, and one would have no sympathy with the disappointment of such a motorist in any event. The issue which divided the English and Scottish courts in *R v MacDonagh* and *McArthur v Valentine* – whether a person who is controlling a car's movement and direction is "driving" it within the meaning of the legislation even if he is not sitting in the driver's seat and the engine is switched off – seems equally unlikely in practice to trouble motorists travelling from one jurisdiction to the other. The significance of these differences also has to be seen in the context of the much more profound differences between other aspects of the criminal law and criminal procedure of Scotland, on the one hand, and England and Wales, on the other hand, which have been accepted since the Union.

67. When it comes to questions of civil law, any differences between the approaches adopted by the intermediate appellate courts to legislation which applies across the United Kingdom can normally be resolved by an appeal to the Supreme Court. Indeed, the resolution of such differences is one of the justifications for the Supreme Court's existence. Nevertheless, as in the criminal context, the desirability of a common approach to provisions which are intended to apply in the same way across different jurisdictions, where that can be achieved, is well recognised. For example, Scottish and English courts treat each other's decisions on the application of common provisions of the Companies Act 2006, the Partnership Act 1890 and the Sale of Goods Act 1979 as persuasive, although not binding.

68. The Northern Ireland Court of Appeal, on the other hand, has at times described its approach in terms which suggest a stricter practice of following the decisions of the Court of Appeal of England and Wales. In *McCartan v Belfast Harbour Comrs* [1910] 2 IR 470, 494-495, a decision of the Irish Court of Appeal, Holmes LJ said:

> "It is true that, although we are not technically bound by decisions in the coordinate English court, we have been in the habit, in adjudicating on questions as to which the law of the two countries is identical, to follow them. We hold that uniformity of decision is so desirable that it is better, even when we think the matter doubtful, to accept the authority of the English court, and leave error, if there be error, to be corrected by the tribunal whose judgment is final on both sides of the Channel [ie the House of Lords]."

That passage was quoted and accepted in *Northern Ireland Road Transport Board v Century Insurance Co Ltd* [1947] NI 77, 107 per Murphy LJ.

69. Some later judgments have described the practice in more qualified terms. In *McGuigan v Pollock* [1955] NI 74, 100, Porter LJ said that the court was "not bound to follow the English Court of Appeal". In the same case, Black LJ said at p 106, under reference to the earlier authorities, that when "a doubtful point has been decided in a particular way by the English Court of Appeal our courts feel a natural hesitation about refusing to follow the English decision". He added at p 107 that "perhaps this course is especially one to be followed when the matter at issue is not one of any broad legal principle but is really a question as to the construction to be placed upon somewhat obscurely worded statutory provisions". That dictum was cited with approval by Carswell LCJ, giving the judgment of the Northern Ireland Court of Appeal in *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd* [1997] NI 142, 155, where the court decided, with some hesitation, to follow an earlier decision of the Court of Appeal as to the construction of a provision in a standard form of building contract, notwithstanding doubts as to its correctness. The English decision was subsequently overruled when *Beaufort Developments* was appealed to the House of Lords: [1999] 1 AC 266.

70. More recently, in *Staritt's Application for Judicial Review* [2005] NICA 48 Campbell LJ, giving the judgment of the court, said (para 21):

> "It has been long established that while this court is not technically bound by decisions of courts of corresponding jurisdiction in the rest of the United Kingdom it is customary for it to follow them to make for uniformity where the same statutory provision or rule of common law is to be applied … This is not to say that the court will follow blindly a decision that it considers to be erroneous."

In *Breslin v McKevitt* [2011] NICA 33 the court said that "it is the practice of this court to follow English Court of Appeal authority leaving it to the Supreme Court to correct the law if appropriate" (para 49).

71. The approach adopted in most of these cases appears to be that decisions of the Court of Appeal will be treated as highly persuasive, as a matter of practice, but will not necessarily be followed. The judgments in *McGuigan v Pollock* and *Beaufort Developments* suggest that decisions of the Court of Appeal are more likely to be followed where the issue concerns a detailed question of construction of legislation or other documents, rather than a broader question of legal principle. That makes practical sense, since it reflects the fact that interpreting a legislative provision often involves making a choice between two or more equally plausible constructions, in relation to which it is difficult to say with confidence that one construction is right and the other wrong. Similar reasoning has also influenced the approach adopted by this court and its predecessor to the review of its own precedents or those of the House of Lords: see, for example, *R v National Insurance Comr, Ex p Hudson* [1972] AC 944, 966 and 1024; *R v G* [2004] 1 AC 1034, paras 30-35. In such cases it can often be said, as Lord Mansfield CJ famously said in relation to mercantile law in *Vallejo v Wheeler* (1774) 1 Cowp 143, 153; 98 ER 1012, 1017 that "it is of more consequence that a rule should be certain, than whether the rule is established one way or the other".

72. One area of the law where a stricter approach has been adopted across all three jurisdictions, to the extent that practice has hardened into a rule, is revenue law. It is an area of the law in which detailed and technical questions of statutory interpretation frequently arise. It is also an area where uniformity of construction has long been recognised as being of particular importance. It is necessary, first and foremost, so that the incidence of taxation is the same throughout the United Kingdom, and the economic consequences of living or investing in one of its constituent parts rather than another are not subject to a divergence in the interpretation of revenue statutes by the courts of different jurisdictions. This is important both constitutionally, as one of the underpinnings of the coherence of the United Kingdom as a unitary state, and as a matter of legal certainty for taxpayers. A difference in approach to matters such as entitlement to capital allowances, or the application of value added tax, could have a major impact on businesses' contractual arrangements and their investment decisions, and could have profound consequences for the viability of commitments which they have undertaken. The fact that there are now some differences in relation to income tax in different parts of the United Kingdom, as a consequence of legislative devolution, does not diminish the importance of the general principle. The scope for such variations is limited by legislation, and does not arise as a consequence merely of differences in judicial interpretation.

73. The importance of uniform interpretation of revenue statutes has long been recognised. In *Income Tax General Purposes Comrs for the City of London v Gibbs* [1942] AC 402, 414 ("*Gibbs*"), Viscount Simon LC said:

> "… in construing a taxing statute which applies to England and Scotland alike, it is desirable to adopt a construction of statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities in taxation as between citizens of the two countries. Lord Halsbury LC affirmed this principle in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 548, when he adopted the canon of construction laid down by the Court of Session in *Baird's Trustees v Lord Advocate* (1888) 15 R 682, and quoted the general principle of common sense which Grose J laid down in a rating case (*R v Hogg* (1787) 1 TR 721, 728): 'an universal law … cannot receive different constructions in different towns.' Lord Watson in *Pemsel's* case [1891] AC 531, 557, deduces from the Scottish decision of *Lord Saltoun v Lord Advocate* (1860) 3 Macq 659 the principle, which he there applies, that the Income Tax Act, 1842, must, if possible, be so interpreted as to make the incidence of its taxation the same in both countries."

74. The authorities cited by the Lord Chancellor, and the case of *Gibbs* itself, were concerned with the proper approach to the construction of revenue statutes rather than with the authority of decisions of courts in different parts of the United Kingdom. However, the importance of following such decisions, in order to achieve a uniform interpretation of such legislation, has also long been recognised: see, for example, *In re Hartland* [1911] 1 Ch 459. It has been reflected in modern times in a strict adherence by the Court of Appeal to decisions of the Inner House, and vice versa, so far as they concern the construction of such legislation, and are neither per incuriam nor dependent on some special feature of Scottish or English law.

75. The leading authority on the point is *Abbott v Philbin* [1960] Ch 27; [1961] AC 352. The case concerned the tax treatment of a share option. The question was whether a charge to income tax under Schedule E to the Income Tax Act 1952 arose as soon as the option was granted or when the option was exercised. In an earlier case, the Inner House had favoured the latter result. When the question came before the Court of Appeal, Lord Evershed MR set out the grounds on which he found the reasoning of the Scottish court unconvincing. He did so, he explained, "because I have thought that, if this matter were to go further, it might be of some assistance if I were to state them" (p 46). However, the decision of the Inner House could not be treated as per incuriam, and it did not depend on any special feature of Scots law. In those circumstances, the Master of the Rolls considered that the Court of Appeal ought to treat the Scottish case as governing its decision. He explained (p 49):

> "It is, of course, quite true that we in this court are not bound to follow the decisions of the Court of Session, but the Income

> Tax Act and the relevant Finance Acts apply indifferently both north and south of the border, and if we were to decide those questions in a sense diametrically opposite to the sense which appealed to the Scottish judges, we should lay down a law for England in respect of this not unimportant matter which would be completely opposite to the law which was applied, on exactly the same statutory provisions, north of the border. I cannot think that that is right. In a case of a revenue statute of this kind it is the duty of this court, unless there are compelling reasons to the contrary, to say, expressing such doubts as we feel we ought to do, that we should follow the Scottish decision."

76. In short, Lord Evershed believed that the correct course was to express his doubts and leave it to the House of Lords, if an appeal were pursued, to decide whether they were well-founded. Harman LJ gave a judgment to similar effect, saying in relation to the Scottish decision that "for reasons of policy it would not be right that this court should express a diametrically opposite view" (p 52). Sellers LJ said that he did not share Lord Evershed's doubts about the correctness of the Scottish decision. The court gave leave to appeal to the House of Lords.

77. The approach adopted by the Court of Appeal to the earlier Scottish decision was explicitly approved in the House of Lords, which by a majority of three to two allowed the appeal and overruled that decision. Viscount Simonds said that the Scottish case was not in any material respect distinguishable, and that the Court of Appeal took the proper course in following it (p 368). Lord Reid said that the Court of Appeal, "though not bound to do so, very properly followed the decision of the Court of Session … I say very properly, because it is undesirable that there should be conflicting decisions on revenue matters in Scotland and in England" (p 373). Parliament subsequently legislated to reverse the decision of the House of Lords, and reinstated the approach which had been adopted in Scotland.

78. The approach adopted in *Abbott v Philbin* has been applied in many subsequent cases concerned with revenue law: see, for example, *Secretary of State for Employment and Productivity v Clarke Chapman & Co Ltd* [1971] 1 WLR 1094, and *R (DK) v Revenue and Customs Comrs* [2022] EWCA Civ 120; [2022] 4 WLR 23. As far as the authorities cited to this court disclose, it was not until recently applied in any other area of the law. For example, in *Flemming v Secretary of State for Work and Pensions* [2002] EWCA Civ 641; [2002] 1 WLR 2322, a case concerned with the interpretation of social security legislation, the Court of Appeal expressed its agreement with an earlier decision of the Northern Ireland Court of Appeal concerned with the interpretation of similarly worded legislation, but did so only after carrying out its own analysis of the provision in question, and without attaching any special weight to the Northern Irish decision.

79. However, in *Deane v* Secretary *of State for Work and Pensions* [2010] EWCA Civ 699; [2011] 1 WLR 743 ("*Deane*"), a case concerned with the same social security legislation as was in question in *Flemming*, the Court of Appeal considered that the approach taken to revenue legislation in *Abbott v Philbin* should in principle be adopted much more widely. Ward LJ, giving the only reasoned judgment, said in relation to decisions of the Northern Ireland Court of Appeal (para 26):

> "Where the decision relates to a statutory requirement which applies or which is the same as that which applies in England and Wales, then we ought to follow that court in order to prevent the wholly undesirable situation arising of identically worded legislation on the other side of the Irish Sea (or the other side of the Tweed) being applied in inconsistent ways. The same approach as we adopt for cases of the Court of Session in Scotland should be followed in the case of Northern Ireland."

Ward LJ then cited *Abbott v Philbin* as exemplifying the approach adopted for cases decided by the Court of Session.

80. Applying authorities concerned with the English law of precedent, Ward LJ considered that the Court of Appeal was "not obliged to follow" the Northern Irish decision in the case before the court if the point in issue was conceded or did not form part of the ratio decidendi. After carrying out an examination of the reasoning of the Northern Ireland Court of Appeal, he concluded that the views which had been expressed on the point in issue were obiter dicta, and that the Court of Appeal was therefore not obliged to follow them.

81. We are unable to accept Ward LJ's reasoning in this case. We note in the first place that since the point in issue had not in fact been decided by the Northern Ireland Court of Appeal, it follows that Ward LJ's discussion of decisions relating to statutory requirements which apply or which are the same as those which apply in England and Wales was itself obiter. Secondly, although Ward LJ quoted Lord Evershed MR's dictum confining his remarks in *Abbott v Philbin* to "a case of a revenue statute of this kind" (para 75 above), and Lord Reid's statement that "it is undesirable that there should be conflicting decisions on revenue matters" (para 77 above), he did not advert to the fact that the case before the court was not concerned with revenue law and might not give rise to equally cogent practical considerations. Thirdly, he appears to have treated the exercise on which he had embarked as one arising under the law of precedent, and as requiring the application of the rules developed by judicial decisions in that area of the law. However, as we have explained, this is not a question of the common law of precedent, but rather of practice based on comity and practical good sense.

82. In the present case, Kerr J said that he was guided by Ward LJ's judgment in *Deane* (para 46). He noted that the point in issue concerned the content of Convention rights, rather than a question of statutory construction. However, as explained above, he accepted that "Human rights should, if possible, have the same content throughout the UK". Accordingly, if the decision of the Northern Ireland Court of Appeal in *O'Donnell* was not distinguishable, he would not depart from it unless persuaded that it was "clearly wrong", which he would find "only with great diffidence" (para 47). He accepted that he had to consider the arguments afresh, as "it would not be right to decide this case only on the basis that *O'Donnell* stands as authority against the [Secretary of State]" (para 75). Having done so, he found himself in agreement with the conclusion reached in *O'Donnell*, although not with all of the reasoning.

83. On appeal, the Court of Appeal adopted an approach based on *Abbott v Philbin* and *Deane.* Underhill LJ, giving a judgment with which the other members of the court agreed, noted that *Abbott v Philbin* was concerned with revenue law, and *Deane* with social security legislation, but said that the difference was not material (para 41). He noted that Lord Evershed MR had said that in "a case of a revenue statute of this kind" it was the duty of the Court of Appeal, "unless there are compelling reasons to the contrary", to follow the earlier decision of a court of coordinate jurisdiction. As to what might amount to compelling reasons, Underhill LJ considered that "it will require more than mere disagreement with the decision of the first court" (para 44), since that was the position in *Abbott v Philbin* itself. In his view, "the minimum requirement for a 'compelling reason' must be that the second court believes that the first court's decision was clearly wrong, where the word 'clearly' connotes a heightened threshold" (ibid). He could conceive that in some circumstances, substantial differences in the evidence adduced or the points argued before the two courts, at least where the differences were fundamental, might be sufficient to justify a departure from the *Abbott v Philbin* rule, but generally courts should be very slow to take that course. The policy reasons for maintaining a uniformity of approach between the jurisdictions applied even if there were differences in how two cases were presented (para 45). Although Underhill LJ went on to identify some difficulties in relation to the reasoning in *O'Donnell*, he did not think it right to develop the points, still less to express any concluded view, because he did not believe that the case before him came close to being "a case of the exceptional kind" where, applying the *Abbott v Philbin* rule, it would be right to decline to follow *O'Donnell* (para 105).

84. Underhill LJ noted that his conclusion accorded with the decision of a Tribunal of Social Security Commissioners in *R (SB) 1/90* (unreported) 26 June 1989, which had been cited with approval by Ward LJ in *Deane.* In their judgment, the Commissioners said that, since a decision of a Commissioner sitting in England and Wales on a Scottish matter could be appealed to the Court of Session, and a decision of a Commissioner sitting in Scotland on an English matter could be appealed to the Court of Appeal, it followed that "pronouncements on common provisions, whether made by the Court of Appeal in England or the Court of Session in Scotland, must be followed, as of necessity rather than for reasons of comity, by *all* Commissioners of Great Britain" (para 12; emphasis in original). In other words, it seems, decisions of the Court of Appeal were legally binding

on tribunals sitting in Scotland, and decisions of the Court of Session were binding on tribunals sitting in England and Wales. That view is incorrect, as we explained at para 59 above.

85. The tribunal recognised that the position was different in relation to Northern Ireland, with which the case before it was concerned, as the province had a separate body of social security legislation, and there was no possibility of a decision taken in Northern Ireland being appealed to the Court of Appeal or the Court of Session, or of a decision taken in England and Wales or in Scotland being appealed to the Northern Ireland Court of Appeal. However, it said, "there has long been a tradition in this country that, where the same Act applies both in England and Scotland, but where, unlike the case of social security legislation, there is no interchange of function between adjudicating authorities resident in each country, then in the interest of comity there should be uniform interpretation" (para 13). As authority for this tradition the tribunal cited the tax cases of *In re Hartland* and *Abbott v Philbin.* Although the social security legislation in force in Northern Ireland was distinct from that in force in the rest of the United Kingdom, the tribunal considered that "where the relevant provisions are identical (as they are in this case), the same judicial approach should equally be adopted" (para 15).

86. Underhill LJ was not referred to authorities demonstrating that a different approach has been adopted in relation to the Employment Appeal Tribunal, which is a single appellate tribunal applying identical legislation throughout Great Britain (subject to some minor exceptions), and exercising its jurisdiction on a Great Britain-wide basis. We cited earlier the decision of the Court of Appeal in *Marshalls Clay Products Ltd v Caulfield*, which emphatically rejected an argument, based on *Abbott v Philbin*, that the Employment Appeal Tribunal sitting in one part of Great Britain ought, as a matter of law rather than pragmatic good sense, to treat the decisions of an appellate court in the other part of Great Britain as binding precedents. On that basis, the court rejected a submission that the tribunal, sitting in London, had erred in law by declining to follow a decision of the Inner House.

87. Subsequently, in *Airbus UK Ltd v Webb* [2007] ICR 956 the Employment Appeal Tribunal, sitting in London, observed per Elias J (President) that although it was not bound by the decisions of the Inner House, pragmatic good sense would suggest that it should ordinarily follow them, "even where there may be narrow grounds for distinguishing the Scottish case" (para 57). In hearing appeals against decisions of the Employment Appeal Tribunal, the Inner House has also adopted the position that it should follow a relevant decision of the Court of Appeal, against which the Supreme Court has refused permission to appeal, "unless there are compelling reasons suggesting otherwise": *Amery v Perth and Kinross Council* [2012] CSIH 11; [2012] ICR 1067, paras 35 and 50.

88. The authorities were reviewed by the Employment Appeal Tribunal, sitting in England, in the recent case of *Augustine v Data Cars Ltd* [2024] EAT 117; [2025] ICR

19. The case concerned a question on which there were conflicting decisions of the tribunal, and also a decision of the Inner House. Eady J (President), giving the judgment of the tribunal, explained that, if they were approaching the question absent any prior judicial consideration, they would not hesitate to adopt a different view from the Inner House (para 67). However, citing the judgment of Laws LJ in *Marshalls Clay Products Ltd v Caulfield*, she said (para 82):

> "Although the decision [of the Inner House] does not bind us as a matter of law, we consider that there is a compelling case for not departing from what has been acknowledged to be good practice, whereby the EAT – which has a Britain-wide jurisdiction – should ordinarily follow relevant decisions of higher courts within Great Britain, notwithstanding that the doctrine of precedent would not normally apply. Where, as here, the decision in question relates to a legislative protection that extends throughout Great Britain, and where there is no separate question as to the application of Scottish law, or the law of England and Wales, there is a legitimate public interest in consistency of approach. The fact that the issue raised by the present appeal has come before us by way of an appeal from an English ET is a matter of chance; as the case law makes clear, this is an issue that has arisen (not infrequently) in cases both north and south of the England/Scotland border. In these circumstances, we consider that the appropriate course is to approach this appeal on the basis that the decision [of the Inner House] is binding upon us."

89. On an appeal against the tribunal's decision, a ground of appeal that it had erred in treating the Scottish decision as binding upon it was not pursued, in the light of the decision of the Court of Appeal in the present case. However, the correctness of the Scottish decision was argued before the Court of Appeal, which concluded by a majority (Elisabeth Laing LJ dissenting) that the decision was wrong: in the view of Bean LJ, "clearly wrong": [2025] EWCA Civ 658; [2025] ICR 1404, para 101. Nevertheless, the Court of Appeal decided to follow it and dismiss the appeal.

90. Edis LJ said that he did so for the reasons given in *Abbott v Philbin.* He added that it was very important that the rules of precedent were applied in a way which avoided inconsistent decisions being reached in different jurisdictions. Bean LJ treated *Abbott v Philbin* as establishing a general principle, which he expressed as follows (para 101):

> "We are not bound by the doctrine of precedent to follow decisions of the Inner House of the Court of Session or the Court of Appeal in Northern Ireland, but where either of those

> courts has given a decision on the meaning of a statutory provision applicable throughout Great Britain or throughout the United Kingdom it is highly desirable that this court should follow the previous decision and leave it to the Supreme Court to resolve the difficulties. That principle was established in the tax case of *Abbott v Philbin* [1960] Ch 27; [1961] AC 352 as one to be adhered to in the absence of what Lord Evershed MR described as 'compelling reasons'."

Bean LJ added that the result of the appeal would "leave the law relating to part-time workers in an unsatisfactory state, with tribunals both north and south of the border now being obliged to follow [the Scottish decision] despite its obvious defects". However, "Only a decision of the Supreme Court (or an amendment to [the relevant legislation]) can resolve the problem" (para 103).

91. In relation to the latter point, an appeal to this court would have been possible whichever way the case was decided by the Court of Appeal. We have also explained that the Inner House, unlike the Court of Appeal, is not bound by its previous decisions. Accordingly, if the Court of Appeal had departed from the decision of the Inner House and put the law of England and Wales on what it considered to be the proper footing, that would have addressed the situation in by far the larger jurisdiction. It would have been open to the Court of Session to review its own previous decision, if the point came before it in another case, and to overrule it if it thought fit, failing which an appeal might have been brought to this court.

92. Drawing these threads together, we reiterate in the first place that the effect of a decision of an appellate court in one part of the United Kingdom on the decision of an appellate court in a different part of the United Kingdom is not a matter governed by the law of precedent. That was clearly explained by Laws LJ in *Marshalls Clay Products Ltd v Caulfield* (para 59 above). The question is governed by practice, not law.

93. Secondly, we have explained that there can be a range of factors which may affect the weight which should be given by one appellate court to another appellate court's decision on a particular question (para 60 above). However, in relation to decisions of courts in the United Kingdom on the interpretation of legislation intended to apply in more than one of its constituent parts, or distinct but identical legislation intended to apply in an identical way, we have explained that two factors are particularly important: first, how convincing the reasoning of the earlier decision is found to be, and secondly, whether practical problems are liable to result if it is not followed (para 61 above). Accordingly, deciding how much weight attaches to a decision in particular circumstances generally involves the exercise of judgement. The position is different only where the approach to be followed in relation to a particular type of case has become so well established that it amounts to a rule of practice.

94. Thirdly, legislation which applies across the United Kingdom (or Great Britain, as the case may be) must in principle have a single meaning, and must be designed to apply in the same way in different parts of the country. It is therefore sometimes said, as Edis LJ said in *Augustine v Data Cars Ltd* (para 90 above), that it is very important to avoid inconsistent decisions being reached in different jurisdictions. However, in principle it is even more important that statutory provisions should be interpreted correctly than that they should be interpreted consistently.

95. Fourthly, the practical importance of *consistent* interpretation depends to some extent on the nature of the legislative provision in question. Examples were given earlier (paras 63-66 above) of inconsistent interpretations of criminal statutes by Scottish and English appellate courts, which do not appear to have produced significant problems. The practical importance of a *correct* interpretation also depends on the nature of the provision in question. It was explained earlier (para 71) why it makes sense to be readier to follow decisions concerning detailed questions of interpretation, in circumstances where it is difficult to say which construction is correct and where certainty may be of greater practical importance than whether one construction is adopted or the other, than to follow decisions on broader questions of legal principle.

96. Fifthly, we have explained that there is a rule of practice in relation to the interpretation of tax legislation which is long established and has its roots deep in the past (paras 73-77 above). As we have explained (para 72 above), the strictness of the practice followed in such cases reflects particular characteristics of tax legislation, notably the constitutional and economic importance of uniformity across the United Kingdom as a whole.

97. In relation to legislation concerned with matters other than taxation, it cannot be assumed that a justification exists for following an equally strict practice. In *Deane*, in the present case, and in *Augustine v Data Cars Ltd*, it was simply assumed that the rule of practice laid down in relation to tax legislation applied equally to social security legislation, to Convention rights, and to employment legislation respectively. However, that cannot be assumed. Without underestimating the importance of a consistent approach to each of those areas of the law, to the extent that they are governed by legislation applying across the United Kingdom or Great Britain as a whole, it is not apparent that inconsistent decisions in any of those areas have the same potential to disrupt economic activity or legal certainty as inconsistent decision-making in relation to tax law.

98. Sixthly, it is necessary to bear in mind the implications of devolution, where devolved legislation is in issue in the earlier proceedings or in the proceedings currently before the court. It cannot any longer be assumed that similarly worded legislation enacted in different parts of the United Kingdom should necessarily be treated in the same way. There are different legislative and executive bodies, which may be acting for different reasons, and on the basis of different background material. Issues of justification under

the HRA, in particular, generally depend on judgements about legislative choices made in the light of conditions in the jurisdiction to which the legislation applies, and the constitutional arrangements in place in that jurisdiction. A further consequence of devolution is that the government bodies which are party to proceedings concerned with legislation enacted by different legislatures may not be the same. For example, since *O'Donnell* concerned devolved legislation, the Secretary of State was not a party to the proceedings (although she might have applied to intervene). That is a further difference from *Abbott v Philbin*. In tax cases the Revenue is inevitably party to the earlier proceedings as well as the proceedings currently before the court. It has therefore been heard before the decision is taken in the earlier proceedings, which will be followed in the later proceedings.

99. In the light of the various factors we have mentioned, the arguments presented to us do not in our view provide a justification for extending the scope of the strict approach adopted in *Abbott v Philbin* beyond the interpretation of tax statutes. In relation to that area of the law, the practice approved in *Abbott v Philbin*, and the factors affecting the scope of that practice as carefully described by Lord Evershed MR, have withstood the test of time.

100. In other areas of the law, it appears to us that the best approach, as a matter of pragmatic good sense, is generally for the appellate courts of the United Kingdom to treat each other's decisions on the interpretation of legislation with great respect, since it is undesirable that there should be conflicting decisions on the construction of provisions which are intended to apply in the same way in more than one jurisdiction. As we have indicated, it may be appropriate to attach particular weight to another court's view of the meaning of statutory language where it is difficult to say with any confidence that one interpretation is correct and another is wrong. Somewhat less weight may attach to another court's interpretation of a similar but different provision.

101. However, appellate courts should not regard themselves as being under an obligation to follow decisions which they consider to be wrong. They do not require to identify some other compelling reason for departing from a wrong decision. They do not have to identify exceptional circumstances. It is better that they should explain clearly why they consider the decision to be incorrect, give what they consider to be the correct decision, and grant leave to appeal to this court so that the difference of views can be resolved without undue delay.

102. Considering the present case in that light, it follows that the Court of Appeal erred in treating the case as falling within the scope of the practice approved in *Abbott v Philbin*. They should have departed from the decision in *O'Donnell* if they considered that it was wrong. There was all the more reason for them to reach their own decision in view of a number of aspects of the case.

103. First, following the decision in *O'Donnell*, the authorities with devolved responsibility for social security in Northern Ireland did not seek to appeal that decision to this court. As we have explained, the Secretary of State was unable to appeal it, not having been a party to the proceedings. However, the Secretary of State decided not to amend the policy for England and Wales so as to bring it into line with *O'Donnell* and the guidance issued by the DfC: see paras 41 and 42 above. Consistency across the United Kingdom was not therefore regarded by those who are constitutionally responsible for operating the system as a matter of overriding practical importance.

104. Secondly, the evidence and arguments before the Court of Appeal were different in some respects from those before the Northern Ireland Court of Appeal in *O'Donnell*. In particular, this court's judgment in *SC* had been issued since the decision in *O'Donnell*, and was relied on before the courts below. It bore significantly on the correctness of the approach adopted by the Northern Ireland Court of Appeal, as we shall explain. T

105. Thirdly, no serious consequences would have followed if the Court of Appeal had reached its own conclusion on the question before it, even if it had given effect to its doubts about aspects of the decision in *O'Donnell*. If it had departed from *O'Donnell*, the status quo would have continued as before. Relevant claims in England and Wales would have been decided on what the Court of Appeal considered to be the correct basis. Claims in Northern Ireland would have gone on being decided in accordance with *O'Donnell*. The difference in approach, which had already existed for three years, would ultimately have been resolved by this court.

## 8. The approach to status in article 14 cases

106. Although doubts have been expressed in the case law about the utility of the concept of status as an independent element in determining whether there has been a breach of article 14 (including in the Court of Appeal in this case), principally because of the increasingly broad approach taken to what can amount to a relevant "other status", the concept is plainly not unlimited and continues to have real relevance at the stage of justification.

107. The list of status grounds in article 14 concentrates on personal characteristics which a claimant either cannot or should not be expected to change (like sex and race or a fundamental or inherent aspect of an individual's identity like religion or nationality). However, since exceptions to the protection from discrimination offered by article 14 ought to be narrowly construed, both Strasbourg and domestic jurisprudence have expanded the range of cases where "other status" has been found and it has not been limited to a characteristic which is analogous to those listed in article 14, or even to characteristics that are highly personal or innate. Rather a status can be acquired and need not be immutable. The fact that article 14 draws a distinction between relevant status and

the difference in treatment does, however, suggest that there must be a ground for the difference of treatment in terms of a characteristic which is something more than a mere description of the difference in treatment, even if that characteristic has no importance in any other context than the difference in treatment about which complaint is made (see para 69 of *SC* per Lord Reed).

108. Certain status grounds are treated as "suspect" grounds. This is an inexact category developed by the case law over time (see *SC* para 100) and includes, for example, sex and race. A strict review is generally required of the reasons put forward to justify a difference in treatment based on suspect grounds of discrimination. Disability has often been treated as a suspect ground by the Strasbourg court which has emphasised the need to prevent discrimination against people with disabilities and foster their full participation and integration in society. The margin of appreciation enjoyed by states in establishing different legal treatment for people with disabilities is correspondingly reduced (see *Glor v Switzerland*, Application No 13444/04 (unreported) 30 April 2009 para 84). In *Guberina v Croatia* (2016) 66 EHRR 11, for example, concerning a refusal to grant a tax exemption for persons with special accommodation needs to the father of a disabled child, the Strasbourg court held that because of the particular vulnerability of persons with disabilities discriminatory treatment on that ground would require "very weighty" reasons to be justified (see para 73). This is entirely understandable. As Lord Reed explained in *SC*, quoting from the judgment in *Guberina* (para 112), "such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs."

## 9. The challenge to the finding of status in the respondent's case (ground 2)

109. The courts below concluded that being the surviving partner of a person with a lifelong inability to work through disability is a relevant status for article 14. As Underhill LJ made clear (for the avoidance of doubt), this refers to the inability of the deceased partner to do paid work to the extent necessary to generate payment of the minimum prescribed level of national insurance contributions. Although in writing the Secretary of State suggested that this "reframing" added to the uncertainty and subjective nature of the status, it seems to us that it is merely a clarification and does no such thing.

110. The principal objections made by the Secretary of State to the finding of an "other status" in this case can be summarised as follows. It is said not to be a personal characteristic, still less within a suspect class. Rather, it is said to be deeply subjective and to have no independent character. The respondent is not relying on his own status, but on his association with the other status of his wife, and the status is defined solely in the context of the impugned contribution condition. Moreover, whether a person is "unable" to work throughout their whole working life – and, therefore, unable to meet the contribution condition – is not objectively or readily ascertainable because subjective

evaluative judgements are required. It would not be clear who would and who would not fall into this claimed group, and there is no obvious proxy or method of determining this matter.

111. We do not accept these submissions. In our view, the conclusion of the courts below on the question of status is right in principle, and we agree with it. There is no doubt that the reason why the respondent was refused BSP was because his wife had not paid national insurance contributions. We assume for present purposes that an investigation of the facts of the case would establish that the reason why she did not make those contributions was because she was in fact unable to work throughout her life because of her severe disability. It follows that although disability (which would obviously be a relevant status) was not itself the reason for the refusal, disability was a factor in the reason the respondent, who was associated with Mrs Jwanczuk through his marriage to her, was refused BSP.

112. We see no difficulty in the fact that the respondent is not relying on his own status, but on his association with the status of his wife. Associative discrimination has long been recognised in this context (see *Coleman v Attridge Law (A Firm)* (Case C-303/06) EU:C:2008:415; [2008] 3 CMLR 27). Being a person permanently unable to work (and therefore to make contributions) through disability is a socially and economically significant personal characteristic. This status is used as a category within both state and private insurance schemes, and across Convention states. Some people will never have this status, others will acquire it during their working life, and some people (an especially vulnerable group) will have it before they reach working age, and potentially from birth. In the case of disability caused by a congenital birth defect, the status may even be inherent or innate. Moreover, we consider that this status is more than a mere description of the difference in treatment complained of even though it may not have any importance in any other context than the difference in treatment about which complaint is made.

113. As for the argument that the respondent's claimed status is too susceptible to change to qualify under article 14, we disagree. The question in the BSP context is whether the deceased spouse or partner was unable to work during their working lifetime (due to disability). As Underhill LJ explained, that requires the application of the single criterion of whether Mrs Jwanczuk was unable to work at any point in her working life: if she was able to work for some part of her life but not others, that would cause no difficulty because the criterion is binary, and she would fall outside the group. Moreover, that question is capable of being objectively determined at the time the application is made, by reference to evidence pre-dating the person's death. It is therefore not the case that what counts as being "unable to work" is uncertain or liable to vary over time.

114. Further, the need for an evaluative judgement is not a peculiar feature of this particular status. Many characteristics which are well recognised as potential grounds of discrimination under article 14 are not absolute in character and can typically only be

identified by an evaluative exercise. Disability itself is an example of this because, as Underhill LJ explained, there are degrees of disability, and it may be necessary in a particular case to carry out an evaluative exercise in order to establish whether a claimant was indeed disabled in the sense relevant to the claim. There are other examples. Take the status of cohabitation, recognised by this court in *In re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250 where a judgement was necessary as to whether the relationship in question was sufficiently close to amount to cohabitation; or the example of being unable to share a bedroom as adult partners because one of them was disabled or where a child required overnight care, both recognised as a relevant status in *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 WLR 4550 despite the fact that they depended on an evaluative assessment of whether the partners could share a room or of what care was required. We agree with Underhill LJ that an evaluative exercise of the necessary kind can properly be described as objective provided that it consists of a rational evaluation of objectively established facts. This is consonant with the overall purpose of article 14.

115. We agree with Mr Jaffey KC that, so far as the question of status is concerned, there is no conceptual difficulty about making an evaluative determination to establish whether a claimant's deceased partner or spouse was indeed unable to work due to disability for the purpose of a BSP claim. That sort of exercise has long had to be performed to determine entitlement to statutory benefits which are dependent on inability, or limited ability, to work. For example, as Mr Jaffey demonstrated, entitlement to sickness benefit under sections 10-13 of the National Insurance Act 1946, and subsequently to invalidity benefit under section 3 of the National Insurance Act 1971, required a determination of whether the claimant was incapable of work, and was treated in the case law as referring to "work which he can reasonably be expected to do". The same was true of entitlement to incapacity benefit under the Social Security (Incapacity for Work) Act 1994. Incapacity benefit was replaced by employment and support allowance under the Welfare Reform Act 2007 which defines the relevant test as "whether a person's capability for work is limited by his physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require him to work" (section 8(1)). Essentially the same test is prescribed by section 37 of the Welfare Reform Act 2012 for the purpose of universal credit.

116. It is plain that these provisions cannot be regarded as a precise proxy for "inability to work as a result of disability" for the purpose of a claim to BSP. Like the Court of Appeal, we readily accept that the detailed scheme under the Employment and Support Allowance Regulations 2008 (SI 2008/794) contemplates that some people in receipt of a benefit of this kind might in fact be capable of some kind of work: see regulations 40 and 45. But what these benefits do show is that there can be no inherent objection to treating incapacity for work as an objectively identifiable characteristic. (The existence of the current test in section 37 of the Welfare Reform Act 2012 also rebuts a point made in the Secretary of State's written case (though not raised in argument) that the test for any exception would have to be that it was impossible for the person to have made any contributions at any point in their working life and that proving impossibility is very

difficult. The benefits legislation has never set a test of impossibility for eligibility for incapacity to work benefits. Instead, the test has long been based on whether the person cannot reasonably be expected to work.)

117. As the Secretary of State accepts, and as is shown by Helen Walker's witness statement at paras 18-20, Mrs Jwanczuk's national insurance record "shows continuous credits of various sorts for the whole of her working life" and none of those relate to "active" benefits, or to work. In terms of income replacement benefit, Mrs Jwanczuk claimed sickness benefit, then incapacity benefit, then employment and support allowance. All these benefits would have involved a determination by a benefits officer about Mrs Jwanczuk's ability to work at the time those assessments were made. In our view, the Secretary of State's objection that there is no reliable proxy for determining the status here and the administrative difficulties she suggests will arise in recognising whether or for how long a person has the status in question are in truth more likely to be relevant to justification than to the status question.

118. Finally, there is no principled or constitutional objection to this claimed status on the basis that it is not one identified in or logically flowing from the Strasbourg case law; nor is it inconsistent with that case law. In our judgment the claimed status is one which we are fully confident would be recognised by the Strasbourg court and so should be recognised in this case: see *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2022] AC 487 at paras 54-59.

119. Having determined that the respondent has a relevant status for article 14 purposes, there is no dispute that he was treated in the same way (by being refused BSP because of the contribution condition) as any other widower whose deceased spouse made no national insurance contributions for reasons other than a lifelong inability to work. It is conceded that this was treatment in the ambit of A1P1. As we have explained, a breach of article 14 can arise where, without an objective and reasonable justification, there is a failure to treat differently persons whose situations are materially different (*Thlimmenos* discrimination). In essence therefore, what must be justified is the failure to make an exception from the contribution condition for the surviving spouse of a deceased person with a lifelong inability to work and pay national insurance contributions. That question is the focus of ground 3 to which we now turn.

## 10. The approach to justification of differential treatment caught by article 14

120. The often-critical question which determines whether the application of a discriminatory measure is compatible with article 14 is whether there is an objective and reasonable justification for the discrimination to which it gives rise.

121. This has been formulated as involving the four "*Bank Mellat* questions" (*Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, para 74 per Lord Reed) as follows:

> "(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective,
> (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
> (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

122. The question at step four involves an assessment of the proportionality of the impugned measure. It is often also put as a question of whether a fair balance has been struck between the rights of the individual affected by the measure and the interests of the community as a whole (see *Bank Mellat* para 20 per Lord Sumption).

123. The parties made detailed submissions on the approach to justification and proportionality, both relying on the judgment of this court in *SC*. *SC* was a case which raised alleged indirect discrimination on grounds of sex in the field of welfare benefits as one of its grounds. It concerned a challenge to an aspect of one of the legacy benefits replaced by universal credit, child tax credit, the maximum amount of which was calculated without reference to any third or subsequent child born to a claimant after a specified date. The challenge was dismissed on the basis that the measure was objectively and reasonably justified.

124. In *SC* Lord Reed undertook an extensive review of both the Strasbourg and domestic case law on justification and on the question of proportionality (paras 97-142). So far as relevant to the issues on this part of the appeal, Lord Reed explained the apparent conflict between statements in a number of Strasbourg cases favouring a wide margin of appreciation when it comes to general measures of economic or social policy (where the standard adopted has often been one of "manifestly without reasonable foundation"), and statements in other cases that as a general rule, "very weighty" reasons would have to be put forward before the court could regard a difference in treatment based exclusively on suspect grounds as compatible with the Convention. Recognising the complexity of the Strasbourg court's approach to justification, and that no single test has been treated as always applying in cases of a particular kind, Lord Reed concluded that there is no mechanical formula that suits every set of facts, and that a more nuanced approach is therefore required.

125. Lord Reed identified five general points that could be made about the Strasbourg court's approach to proportionality (see paras 115-129). The points can be summarised as follows. First, the Strasbourg court has consistently differentiated between cases concerning suspect grounds (to which a strict test of justification has been applied, or the court has said differential treatment on such grounds is incapable of justification) and non-suspect grounds (which are in principle subject to a less intensive review). Secondly, it has almost always recognised the general appropriateness of a wide margin in relation to measures of economic or social strategy, reflected in the context of welfare benefits, pensions and social housing by the "manifestly without reasonable foundation" formulation. Thirdly, the existence or absence of common standards among contracting states has been regarded as relevant in some cases. Fourthly, it has regarded as relevant the fact that the measure in question forms part of arrangements intended to eliminate historical inequality in a transitional period or in an area of evolving rights, where there is no established consensus. Fifthly, a wide variety of other factors or circumstances have been treated as relevant, including the example given by Lord Reed of conduct of the domestic authorities in creating a legitimate expectation that the applicant would receive favourable treatment (illustrated by *Muñoz Díaz v Spain* (2009) 50 EHRR 49 where the court attached importance to this feature). The same factors have been treated as relevant in the domestic jurisprudence.

126. Paras 158-162 of Lord Reed's judgment explained:

> "158. … In the light of that jurisprudence as it currently stands, it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a 'suspect' ground is to be justified. … But other factors can sometimes lower the intensity of review even where a suspect ground is in issue …
>
> 161. It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the 'manifestly without reasonable foundation' formulation, it is more fruitful to focus on the question whether a wide margin of judgment is

appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. …

162. It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in *JD* [2020] HRLR 5, para 11:

> 'Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore, any legislation may be contested from the viewpoint of the principles of equality and non- discrimination and such cases have become more and more frequent in the courts.'

In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As Judges Pejchal and Wojtyczek commented, at para 10:

> 'Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the

> judicial power is to be independent, the judicial and political spheres have to remain separated.'"

127. Overall, what emerges from this analysis is the requirement for a more flexible approach to the level of scrutiny or margin of judgement accorded to the primary decision- maker, giving appropriate respect to the assessment made by democratically accountable institutions but also taking proper account of the other factors (including as summarised above) that may be relevant in the particular case. A fact-specific balance must be struck that will inevitably be affected by the individual circumstances of the case. There can therefore be no automatic read across from one case to another and apparently similar considerations may have a different significance in one case compared with another because of the presence or absence of other material circumstances.

## 11. The aims or objectives of the contribution condition

128. The Secretary of State has put forward three aims or objectives of the contribution condition. The first is to "reward work through the benefit system". This policy aim relies on the distinction between contributory and non-contributory benefits, and the fact that the contribution principle is a central policy principle in the benefits system. As Helen Walker explains at paras 88 and 90 of her witness statement:

> "The contribution condition seeks to give effect to the principle that the Government should encourage and reward work through the benefit system: that work should pay. The Claimant's claim undermines this essential tenet of Government policy. This is despite the fact that there have always been benefits aimed at different groups of individuals and successive Parliaments since the Beveridge Report have repeatedly decided that some benefits are based on contributions, and some are not. …
>
> The contribution principle is a central policy principle. It ensures that individuals are encouraged to work and that the stigma of receiving a benefit is reduced. It also ensures that those who pay NI Contributions through working, even where working is challenging, are rewarded. Dilution of the contribution principle, by adding an exception to the contribution requirement will undermine the principle that work is rewarded in the benefit system. This will also increase the stigma experienced by those in receipt of benefits."

129. At para 92 of her witness statement, Helen Walker says:

> "In this context it is worth again repeating that BSP is a benefit which is intended to provide short term support to a claimant who has been bereaved (not support disabled individuals or their partners). The support it provides is based on the work of the deceased. It is the deceased's NI Contributions gained through working which give entitlement to the benefit. That is the very purpose and structure of the benefit and is part of the 'insurance' aspect of the benefit system, in that in order to obtain the benefit you must first contribute."

130. In other words, the importance of the contribution principle is that it encourages people to work in order to make the contributions necessary to obtain certain important contributory benefits as part of an insurance-type model. For BSP (and other contributory benefits) the worker makes payments by way of national insurance contributions that are deducted from earnings and receives, in return, benefits on the occurrence of a relevant event (such as sickness, unemployment, or bereavement) as of right and without any means-testing.

131. Non-contributory benefits are different. They are paid to everyone, whether they work or not, as a matter of welfare and dependent on an assessment of need. Because of this they are liable, however unfairly, to be regarded as "hand-outs", with the accompanying stigma associated with the receipt of such benefits. That stigma is mitigated where the benefit has been earned by the making of contributions. The centrality of that distinction means that requiring a contribution for a contributory benefit is a matter of principle, not simply a matter of administrative choice; and any exception to that rule may be regarded as compromising the integrity of the system.

132. The second aim is to simplify the benefit system to ensure that administrative cost and complexity are reduced. In addition to the contribution principle, Sir James Eadie KC submits that basing entitlement on the payment of contributions also provides a straightforward bright line rule for determining eligibility that can be easily ascertained from available records. That is in the interests of the public since it places little burden on DWP resources, and it enables quicker decision making which benefits bereaved claimants at what is inevitably a difficult time.

133. By contrast, as Helen Walker explains (at paras 58-87), a case-by-case assessment of lifelong inability to work is likely to be time consuming, difficult and resource intensive. There is no single proxy or piece of information held by government departments that could answer this question in most cases. Ms Walker's witness statement explains some of the difficulties that would arise in establishing a deceased spouse's benefits history in order to see whether they were in receipt of inability to work benefits or benefits inconsistent with inability to work, especially where it might be necessary to go back as far as the 1970s, and depending on the deceased's age at death. Even where

benefits and other relevant records are available for the whole period, they cannot necessarily give a wholly reliable answer because neither receipt nor non-receipt of inability to work benefits definitively establishes whether a person was or was not able to work. The detailed account given by Ms Walker of her attempt to reconstruct Mrs Jwanczuk's benefit records from 1990 onwards, including by making enquiries with HMRC, supports this. Ms Walker explains that this is liable to lead to arbitrary outcomes and unfairness as between claimants: for example, claimants who knew their spouses from a young age would be in a better position to prove that they had never been able to work than those who had only met them in later life.

134. The third aim put forward by the Secretary of State (which is probably better viewed as an aspect of the second aim rather than a separate aim in itself) is to ensure greater certainty in understanding entitlement to benefits so that individuals understand what they are entitled to and are able to plan for their financial future.

135. The Secretary of State contends that the harm done to these legitimate aims by allowing the exception sought to the contribution condition outweighs the discriminatory impact on the group of people affected by it and that a fair balance has been struck by the existing regime. Sir James Eadie submits that because the impugned measure represents a policy choice about a question of economic or social strategy in the context of welfare benefits, made initially by the Government but endorsed by Parliament in primary legislation, the margin of appreciation is at its widest. He emphasises that the Minister made a conscious decision that the importance of the contributory principle outweighed the fact that the contribution condition would exclude spouses of people who were unable to meet it as a result of illness or disability.

136. Mr Jaffey faintly suggests that the Secretary of State's reliance on the contribution principle was of recent origin. That submission is contradicted by the evidence including the Government's response to the consultation on bereavement benefits which recognised expressly "the important role that the contributory principle plays in people's experience of accessing benefits by creating a sense of entitlement that removes the stigma often associated with claiming means-tested benefits". He also submits that the strength of the aim is weakened in this case by the fact that the contribution is set at such a modest level.

137. For the reasons we give below, we are satisfied not only that the three aims are legitimate and rationally connected to the imposition of the contribution condition but also that the contribution condition is justified and strikes the necessary fair balance in this case.

**12. Is there an objective and reasonable justification for the discriminatory treatment in this case?**

138. In our view the starting point is that the widest margin of appreciation is ordinarily appropriate in a case such as this. This is because the contribution condition governing entitlement to BSP is a measure in primary legislation defining entitlement to social security benefits. It falls squarely in the social and economic sphere and involves policy choices made by Parliament about the allocation of scarce public resources. Moreover, the legislation introducing BSP was relatively recently enacted by Parliament following a consultation in which the impact of the contribution condition on disabled people was expressly considered by the Minister and the decision not to make an exception for people in the respondent's situation was expressly maintained on the policy basis that to make such an exception would undermine the basic principle that contributory benefits should only be available to those who had paid contributions. It is also significant that the measure is concerned with defining entitlement to a benefit as to which there is no general consensus or common standard about when or whether it should be paid.

139. Mr Jaffey submits that there are countervailing features that significantly reduce the margin of appreciation or, put another way, increase the intensity of review required in this case. First and foremost, he relies on the associative disability-related status in this case as being a suspect ground on which the differential treatment is based and submits that this reduces the margin significantly. Mr Jaffey submits that people with permanent inability to work are a particularly vulnerable group even amongst disabled people. They have a low life expectancy, low income and can experience social exclusion. Further, historically stereotypical assumptions have been made about the family life of people with permanent inability to work, including that they would die too early to marry, or would be unable to find a partner who wished to marry them, so that marriage would have been considered unrealistic or inappropriate in the case of severely disabled people.

140. We do not underestimate the vulnerability of people in Mrs Jwanczuk's position, and the difficulties faced by their families (emotional, financial and other) in supporting their inclusion in private and family life. Nonetheless we do not accept the relevance to this case of the problems of stereotyping, stigma and social exclusion relied on by Mr Jaffey.

141. The disentitlement to BSP is not based on disability itself and the connection between disability and disentitlement is relatively weak. Many, perhaps most, disabled people perform some work and are in a position to make the modest Class 1 or Class 2 contributions necessary to establish eligibility for the benefit at some point in their working lives. Disability is a factor in this case because it is the reason why Mrs Jwanczuk was unable to make contributions by working. But the contribution condition does not operate in a way that inhibits participation by disabled people in the labour market, and it is hard to see how it might perpetuate stereotypes that suggest marriage is not for disabled

people. Put another way, most people who work can and do qualify for BSP relatively easily given the modest contribution threshold. The minority who cannot qualify are not necessarily disabled or even severely disabled. This is not a case where such prejudice as there may historically have been, can be said to have led to legislative stereotyping which has interfered with or prevented some kind of individualised evaluation of the capacities or needs of this group.

142. Moreover, the nature of the benefit itself is not such as would result in stigma or exclusion of those not entitled to receive it. We can discern no intention behind the legislation to discriminate against disabled people. BSP is not an income replacement benefit. There is a benefits safety net for disabled people on a non-contributory basis as we have explained.

143. Secondly, Mr Jaffey relies on the fact of an exception made in the case of death at work (see section 31(3) of the 2014 Act) together with the modest level of contribution required to qualify for BSP, to submit that it was manifestly without reasonable foundation for Parliament not to make an exception to the contribution condition for those who were unable to work throughout their lifetime as a result of disability in those circumstances. We disagree. In our view the death at work exception is in fact consistent with the spirit of the contributory principle: it applies only where the deceased was in employment and (at least potentially) liable to pay contributions but was prevented from doing so by a work-related death. To the extent that this is a departure from the contributory principle it is very limited compared with an exception to cover a case where the deceased never worked at all. It is also significant that there was a legislative decision to make a single limited exception only.

144. More broadly, the evidence reflects the fact that the contribution principle has long been regarded as an important principle in the welfare benefits context, seen as ensuring that individuals are encouraged to work and that the stigma of receiving a benefit is reduced, and that those who do strive to work, even in challenging circumstances when it might be easier not to do so, are rewarded. It is true that there is a modest contribution only, but the fact that the contribution requirement was maintained even at a low level emphasises the importance attached to that principle. It reflects the importance attached by Parliament to the proposition, as articulated in the consultation materials which were before it, that with respect to certain benefits, people should get "something for something". This is a value judgement made by successive Parliaments and underscores the absence of any legal standard against which to make an assessment of the social, moral or other value attached to preserving this principle.

145. It is to be hoped that most disabled people will be able to find some form of work during their working lives to enable them to obtain the many personal benefits that working can bring. But even recognising that a minority of people will never be able to work, we consider that Parliament was entitled to legislate in a general way in relation to

welfare benefits to incentivise work. As Underhill LJ observed and we agree, it is not "self-evident that a contributory benefit should be payable to the bereaved spouses of those who have not paid contributions, even where that is as a result of disability. It might be thought to be a matter for the judgement of the legislature whether such a case requires a departure from the contributory principle or whether it is sufficient to leave the surviving spouse, if they are in need, to claim non-contributory benefits" (para 102). Certainly, this is not a case where we discern a broad consensus in society (whether at Council of Europe level or domestically) that such benefits should be made available in this circumstance.

146. Mr Jaffey relies on the fact that there is a non-discriminatory BSP scheme operating in Northern Ireland, without any reported difficulties, and he submits that if the exemption contended for were genuinely problematic, evidence would have been adduced of the problems created by it. But this is to miss the point. Parliament is entitled to legislate in a general way in relation to welfare benefits and is entitled to draw a bright line. In the welfare context, where broad categorisations are necessary for the welfare system to be workable, it is unsurprising that the legislation involves the drawing of general or bright line rules. In principle it may be justifiable for the administrative workability of a bright line rule to outweigh the unfairness to some who may be excluded by it. In other words, given that a line must be drawn somewhere, the fact that there may be hard cases which fall on the wrong side of a bright line rule should not invalidate the rule provided that it is beneficial overall: see for example, *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] AC 1312 at para 33 per Lord Bingham; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250 at para 27 per Lord Wilson; *R (A) v Criminal Injuries Compensation Authority* [2021] UKSC 27; [2021] 1 WLR 3746, at para 89 per Lord Lloyd-Jones; and *SC* at para 206.

147. There are obvious benefits of a bright line rule in this case, including the ease of administering the system, the clarity and certainty of speed and outcome, and the avoidance of individualised decision making. Moreover, there is no alternative bright line rule that could achieve an exceptions policy for those unable to work and make contributions for the whole of their working lives by reason of their disability. Nor is there a single proxy or piece of information held by the state capable of giving an answer to whether this is established. An exceptions policy would require individualised decision making, based on a retrospective evaluation of the extent and effect of a person's disability on their ability to work over the course of a lifetime, with all the difficulties that entails as earlier described. It would create particular difficulties if the disabled partner had lived abroad for part of their working life. It seems to us that it was not unreasonable in these circumstances for Parliament to conclude that it was better to have a certain, simple and consistent rule for all, which was quick to administer, and required almost no information to be provided by the bereaved, than to have an exception which would require the bereaved to provide detailed evidence of their deceased partner's capacity to work at such a sensitive time, only for the chance of a benefit to which they may not be entitled.

148. In these circumstances, we accept that dilution of the contribution principle by making the exception sought would undermine the contribution principle and that making the exception contended for would have undermined the basic contributory principle that BSP should only be available to those who have actually paid the minimum prescribed contributions.

149. Thirdly, we reject Mr Jaffey's submission that the 2014 Act is retrogressive legislation in the sense that it introduced a new discriminatory effect or disadvantage not present in the earlier legislation. BSP is just different from the former bereavement benefits it replaced. Parliament has changed the way certain benefits are delivered. It is inevitable where changes are made that there will be winners and losers. But political compromise and legislative choices have to be made, and the mere fact of change does not affect the intensity of review. Nor do we accept the argument that there is an inherent illogicality in Parliament deciding to accept national insurance credits when it comes to qualifying for pension entitlement under the 2014 Act but refusing to do so for BSP, even if they are closely related benefits. These are not linked benefits and there is nothing irrational or illogical in having different qualifying conditions for pension benefits (which can last for decades and are a form of income replacement benefit that ensures basic needs) as compared with BSP, a short-term benefit payable on the happening of a specific event but at the same time as other benefits are payable. The same is true of the complaint made by Mr Jaffey that the failure to make an exception to the contribution condition in cases like the respondent's reflected legislative incoherence. As we have explained, hard choices must inevitably be made in any welfare system and that is why a wide margin of appreciation is accorded in this context.

150. Fourthly, Mr Jaffey submits that Parliament did not consider the special position of a small minority of people with permanent inability to work in a way that was distinct from others who would fail to qualify. We do not accept this submission. Parliament has determined that a broad general rule or bright line should apply based on the contributory principle and has created a single narrow exception to that rule. Those choices are evident on the face of the legislation, and in the published response to the formal consultation (see paras 53-54 above) which was presented to Parliament before the draft legislation was debated and enacted. Given these clear references in this material, Parliament can be taken to have chosen not to enact an exception to cater for those whose incapacity to work means that they will be unable to meet the modest contribution condition to qualify for BSP.

151. Ms Walker exhibited to her witness statement a submission sent to the Minister by the responsible civil servant after the close of the consultation period together with the email recording the Minister's response. Although these might in some cases form useful background, such exchanges between the Minister and the departmental advisers are of no assistance to the court in determining the intention of the legislature in enacting the primary legislation on which the appeal depends. In response, Mr Jaffey sought to identify a mistaken or misleading conclusion drawn from the statistics in the submission. His

inference seemed to be that such an error would somehow invalidate or reduce the respect to be given to the Minister's decision to approve the recommendation and incorporate the provision in the Bill and that in turn would somehow undermine Parliament's approval of the overall regime. Such an approach confuses the intention of the executive branch with that of the legislature and is not a legitimate tool for statutory construction. Moreover, Parliament specifically considered the question of exceptions and made one narrow exception restricted to those in employment who die in the course of that employment (the death at work exception in section 31(3) of the 2014 Act). The making of a single exception by Parliament indicates a careful and conscious legislative policy choice which should be respected.

152. The assessment of proportionality ultimately depends on whether Parliament made the right judgment. Here, just as in *SC,* this question cannot be answered by any process of legal reasoning because there are no legal standards by which a court can decide where the balance should be struck between the interests of bereaved spouses in receiving BSP but whose deceased partners have not made contributions because of lifelong inability to work on the one hand, and the interests of the general community on whom the tax burden falls. Democratically elected institutions are in a better position than the courts to reflect a collective sense of what is fair and affordable and to assess where the balance of fairness lies (see to this effect para 208 in *SC*).

153. It follows that we are in an area in which the court should be very slow to substitute its own view for that of Parliament. Its decision was an exercise of political judgement. Even accounting for the fact that the respondent's discrimination case includes disability as part of the grounds for the impugned treatment, we are satisfied that requiring the contribution condition to be met without any relevant exception being made is reasonably and objectively justified. Balancing the severity of the effect on the respondent (being deprived of any right to BSP) against the importance of the objectives pursued by the contribution condition, we are satisfied that the former is outweighed by the latter. This is sufficient to answer the respondent's claim which fails for these reasons.

## 13. Issue 4: remedy

154. This issue is academic in view of our conclusions reached thus far. However, since it was argued, we express our views shortly.

155. Whatever the position in *O'Donnell*, we do not consider that it is "possible" within the meaning of section 3 of the HRA 1998 to read in an exception to the contribution condition in this legislation.

156. Though section 3 imposes a powerful, far-reaching interpretative obligation on the courts to construe primary and subordinate legislation in a way which is compatible with

Convention rights, there are well-established limits to it. They are that the meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed": see *Ghaidan* v *Godin Mendoza* [2004] 2 AC 557, para 33 per Lord Nicholls. This recognises that where there is a variety of ways in which incompatible primary legislation might be altered to achieve compatibility, the HRA makes clear that it is ordinarily for Parliament to make the relevant legislative choices.

157. Here, as we have explained, an important feature of BSP is that it supports the policy behind the contribution principle that work should be encouraged and rewarded, reducing the stigma of claiming benefits. There are other benefits available to support those who by reason of disability are unable to work. The actual payment of national insurance contributions is a relevant and fundamental feature of the contribution condition in the 2014 Act. Parliament expressly decided to exclude national insurance credits and voluntary Class 3 contributions from the entitlement. The fact that Parliament maintained the contribution condition despite the low level at which it is set, demonstrates its significance and importance, rather than the reverse.

158. We have also explained above why the contribution condition and the policy of rewarding work are not inconsistent with Parliament choosing to make the limited exception in section 31(3) of the 2014 Act that it did, in relation to those who die in an industrial accident or as a result of an industrial disease. The narrow death at work exception applies in circumstances where, but for the work-related death, the deceased would have been expected to have "actually paid" contributions. This limited exception maintains the policy that work should be rewarded and goes with the grain of the legislation. It cannot be treated as a gateway to a much broader exception for those who have never worked (for whatever reason) under section 3 of the HRA.

159. It is also the case that Parliament having expressly considered what exception (if any) should be made to the fundamental feature of the BSP scheme (the contribution condition) it would go against the grain to introduce, by implying words, a different, and far wider, exception than the one that Parliament has chosen to make.

## 14. Conclusion

160. Accordingly, the Secretary of State's appeal succeeds. The respondent is not entitled to BSP because no actual contributions were paid by Mrs Jwanczuk during her working life. This may seem a harsh decision but, as this court made clear in *SC*, the risk of undue interference by the courts in the sphere of political choices made by the legislature in the welfare context can only be avoided if the courts respect the boundaries between legality and the political process. There is no proper basis, consistent with the separation of powers, on which to overturn Parliament's judgement.