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Court of Appeal

Swift *v* Secretary of State for Justice

[2013] EWCA Civ 193

2013 March 5; 18 Lord Dyson MR, Lewison, Treacy LJJ

B

Fatal Accidents Acts — Right of action — Dependency — Claim by person cohabiting with deceased for six months prior to death — Claimant giving birth to couple's child after deceased's death — Legislation confining right to recover damages for loss of dependency to person cohabiting with deceased for at least two years prior to death — Whether interfering with Convention rights — Whether means chosen proportionate — Whether any interference justified — Fatal Accidents Act 1976 (c 30), s 1(3)(b) (as substituted by Administration of Justice Act 1982 (c 53), s 3(1)) — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 8, 14

C

The claimant cohabited with W for about six months before the latter was fatally injured in an accident at work as a result of the admitted negligence of a third party tortfeasor. Their child, who was born after W's death, was able to make a claim for loss of financial dependency under section 1(3) of the Fatal Accidents Act 1976, as

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subsituted[1], but since the claimant had lived with W in the same household for less than two years immediately before the date of his death, she was not entitled to make such a claim. The claimant brought proceedings against the Secretary of State claiming a declaration that section 1(3)(b) of the 1976 Act was incompatible with her rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2], in conjunction with article 14, in that (i) it unjustifiably

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discriminated against persons cohabiting as husband and wife for less than two years by excluding them from the classes of family members entitled to claim damages for loss of dependency under the 1976 Act, or (ii) alternatively interfered with her right to respect for her family life under article 8.1 and was not justified under article 8.2. The judge dismissed the claim.

On the claimant's appeal—

Held, (1) that the decision whether to give a statutory right of action for damages

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for loss of dependency to the dependant of a victim of a wrongful death raised important and difficult issues of social and economic policy; that special weight should be given to social and economic policy choices made in the public interest by a national legislature; and that the combined effect of the facts that the claim raised issues as to the extent of the positive obligations on the state to provide legal remedies between individuals, that the article 8 issue raised did not affect any aspect of the claimant's personal identity or an intimate aspect of family or private life or raise

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questions of discrimination on grounds such as sex or race, and that there was no consensus across the contracting states of the Convention as to the importance of such a right of action or the nature and duration of the relationship of dependency which it required, was that the legislature should be accorded a generous or wide margin of discretion in relation to the legislative choices which it had made in enacting section 1(3) of the Fatal Accidents Act 1976, as substituted (post, paras 25, 26, 27–29, 30–31, 43, 44).

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Draon v France (2005) 42 EHRR 807, GC and *Mosley v United Kingdom* (2011) 53 EHRR 1011 applied.

[1] Fatal Accidents Act 1976, s 1, as substituted: see post, para 1.
[2] Human Rights Act 1998, Sch 1, Pt I, art 8: see post, para 5. Sch 1, Pt I, art 14: see post, para 6.

(2) Dismissing the appeal, that the legislature had been entitled to decide that there had to be some way of proving the requisite degree of permanence and constancy in the relationship of the dependant with the deceased beyond the mere fact of living together as husband and wife, that such permanence could not be presumed in the case of short-term cohabitants, and that the requirement of cohabitation for at least two years, which was not arbitrary, was a simple way of demonstrating a real relationship of permanence; that the legislature had also been entitled to prefer such a distinction to an approach which depended on fact-sensitive decisions in each case as to whether the relationship was sufficiently constant or permanent to justify a right of claim; that the fact that making such a distinction would inevitably result in hard cases falling on the wrong side of the line was not a sufficient reason for invalidating it if in the round it was beneficial and produced a reasonable and workable solution; that the two-year requirement provided greater certainty as to the scope of the Act by ensuring that the court had some evidence of past experience and the nature of the relationship to inform its assessment of damages, and by reducing the need to conduct an intrusive and intimate inquiry into the nature and quality of the relationship so as to establish whether it satisfied some objective standard of permanence and constancy; that, therefore, section 1(3)(b) of the 1976 Act provided a proportionate means of pursuing the legitimate aim of conferring on dependants of primary victims of fatal wrongdoing who had had relationships of some degree of permanence and dependence with the deceased a right of action to recover damages for their loss of dependency; and that, accordingly, the difference in treatment of cohabitees on the basis of two years' cohabitation provided in section 1(3)(b) was justified and was not incompatible with article 14 in conjunction with article 8 of the Convention, and any interference with the claimant's right to respect for her family life under article 8.1 was justified under article 8.2 (post, paras 35–42, 43, 44).

Decision of Eady J [2012] EWHC 2000 (QB); [2012] PIQR P458 affirmed.

The following cases are referred to in the judgment of Lord Dyson MR:

Draon v France (2005) 42 EHRR 807, GC
Humphreys v Revenue and Customs Comrs [2012] UKSC 18; [2012] 1 WLR 1545; [2012] PTSR 1024; [2012] 4 All ER 27, SC(E)
Kotke v Saffarini [2005] EWCA Civ 221; [2005] PIQR P500, CA
Mosley v United Kingdom (2011) 53 EHRR 1011
R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15; [2008] AC 1312; [2008] 2 WLR 781; [2008] 3 All ER 193, HL(E)
R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 37; [2006] 1 AC 173; [2005] 2 WLR 1369; [2005] 4 All ER 545, HL(E)
R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening) [2008] UKHL 63; [2009] AC 311; [2008] 3 WLR 1023; [2009] PTSR 336; [2009] 2 All ER 556, HL(E)
Şerife Yiğit v Turkey (2010) 53 EHRR 872, GC
Stec v United Kingdom (2006) 43 EHRR 1017, GC

The following additional cases were cited in argument:

Botta v Italy (1998) 26 EHRR 241
Burgess v Florence Nightingale Hospital for Gentlewomen [1955] 1 QB 349; [1955] 2 WLR 533; [1955] 1 All ER 511
Clift v United Kingdom (Application No 7205/07) given 13 July 2010; The Times, 21 July 2010, ECtHR
EB v France (2008) 47 EHRR 509; [2008] 1 FCR 235, GC
Hode and Abdi v United Kingdom (2012) 56 EHRR 960

M v Secretary of State for Work and Pensions [2006] UKHL 11; [2006] 2 AC 91; [2006] 2 WLR 637; [2006] 4 All ER 929, HL(E)
Marcic v Thames Water Utilities Ltd [2003] UKHL 66; [2004] 2 AC 42; [2003] 3 WLR 1603; [2004] 1 All ER 135, HL(E)
Marckx v Belgium (1979) 2 EHRR 330
Mata Estevez v Spain Reports of Judgments and Decisions 2001-VI, p 311
PB and JS v Austria (2010) 55 EHRR 926
Petrovic v Austria (1998) 33 EHRR 307
R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening) [2011] UKSC 45; [2012] 1 AC 621; [2011] 3 WLR 836; [2012] 1 All ER 1011, SC(E)
R (Chen) v Secretary of State for the Home Department [2012] EWHC 2531 (Admin); [2012] HRLR 873
R (Clift) v Secretary of State for the Home Department [2006] UKHL 54; [2007] 1 AC 484; [2007] 2 WLR 24; [2007] 2 All ER 1, HL(E)
R (McDonald) v Kensington and Chelsea Royal London Borough Council (Age UK intervening) [2011] UKSC 33; [2011] PTSR 1266; [2011] 4 All ER 881, HL(E)
R (S) v Chief Constable of the South Yorkshire Police [2004] UKHL 39; [2004] 1 WLR 2196; [2004] 4 All ER 193, HL(E)
R (T) v Chief Constable of Greater Manchester Police (Liberty intervening) [2013] EWCA Civ 25; [2013] 1 WLR 2515; [2013] 2 All ER 813; [2013] 1 Cr App R 344, CA
Secretary of State for Defence v Hopkins [2004] EWHC 299 (Admin); [2004] ACD 226
Zarb Adami v Malta (2006) 44 EHRR 49

APPEAL from Eady J

By a claim form issued on 13 July 2011 the claimant, Laurie Swift, sought a declaration against the defendant, the Secretary of State for Justice, following the death on 15 July 2008 of Alan Lee Robert Winters, with whom she had been cohabiting for about six months and who had been fatally injured as a result of the fault of a third party, that section 1(3)(b) of the Fatal Accidents Act 1976 was incompatible with her rights under article 8, or alternatively articles 8 and 14, of the Convention for the Protection of Human Rights and Fundamental Freedoms. On 18 July 2012 Eady J dismissed the claim [2012] PIQR P458, and refused permission to appeal.

By an appellant's notice filed on 30 July 2012 and pursuant to permission granted by the Court of Appeal (Richards LJ) on 20 September 2012 the claimant appealed on the following grounds. (1) The judge had wrongly held that article 14 was not applicable because the case did not fall within the ambit of article 8; in particular, he had applied the wrong test of whether there was a direct and immediate link, and he should have recognised that the test for coming within the ambit of article 8 in the context of a claim brought under article 14 was different and more generous, since article 14 applied to those additional rights falling within the general scope of article 8 for which Parliament had voluntarily decided to provide; further, he should have appreciated that the 1976 Act, in permitting classes of individuals who were in a familial relationship with the deceased to claim for loss of the dependency which they would otherwise have enjoyed arising out of their personal relationship with the deceased, was thereby respecting the family life which had been enjoyed by the claimant and the deceased, so that the claim fell within the general scope of article 8. (2) The judge had wrongly held that the claimant did not have "other status" within the terms of

article 14; in particular he should have accorded a generous meaning to those words and recognised that the claimant had status as a cohabitant of less than two years; he should have accepted that there was no requirement that the treatment of which the claimant complained should exist independently of the other status on which it was based; and he should, alternatively, have found that the claimant's other status was that of a cohabitant. (3) The judge should not have accepted that section 1(3) of the 1976 Act was justified in that (a) he should have recognised that the additional requirement of establishing that cohabitation had continued for two years up to the date of death did not detract from the requirement that a claimant had to prove that he had been living as husband or wife in the same household with the deceased; (b) he should have appreciated that the requirement to prove that the claimant had been in cohabitation sufficed to distinguish the case from that of a casual relationship in accordance with the limited legitimate aim of Parliament; (c) he should have attached proper weight to the criticisms made by the Law Commission, the Department for Constitutional Affairs, the Ministry of Justice and the House of Commons Justice Committee, all of which were recognised by the defendant as valid, of the failure by Parliament in 1983 to permit less than two-year cohabitants to claim when it was obvious that they would also be in a position of dependency; (d) he had erred in permitting too great a margin of appreciation to Parliament and failed sufficiently thoroughly to scrutinise the section and so to recognise its discriminatory effect; and (e) he had failed to attach sufficient weight to the fact that a claimant passing through the gateway of the section still needed to prove that he had a loss of dependency (and its extent) so that unmeritorious claims would still be excluded by the courts. (4) The judge had wrongly dismissed the claim based on article 8 alone, in that he should have found that there was a direct and immediate link between the operation of the section and respect for family life, as enjoyed between claimants and deceased, such that the claim fell within article 8, and he should not have accepted the case that section 1(3)(c) was justified.

The facts are stated in the judgment of Lord Dyson MR.

Robert Weir QC (instructed by *Slater & Gordon (UK) LLP, Sheffield*) for the claimant.

The issue of financial dependency is intimately connected with family life and falls within the ambit of article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. [Reference was made to *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, paras 12, 13, 17, 18, 24; *Petrovic v Austria* (1998) 33 EHRR 307, paras 26–29; *EB v France* (2008) 47 EHRR 509, paras 48–50; *PB and JS v Austria* (2010) 55 EHRR 926, paras 30–34 and *Marckx v Belgium* (1979) 2 EHRR 330, para 52.] The judge was wrong to hold that the present was a "positive obligations" case so that the claimant had to show that her case gave rise to a direct and immediate link with family life: contrast *Botta v Italy* (1998) 26 EHRR 241, paras 34, 35 and *R (McDonald) v Kensington and Chelsea Royal London Borough Council (Age UK intervening)* [2011] PTSR 1266, para 15.

Where a claimant alleges breach of article 14, the case may fall within the ambit of article 8 even where there is no positive obligation under article 8:

see *Şerife Yiğit v Turkey* (2010) 53 EHRR 872, paras 57, 58, 93–98; *Mata Estevez v Spain* Reports of Judgments and Decisions 2001-VI, p 311; *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, paras 14–19, 84, 108, 127; *Zarb Adami v Malta* (2006) 44 EHRR 49, paras O-16, O-17 and *Burgess v Florence Nightingale Hospital for Gentlewomen* [1955] 1 QB 349, 359. The only claims that can be made under the Fatal Accidents Act 1976 are for loss of dependency arising out of the personal relationship between the claimant and the deceased. Parliament has accorded value to that relationship by requiring the tortfeasor to compensate the family member for the loss of the dependency. *Secretary of State for Defence v Hopkins* [2004] EWHC 299 (Admin) at [51] is distinguishable on its facts.

The judge wrongly held that the claimant did not have "other status" within the terms of article 14. The words "or other status" should be given a wide meaning. That status is personal to the claimant; it is descriptive of what has happened to her: see *Clift v United Kingdom* (Application No 7205/07) given 13 July 2010; The Times, 21 July 2010, paras 55–63. The protection afforded by the article is not confined to different treatment based on personal characteristics which are personal or inherent. There is no requirement that the treatment complained of must exist independently of the other status on which it is based. The level of specificity to be accorded to the other status may be set by the legislation in question. [Reference was made to *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, paras 28, 48; *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] AC 311, paras 41, 42, 45; *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, para 50; *R (Chen) v Secretary of State for the Home Department* [2012] HRLR 873, paras 45, 46; *Hode and Abdi v United Kingdom* (2012) 56 EHRR 960, paras 47, 48 and section 1(3) of the 1976 Act.]

The amendment to the 1976 Act in 1983 was Parliament's recognition that cohabitants, like married people, lived together in mutually supportive relationships. Cohabitation naturally brings an ongoing mutual dependency, in particular a financial one. It would be anomalous if those of less than two years' cohabitation were excluded from the classes of individuals entitled to bring a claim. The two-year threshold is a legitimate aim in so far as it is understood as an intention to distinguish between a relationship that can properly be described as mutually dependent and one that is casual. The additional requirement that the relationship has to have lasted for two years is arbitrary and not proportionate to the aim sought to be achieved of providing for cohabitants. [Reference was made to the Law Commission report, *Claims For Wrongful Death* (1999) (Law Com No 263), paras 3.16–3.18, 3.28, 3.29; the Department of Constitutional Affairs consultation paper, *The Law on Damages* (CP 9/07), p 13, para 7; the Ministry of Justice paper, *The Law on Damages* (CP(R) 9/07), p 44 and the House of Commons Justice Committee report, *Draft Civil Law Reform Bill: pre-legislative scrutiny*, para 28.] Courts are more astute to scrutinise differences in treatment based on the length of cohabitation and can be expected to make value judgments: see *Şerife Yiğit v Turkey* 53 EHRR 872, para 70; *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2012] 1 AC 621, para 46 and *R (T) v Chief Constable of Greater Manchester Police (Liberty intervening)* [2013] 1 WLR

2515, para 41. The expressed views of various government agencies show that section 1(3) of the 1976 Act has a disproportionate effect on a class of claimants deserving of entitlement to bring a claim for loss of dependency.

Jason Coppel (instructed by *Treasury Solicitor*) for the Secretary of State.

Neither the Law Commission nor the draft Civil Law Reform Bill adopted the approach that cohabitation in and of itself is a sufficient indication of constancy or permanency in a relationship, so that there is no justification for any qualifying period. Both the current regime and reforms proposed in the draft Bill would comply with the Convention for the Protection of Human Rights and Fundamental Freedoms, falling within the wide margin of discretion to which the legislature is entitled. As the present is a positive obligations case the relevant legislative provision has to go beyond merely having a tenuous link to family life to come within the ambit of article 8 of the Convention: there has to be a direct and immediate link between the measure complained of and private and family life.

Section 1 of the Fatal Accidents Act 1976 does not embody a decision of the state which can be said itself to interfere with private or family life, such as a decision to grant or withhold a state benefit, or to require payment of child maintenance. [Reference was made to *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, paras 5, 87; *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, para 12; *Botta v Italy* (1998) 26 EHRR 241, paras 33, 34; *Draon v France* (2005) 42 EHRR 807, paras 105, 106, 111, 114–116 and *Mosley v United Kingdom* (2011) 53 EHRR 1011, paras 106–110.]

None of the authorities relied on by the claimant supports the proposition that the scope of a private law remedy in damages for death of a loved one has that link with private or family life, nor even that the scope of such a remedy falls within article 8. The 1976 Act only impinges on family life following death. The possibility of bringing a claim for damages against a third party after death does not form any part of a family's financial affairs while family life persists.

A personal characteristic or "other status" within the meaning of article 14 of the Convention cannot be defined by the treatment of which the person complains: see the *Clift* case [2007] 1 AC 484, paras 28, 47 and *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] AC 311, paras 5, 45, 46. [Reference was also made to *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, paras 50–52.] The financial interests of the claimant have no clear analogy with recognised cases of "status" in the jurisprudence of the European Court of Human Rights, and do not call for the same anxious scrutiny as the interests in the *Clift* case.

Even if section 1(3)(b) of the 1976 Act were to give rise to a difference of treatment on the basis of "other status", it is objectively justified since it involves a question of social and economic policy on which reasonable views may differ. The European Court of Human Rights has afforded to Parliament a wide margin of discretion when framing legislation on social issues: see the *Draon* case 42 EHRR 807, para 108. [Reference was also made to *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42, paras 41–42 and *Mosley v United Kingdom* 53 EHRR 1011.] In the present case the objective is the imposition of a limitation on the liability in tort of third

A parties, and Parliament's solution of striking the balance with the two-year rule should be afforded considerable respect. There was no suggestion that the United Kingdom lagged behind the legislative schemes of other contracting states. The Law Commission report supports the imposition of limits: see para 6.28. The legislature was entitled to prefer a bright-line distinction to an approach which depends on fact-sensitive decisions by the courts as to whether a particular relationship is sufficiently constant or permanent to warrant a right of claim under the 1976 Act.

B

Weir QC replied.

The court took time for consideration.

18 March 2013. The following judgments were handed down.

C

LORD DYSON MR

1 The claimant appeals from the order of Eady J by which he dismissed her claim pursuant to section 4 of the Human Rights Act 1998 that section 1(3)(b) of the Fatal Accidents Act 1976 (as amended) is incompatible with her rights under article 14 in conjunction with article 8, alternatively article 8 alone, of the Convention for the Protection of Human Rights and Fundamental Freedoms. So far as material, section 1 of the 1976 Act (as substituted by section 3 of the Administration of Justice Act 1982 and added to by section 83 of the Civil Partnership Act 2004) provides:

D

"*Right of action for wrongful act causing death.*

"(1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

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"(2) Subject to section 1A(2) below, every such action shall be for the benefit of the dependants of the person ('the deceased') whose death has been so caused.

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"(3) In this Act 'dependant' means— (a) the wife or husband or former wife or husband of the deceased; (aa) the civil partner or former civil partner of the deceased; (b) any person who— (i) was living with the deceased in the same household immediately before the date of the death; and (ii) had been living with the deceased in the same household for at least two years before that date; and (iii) was living during the whole of that period as the husband or wife or civil partner of the deceased . . . (e) any child or other descendant of the deceased . . ."

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2 Section 1A(1) (as inserted by section 3 of the 1982 Act) provides: "An action under this Act may consist of or include a claim for damages for bereavement." Section 3(1) (as substituted by section 3 of the 1982 Act) provides: "In the action, such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively."

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3 The facts can be shortly stated. The claimant had been cohabiting with Alan Lee Robert Winters for about six months when he was fatally injured in an accident at work as a result of the admitted negligence of a

third party tortfeasor. Their child was born after his death. The child was able to make a claim for loss of dependency under section 1(3)(e) of the 1976 Act. But since the claimant and Mr Winters had been living together as husband and wife in the same household for less than two years immediately before his death, she was not able to do so.

4 The claimant's primary case is that section 1(3)(b) is incompatible with her rights under article 14 in conjunction with article 8 of the Convention. In summary, she says that section 1(3)(b) unjustifiably discriminates against persons who have been cohabiting as husband and wife for less than two years, by excluding them (but not those who have been cohabiting for two years or more) from the classes of family members entitled to claim damages for loss of dependency under the 1976 Act. Her alternative case is that section 1(3)(b) interferes with her right to respect for family life contrary to article 8.1 of the Convention alone and that this interference is not justified under article 8.2.

5 Article 8 of the Convention provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

6 Article 14 provides:

> "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."

7 The issues that arise in relation to the claimant's primary case are (i) whether the facts fall within the ambit of article 8 so as to engage article 14 ("the ambit issue"); (ii) whether as a cohabitant of less than two years the claimant had "other status" within the meaning of article 14 ("the other status issue"); and (iii) whether, if article 14 is engaged and the claimant had "other status", the difference in treatment of claimants based on the duration of their cohabitation by the 1976 Act is objectively justified. The issues that arise in relation to the claimant's alternative case are (i) whether section 1(3)(b) of the 1976 Act amounts to an interference with the claimant's right to respect for family life at all; and (ii) if it does, whether the interference is objectively justified pursuant to article 8.2.

8 In a careful and comprehensive judgment, the judge found against the claimant on all these issues. We heard full argument on each point. The justification defence advanced by the Secretary of State, if well-founded, is fatal to both the primary and alternative cases. For the reasons that I give in this judgment, I am satisfied that the difference in treatment is justified. I do not, therefore, find it necessary to deal with the submissions which were addressed to us on the ambit issue or the other status issue. I propose to say no more about them.

History of section 1(3) of the 1976 Act and proposals for its reform

9 Before I come to the issue of objective justification, I should say something about the views that have been expressed about section 1(3)(b) from time to time and the proposals that have been made for its reform. As enacted in 1976, the Act contained no provision for the right to claim damages for loss of dependency by cohabitants. At the committee stage of the Administration of Justice Bill, it was recognised that it was anomalous that an illegitimate child qualified as a dependant entitled to claim under the 1976 Act, but the child's surviving dependant parent did not. But it is clear from the debates in Parliament that there were differences of opinion as to how this anomaly should be remedied and, in particular, which cohabitants should be eligible to claim and which should not. By the time of the report stage on 4 May 1982, the two-year qualifying period for cohabiting couples had been included in the Bill. Lord Hailsham of St Marylebone LC expressed the Government's position in these terms (Hansard HL Debates, 4 May 1982, col 1106):

> "Then there must, I think, be some degree of permanence about the relationship. The weight of the speeches made on Committee, especially Lord Edmund-Davies's speech, related to these enduring relationships in which the actual status of marriage had not been achieved but much else that is part and parcel of a marriage had been, and I have put in a specific period of years."

10 Thus it was that the present provisions in relation to cohabitants came to be enacted in the Administration of Justice Act 1982. But with the decline in the number of marriages and the corresponding rise in the number of couples who chose to cohabit as husband and wife without undergoing the formality of a marriage, the debate continued as to whether Parliament had struck the balance in the right place.

11 In November 1999 the Law Commission published its paper entitled *Claims for Wrongful Death* (Law Com No 263). This paper reviewed a number of areas of law in relation to claims for damages for wrongful death (including damages for loss of dependency and for bereavement). In the executive summary of its paper, p iii, the Law Commission said that it was recommending reform and that a key aim of its recommendations was "to modernise the existing legislation, so as to bring this area of the law into line with the values of modern society". It added:

> "The present law arbitrarily excludes from an entitlement to claim compensation for financial loss some people who were financially dependent on the deceased. Our proposed reform would remove that anomaly by adding a generally worded class of claimant to the present fixed list."

12 At para 3.16 of the paper, the Commission referred to the position of (amongst others) cohabitants living together who did not satisfy the two-year rule and said that these examples provided "powerful support for the view that the present list is too restrictive". At para 3.18, they recommended that the list should be reformed. This they did by proposing

(in Appendix B) in a new section 1(3)(h) a generally worded class of claimant defined as

> "any [other] person who was being wholly or partly maintained by the deceased immediately before the death or who would, but for the death . . . have been so maintained [at a time beginning after the death]".

It also recommended a new section 1(7):

> "For the purposes of this Act a person shall be treated as being wholly or partly maintained by another person if the other person, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards his reasonable needs."

It further recommended amendments to section 1A so as to identify those for whose benefit a claim for damages for bereavement could be made. These included in subsection (2)(b) "any person who has lived with the deceased as husband and wife for a period of at least two years immediately before the death".

13 On 4 May 2007 the Department of Constitutional Affairs ("DCA") issued a consultation paper entitled *The Law on Damages* (CP 9/07) which considered the recommendations of the Law Commission report. At para 7, the paper acknowledged that these recommendations would allow anyone who could prove dependency immediately prior to the death to claim, including cohabitants of less than two years duration. It also referred to "the injustice that can be caused by the current situation". As an example of this injustice, reference was made to *Kotke v Saffarini* [2005] PIQR P500, where the claimant had been unable to obtain compensation for the death of her partner, since she had not been living with him in the same household for two years before his death, although the relationship between them had lasted some years and they had a child together. The paper noted:

> "While many people could potentially fall within the proposed categories, in each case financial dependency would have to be proved, and thus unmeritorious claims would be unlikely to succeed. The Government therefore proposes to accept this part of the recommendation."

14 On 1 July 2009 the Ministry of Justice published its summary of responses to the DCA paper: *The Law on Damages: Response to consultation* (CP(R) 9/07). At p 44, the summary stated that it remained the Government's view that the residual category proposed by the Law Commission was

> "the fairest approach to take, and would ensure that all those actually dependent on the deceased could claim while avoiding the possibility of speculative claims based on possible future dependency."

It continued:

> "Concerns were expressed that introducing the residual category would enable claims to be brought where the dependency (in particular of a cohabitant) has been of a very short duration. However, a two-year qualifying period as suggested by some responses would put cohabitants

A in no better position than under the current law, and would not prevent unjust outcomes in circumstances such as that in *Kotke v Saffarini* (as set out in the consultation paper). A shorter qualifying period such as six months would be less disadvantageous, but on balance the Government believes that this would not be appropriate. As the consultation paper pointed out, in each case that arises actual financial dependency would B have to be proved, and thus unmeritorious claims would be unlikely to succeed. The fact that dependency has to be proved distinguishes this situation from the proposed two-year qualifying period for a cohabitant to receive bereavement damages, as the latter is an automatic award to those in the eligible categories."

15 In December 2009 the Ministry of Justice produced a draft Bill C entitled "Civil Law Reform" which gave effect to the Law Commission recommendations. This was scrutinised by the House of Commons Justice Committee who published a report (Draft Civil Law Reform Bill: pre-legislative scrutiny) on 31 March 2010. Para 28 of this report stated:

"We agree with the Government that the new category of claimant does not require a qualifying period to achieve legal clarity as all potential D dependants will be required to evidence their claims. We would go further and conclude that the introduction of a qualifying period would exclude those whom this category is intended to benefit, for example a cohabitee who had lived with the deceased for less than two years. This would undermine the intention behind the creation of a new category, which is to introduce some flexibility and allow it to keep pace with changes in society." E

16 On 10 January 2011 a Written Ministerial Statement was made by the Parliamentary Under-Secretary of State for Justice which said that the Government had decided not to proceed with the proposed Civil Law Reform Bill because "in the present financial situation we need to focus our resources on delivering our key priorities".

F

The judgment

17 In summary, the judge held as follows. First, it is legitimate for the legislature to take steps to limit the liability of tortfeasors for loss caused to individuals who are not the primary victims of the wrongdoing in question. Where the balance should be struck between the competing interests is a G matter of social policy. Secondly, in assessing whether the measure is a proportionate way of meeting that legitimate aim, the legislature is entitled to a wide margin of discretion since (a) it does not involve discrimination on grounds such as sex and race as opposed to a matter of social and economic policy; (b) it concerns the question whether the state is under a positive obligation to provide legal remedies between individuals; and (c) it deals with an area where there is no effective consensus of treatment by the H member states. Thirdly, the two-year period is not disproportionate or arbitrary: it is a bright line which provides a practical means of achieving a legislative objective which "is well within the broad margin of appreciation allowed in the context of decisions on social policy" [2012] PIQR P458, para 61.

The grounds of challenge

18 The following is a summary of the submissions of Mr Weir QC. It was legitimate to insist on "some degree of permanence about the relationship" in order to distinguish between a family relationship on the one hand and a casual relationship on the other. But there is no legitimate aim in setting an arbitrary requirement as to the duration of a cohabitation relationship before a claim for damages for loss of dependency can be made. The aim of limiting the right of action to those who are in a relationship of some degree of permanence is adequately met by the statutory requirement that the claimant has been "living with the deceased in the same household immediately before the date of the death . . . as the husband or wife of the deceased". By this means, the casual relationship is excluded. The additional requirement that this familial relationship should have lasted for at least two years is unnecessary in order to meet the legitimate aim and is therefore a disproportionate means of doing so. Once Parliament decided to provide for some cohabitants, it was not open to it to treat cohabitants differently for no other reason than the length of their relationship.

19 The bright line solution chosen by Parliament does not solve anything. The burden remains on a claimant under section 1(3) to prove that he started living as husband or wife of the deceased in the same household. This normally involves adducing evidence as to a shared purchase of a property or a shared tenancy, shared bills, shared bank accounts and so on. The so called "bright line" of two years avoids none of this. All that it does is to set an additional requirement, namely that the relationship of cohabitation, once started, had lasted continuously for two years prior to the death.

20 The injustice of excluding cohabitants of less than two years duration was recognised by the Law Commission, the Department for Constitutional Affairs, the Ministry of Justice and the House of Commons Justice Committee. The position taken by all of these bodies was that it was unjust, unfair and indefensibly arbitrary to exclude less than two-year cohabitants.

21 Mr Weir accepts that Parliament is to be accorded a margin of appreciation in relation to this issue of social policy. But the margin is not as great as in a case involving the payment out of state benefits. He submits that the case falls somewhere between those cases in which the state's decision has to be shown to be manifestly without reasonable foundation (such as state benefits cases) and those in which core grounds of discrimination are involved. But whatever the area of discretionary judgment afforded to Parliament, it is clear that section 1(3) has a disproportionate effect on a class of claimants who deserve to be entitled to bring a claim for loss of dependency, namely those who have been cohabitants for less than two years.

Discussion

22 I would dismiss this appeal substantially for the reasons advanced by Mr Coppel and accepted by the judge. The test for justification under article 14 has been stated by the European Court of Human Rights on a number of occasions. It is similar in principle to the test that is adopted in relation to the interference with rights under other articles of the

Convention. Thus, for example, in *Şerife Yiğit v Turkey* (2010) 53 EHRR 872 the Grand Chamber of the court said, at para 67:

> "[Discrimination] means treating differently, without an objective and reasonable justification . . . A difference in treatment has no objective and reasonable justification 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."

Legitimate aim

23 There is little, if any, disagreement between the parties about this. The legitimate aim that is sought to be pursued by section 1(3) as a whole is to confer a right of action on dependants of primary victims of fatal wrongdoing to recover damages in respect of their loss of dependency, but to confine the right to recover damages to those who had relationships of some degree of permanence and dependence. The real question is whether the means chosen by the legislature to pursue this aim are proportionate. I bear in mind the important point that the burden lies on the Secretary of State to show that they are proportionate.

Margin of discretion

24 I accept the submission of Mr Coppel that a wide margin of discretion should be accorded to the legislature in this case. The difference in treatment based on the duration of cohabitation is not founded on what has been described in the case law as a "suspect" ground of discrimination. In *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 Lord Walker of Gestingthorpe explained at paras 55–60 that not all possible grounds of discrimination are equally potent. The United States Supreme Court has developed the doctrine of "suspect" grounds of discrimination which the court will subject to particularly severe scrutiny. "Suspect" grounds of discrimination are those based on personal characteristics (including sex, race and sexual orientation) which an individual cannot change. The same approach has been adopted in the Strasbourg jurisprudence. Thus, for example, in *Stec v United Kingdom* (2006) 43 EHRR 1017, para 52, the court drew a distinction between (i) discrimination based exclusively on the ground of sex (requiring very weighty reasons in justification) and (ii) general measures of economic or social strategy (where a wide margin is usually allowed). In relation to the latter, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the European Court of Human Rights will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation". It is true that these observations were made in relation to the margin of appreciation accorded by the Strasbourg court to member states. But the same approach was adopted by Baroness Hale of Richmond JSC in a domestic context in *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545, paras 15–19: see also *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] AC 311.

25 I accept that, unlike the *Carson*, *RJM* and *Humphreys* cases, the present case is not concerned with state benefits. Such cases are the most obvious examples of decisions by the legislature on questions of what is in the public interest on social or economic grounds. But the decision whether to give a statutory right of action to the dependant of a victim of a wrongful death for damages for loss of dependency also raises important and difficult issues of social and economic policy. It does not raise a technical legal question which has little or no social or economic consequences. That is no doubt why Lord Hailsham of St Marylebone LC took extensive soundings at the Committee stage of the Administration of Justice Bill in 1982. He consulted not only the Bar and the Law Society (as one would expect with proposed legislation of this kind), but also the Trades Union Congress, the Confederation of British Industry and the British Insurance Association. In its turn, the Law Commission also consulted a number of different organisations. The list of those who responded to the consultation by the Ministry of Justice in 2007 is even more striking. It includes many insurers and defendant organisations, trades unions and organisations promoting the interests of business. At p 102 of its consultation paper "The Law on Damages", the Department for Constitutional Affairs identified the groups with an interest in the proposals as being claimants, defendants, insurers, taxpayers and public sector NHS.

26 I have set all of this out in some detail, because it reflects the fact that the Ministry of Justice (correctly) understood in particular the wide social and economic implications of enlarging the class of those who could claim damages for loss of dependency.

27 The Grand Chamber decision in *Draon v France* (2005) 42 EHRR 807 is an important illustration of the principle that special weight should be given to social and economic policy choices made in the public interest by a national legislature even in a case which is not concerned with state benefits. In that case the applicants were the parents of a child born with serious disabilities. Due to medical errors, the child's disabilities were not discovered during a procedure undertaken on him in a hospital run by the Paris Health Authority. The applicants started proceedings claiming compensation. Before the Administrative Court was able to reach a decision on the claim, the principles applicable to the assessment of compensation were changed by a new law with retrospective effect to the detriment of the applicants. The court found that the health authority had been negligent, but dismissed part of the claim in reliance on the new law. The applicants alleged that the retrospective nature of the new legislation amounted to a breach of various articles of the Convention. This was therefore not a state benefits case. Like the present case, it was concerned with legislation governing the right of one individual to seek compensation from another. Despite that difference, the court said this in relation to the margin of appreciation, at para 108:

> "At the same time, the court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a

A democratic society may reasonably differ, the role of the domestic policy-maker should be given special weight."

28 I bear in mind that this was said in the context of the margin of appreciation accorded by the European Court of Human Rights to the national court of a member state. But I do not consider that this should affect the view to be taken in relation to the margin of discretion accorded by
B the court of the member state to a decision by the legislature on a matter of social or economic policy: see para 24 above.

29 As the judge said, there are further reasons why Parliament should be afforded a generous margin of discretion in this case. These are usefully collected in the European Court of Human Rights' decision in *Mosley v United Kingdom* (2011) 53 EHRR 1011, paras 107–110:

C "107. The court emphasises the importance of a prudent approach to the state's positive obligations to protect private life in general and of the need to recognise the diversity of possible methods to secure its respect. The choice of measures designed to secure compliance with that obligation in the sphere of the relations of individuals between themselves in principle falls within the contracting states' margin of appreciation.
D However, this discretion goes hand in hand with European supervision.

"108. The court recalls that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be accorded to the state in a case in which article 8 of the Convention is engaged. First, the court reiterates that the notion of 'respect' in article 8 is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: bearing in mind the diversity of the practices
E followed and the situations obtaining in the contracting states, the notion's requirements will vary considerably from case to case. Thus contracting parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. In this regard, the court recalls that by reason of their direct and continuous contact with the vital forces of their countries, the state authorities are, in
F principle, in a better position than the international judge to give an opinion on how best to secure the right to respect for private life within the domestic legal order.

"109. Secondly, the nature of the activities involved affects the scope of the margin of appreciation. The court has previously noted that a serious interference with private life can arise where the state of domestic law
G conflicts with an important aspect of personal identity. Thus, in cases concerning article 8, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the state is correspondingly narrowed. The same is true where the activities at stake involve a most intimate aspect of private life.

"110. Thirdly, the existence or absence of a consensus across the member states of the Council of Europe, either as to the relative
H importance of the interest at stake or as to the best means of protecting it, is also relevant to the extent of the margin of appreciation: where no consensus exists, the margin of appreciation afforded to states is generally a wide one. Similarly, any standards set out in applicable international instruments and reports are relevant to the interpretation of the

guarantees of the Convention and in particular to the identification of any common European standard in the field." (Footnotes omitted.)

30 All of these factors are in play in the present case. First, the claim raises issues as to the extent of the positive obligations of the United Kingdom to provide legal remedies between individuals. Secondly, the article 8 issues raised here do not affect an important (or indeed any) aspect of the claimant's personal identity or an intimate aspect of family or private life. We are in territory which is far removed from that of the "suspect" discrimination on grounds such as sex or race and the legislature is entitled to a generous margin of discretion. Thirdly, there is no consensus across the member states as to the importance of the right of action with which we are concerned or as to the nature and duration of the relationship of dependency that it requires.

31 In my view, the combined effect of all these factors is that the court should accord a generous or wide margin of discretion to Parliament in relation to the legislative choices that it made in enacting section 1(3) of the 1976 Act.

Proportionality

32 The question that lies at the heart of the proportionality issue is whether the requirement of cohabitation as husband and wife for at least two years can be justified as a proportionate means of pursuing the legitimate aim to which I have referred at para 23 above. Mr Weir submits that section 1(3)(b) is not proportionate to this legitimate aim in that (i) it does not further the aim at all and (ii) the line that has been drawn by Parliament at two years is arbitrary.

33 As regards Mr Weir's first submission, as we have seen, he says that the legitimate aim is sufficiently met by the requirement that the claimant and the deceased lived in the same household as husband and wife immediately before the date of the death. Nothing is gained by adding the requirement that there has been cohabitation for a period of at least two years. Cohabitation as husband and wife is of itself adequate proof of a relationship of sufficient constancy and permanence to warrant entitlement to claim under section 1 of the 1976 Act.

34 As Mr Coppel submits, this approach is one possible view as to the degree of constancy and permanence that is required to justify conferring on a survivor a right of action against a tortfeasor. But bearing in mind (i) the broad margin of discretion that should be accorded to the legislature and (ii) the number of different interests that had to be taken into account, I consider that Parliament was entitled to take a different view. There is no obviously right answer. It is material that neither the Law Commission (proposing a Bill) nor the Justice Select Committee (considering the draft Bill) proposed the abolition of section 1(3)(b). They seem to have been of the view that a two-year requirement was an appropriate measure of constancy or permanence, although they also proposed a new category of claimants for loss of dependency damages, who would not have an automatic right to claim, but would have to prove that they were being maintained to a "substantial" extent immediately before the death. It is also to be noted that they proposed cohabitees of two years' standing as a new category of claimants for bereavement damages under section 1A of the Act. I do, however, accept that there are obvious differences between damages for loss

of dependency and damages for bereavement. The important point, however, is that it has never been suggested that merely living together as husband and wife for a single day or week would establish the necessary degree of permanence or dependency required for a right of action.

35 Mr Weir relies strongly on the fact that the Law Commission and the Government considered that the existing law is unfair and unjust for the reasons which I have summarised above. The decision not to amend the Act was not taken because of a late change of mind as to the merits of the proposed amendments. It was taken simply because the Government had to focus its resources on other matters. But the question is not whether the existing law is unfair and could be made fairer. Nor is it whether the existing law is the fairest means of pursuing the legitimate aim referred to at para 23 above. Rather, the question is whether the existing law pursues that aim in a proportionate manner. The Strasbourg jurisprudence does not insist that a state pursues a legitimate aim in the fairest or most proportionate way. It requires no more than that it does so in a way which is proportionate. There may be a number of ways in which a legitimate aim can be pursued. Provided that the state has chosen one which is proportionate, Strasbourg demands no more.

36 In my view, Parliament was entitled to decide that there had to be some way of proving the requisite degree of permanence and constancy in the relationship beyond the mere fact of living together as husband and wife. It was entitled to take the view that there cannot be a presumption in the case of short-term cohabitants, unlike that of married couples (section 1(3)(a)) or parents and their children (section 1(3)(e)) that the relationship is or is likely to be one of permanence and constancy. It was entitled to decide that it was therefore necessary to have a mechanism for identifying those cases in which the relationship between cohabitants is sufficiently permanent to justify protection under the 1976 Act.

37 I accept that the existing law can lead to some results which many would regard as unjust. This was recognised by the Law Commission and indeed the Government itself. Many would say that the proposals that were made for reform were fairer. But I do not accept Mr Weir's submission that section 1(3) in its existing form does not further the legitimate aim *at all*. The requirement of cohabitation for two years is a simple way of demonstrating a real relationship of constancy and permanence. It adds something to the mere fact that a couple lived together as husband and wife in the same household, possibly for a very short period, immediately before the date of the death.

38 As regards Mr Weir's second submission, I cannot accept that the two-year requirement is arbitrary and is therefore disproportionate on that account. In my view, the policy decision that a relationship between cohabitants will only have the requisite degree of permanence and constancy to justify protection under the 1976 Act if a couple has lived together for at least two years immediately before the death was one which Parliament was entitled to make. I have already referred to the two-year period specified in the Bill proposed by the Law Commission and the draft Bill considered by the Justice Select Committee.

39 Parliament was entitled to prefer a bright-line distinction to an approach which depended on fact-sensitive decisions in each case as to whether the relationship was sufficiently constant or permanent to justify a right of claim under section 1 of the 1976 Act. It is now well understood that where Parliament chooses to draw a line, it is inevitable that hard cases will

fall on the wrong side of it. But that is not a sufficient reason for invalidating it if in the round it is beneficial and it produces a reasonable and workable solution: see the *Carson* case [2006] 1 AC 173, per Lord Hoffmann, at para 41, and Lord Walker, at para 91; and *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] AC 1312, para 33, per Lord Bingham of Cornhill.

40 In summary, the two-year requirement provides greater certainty as to the scope of the 1976 Act; it ensures that the court has some evidence of past experience and the nature of the relationship to inform its assessment of damages under section 3(1) of the Act; and it reduces the need to conduct an intrusive and intimate inquiry into the nature and quality of the relationship, in order to establish whether it satisfies some objective standard of permanence and constancy.

Conclusion

41 For these reasons, I am satisfied that section 1(3)(b) of the Act is not incompatible with article 14 of the Convention in conjunction with article 8. It is a proportionate means of pursuing the legitimate aim to which I have referred at para 23 above. The decision as to which cohabitees should be able to claim damages for loss of dependency raises difficult issues of social and economic policy on which opinions may legitimately differ. There is no obviously right answer. It may be that many would say that the law needs changing. But the choice made by Parliament was not manifestly without reasonable foundation and was one which it was entitled to make. It follows that, even if article 14 of the Convention is engaged (as to which I express no opinion), the difference in treatment of cohabitees on the basis of two years' cohabitation is justified.

42 The same reasoning inevitably leads to the conclusion that, even if section 1(3)(b) amounts to an interference with the claimant's right to respect for her family life in breach of article 8.1, the interference is justified under article 8.2.

LEWISON LJ

43 I agree.

TREACY LJ

44 I also agree.

Appeal dismissed with costs on standard basis, subject to detailed assessment.
Permission to appeal refused.

30 October 2013. The Supreme Court (Baroness Hale of Richmond DPSC, Lord Toulson and Lord Hodge JJSC) dismissed an application by the claimant for permission to appeal.

ROBERT RAJARATNAM, Barrister