

**OPINIONS**  
**OF THE LORDS OF APPEAL**  
**FOR JUDGMENT IN THE CAUSE**

**Regina v. Secretary of State for Work and Pensions (Appellant)**  
***ex parte Hooper and others (FC) (Respondents)***  
**Regina v. Secretary of State for Work and Pensions (Respondent)**  
***ex parte Hooper (Appellant) and others***  
**Regina v. Secretary of State for Work and Pensions (Respondent)**  
***ex parte Hooper and others (FC) (Appellants)***  
**(Conjoined Appeals)**

ON  
THURSDAY 5 MAY 2005

The Appellate Committee comprised:

Lord Nicholls of Birkenhead  
Lord Hoffmann  
Lord Hope of Craighead  
Lord Scott of Foscote  
Lord Brown of Eaton-under-Heywood

## HOUSE OF LORDS

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[2005] UKHL 29

#### LORD NICHOLLS OF BIRKENHEAD

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons he gives, with which I agree, I would allow the appeals of the Secretary of State and dismiss the appeals of the widowers.

2. I add a note on one point, concerning the claims in respect of widow's payment and widowed mother's allowance under sections 36 and 37 of the Social Security Contributions and Benefits Act 1992. The widowers' claim is that non-payment of corresponding amounts to them was unlawful discrimination. Non-payment of these amounts to them, it is said, violated their Convention right under article 14 read with article 1 of Protocol 1. Accordingly the Secretary of State's failure to make corresponding payments to widowers was unlawful under section 6(1) of the Human Rights Act 1998. By failing to make such payments the Secretary of State acted incompatibly with the claimants' Convention right.

3. The Secretary of State's primary defence to this claim lies in section 6(2) of the Human Rights Act. Your Lordships are all of the opinion that this defence is well-founded. I agree. There is a measure of disagreement on whether the applicable paragraph of section 6(2) is paragraph (a) or paragraph (b). In my view it is not necessary to decide which is the applicable paragraph in this case and there is good reason

for not doing so. It is not necessary because it is clear that one paragraph or the other is applicable. It is not desirable because a decision on which paragraph is applicable cannot be reached without first deciding a legal point which is better left for decision on another occasion.

4. Let me explain. Whether the limb of section 6(2) applicable in the present case is paragraph (a) or paragraph (b) depends upon the view taken of the Secretary of State's common law powers. That is the starting point. Under the Social Security Contributions and Benefits Act 1992 Parliament made provision for payment of benefits to widows, but not widowers. The parliamentary intention in this regard was abundantly clear. If the effect of this statutory provision was that thereafter the Secretary of State acting on behalf of the Crown could not lawfully have made corresponding payments to widowers in exercise of the Crown's common law powers, then the present case would fall squarely within section 6(2)(a). If the Secretary of State could not lawfully have made corresponding payments to widowers he could not have acted otherwise than he did.

5. The Secretary of State, however, does not contend he lacked power to make corresponding payments to widowers and that therefore the case falls within paragraph (a). Mr Sales submitted that the Secretary of State, acting on behalf of the Crown, had power and retained power to make such payments. Mr Goudie QC, of course, made a similar submission. Indeed, the foundation of the widowers' case is that the Secretary of State had such a power. The widowers' case is that the Secretary of State had such a power and, unlawfully, failed to exercise it.

6. Whether the Crown, in exercise of its common law powers, could lawfully have made corresponding payments to widowers is a difficult question with far-reaching constitutional implications. I prefer to express no view on this issue in the absence of fuller argument. This issue would be better decided in a case where, unlike the present case, the contrary argument is presented. This issue does not call for decision in the present case because, either way, section 6(2) provides a defence for the Secretary of State. If the Secretary of State could not lawfully have paid the widowers the case falls within paragraph (a) as already mentioned. If the Secretary of State could lawfully have made corresponding payments to widowers the case falls within section 6(2)(b). Section 6(2)(b) provides that section 6(1) does not apply to an act if the authority was acting so as to give effect to a provision in

primary legislation. Clearly, in making payments to widows the Secretary of State was giving effect to sections 36 and 37 of the Social Security Contributions and Benefits Act 1992. Likewise in not making corresponding payments to widowers the Secretary of State was giving effect to those statutory provisions. Sections 36 and 37 make provision for payments to widows alone. If the Secretary of State were asked ‘Why are you not making similar payments to widowers?’ he would have answered ‘Because the statute provides these payments should be made to widows and makes no provision for payments to widowers’. The fact that the Secretary of State could lawfully have made corresponding payments to widowers does not detract from the crucial fact that in declining to pay widowers he was ‘giving effect’ to the statute.

## **LORD HOFFMANN**

My Lords,

### *Introduction*

7. The four claimants are widowers. Mr Hooper’s wife died on 27 March 1997. Mr Withey’s wife died on 26 November 1996. Mr Martin’s wife died on 11 September 2000. Mr Naylor’s wife died on 2 July 1995. All except Mr Naylor had dependent children at the time of bereavement.

8. If the claimants had been widows, they would have been entitled to claim widow’s benefits. Under section 36(1) of the Social Security Contributions and Benefits Act 1992 they would have been entitled to claim a widow’s payment (“WPt”) of £1,000. Under section 37, all except Mr Naylor would have been entitled to claim widowed mother’s allowance (“WMA”), a weekly sum payable until such time as the children ceased to be dependent. Under section 38, Mr Naylor would have been entitled to claim a widow’s pension (“WP”).

9. The widowers submit that in denying them the benefits which would have been payable to widows, the Secretary of State for Work and Pensions has acted in a way which is incompatible with their rights under article 14 read with article 1 of Protocol 1 and article 8 of the

European Convention on Human Rights. Under article 14 they have the right to enjoyment of the rights and freedoms “set forth in this Convention” without discrimination on grounds of sex. One of those rights is the “peaceful enjoyment of possessions” protected by article 1 of Protocol 1 and another is the respect for family life protected by article 8. A widow’s benefit is a pecuniary right generated by the national insurance contributions of the husband and its object is the enhancement of family life. The widowers therefore say that if the state provides such benefits, it must do so without discrimination on grounds of sex. Before the judge (Moses J) the Secretary of State accepted only that WMA fell within the ambit of article 8 but the judge found that all three benefits did so. On the other hand, he rejected the argument that they fell within article 1 of Protocol 1. In the Court of Appeal and before your Lordships the Secretary of State has accepted that all widow’s benefits fall within the ambit of one or both of the Convention rights.

10. The widowers accept that in respect of the acts or omissions of the Secretary of State which occurred before the Human Rights Act 1998 came into force on 2 October 2000, they can make no complaint in domestic law. But they submit that in denying them the benefits which a widow would have received after that date, the Secretary of State has acted incompatibly with their Convention rights and therefore contrary to section 6(1):

“It is unlawful for a public authority to act in a way which is incompatible with a Convention right”.

11. The widowers say that they are victims of the Secretary of State’s unlawful acts or omissions and are therefore entitled to bring proceedings under section 7(1)(a).

12. To these claims, the Secretary of State raises two principal defences. The first, in response to Mr Naylor’s claim, is that discrimination between men and women in the payment of WP was and continues to be objectively justified. The second, in response to the claims of the other three widowers, is that although discrimination in the payment of WPt and WMA did in principle infringe the Convention rights of widowers, it was not unlawful under section 6(1) because the application of that subsection was excluded by section 6(2):

“Subsection (1) does not apply to an act if—

- (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
- (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.”

13. Thus the question of objective justification for WP and whether section 6(2) excludes a claim in respect of WPt and WMA are the two chief issues in this appeal. In addition, there are some subsidiary questions, to which I shall later return, as to whether the individual widowers would have qualified for benefits even if they had been widows: questions which go either to the legality of the Secretary of State’s refusal to pay them or to whether they qualify as victims.

14. Before the 1998 Act came into force, some other widowers petitioned the European Court of Human Rights in Strasbourg for redress. In the lead case of *Willis v United Kingdom* (2002) 35 EHRR 547 the court found that discrimination in the payment of WPt and WMA infringed the rights conferred by article 14 read with article 1 of Protocol 1 but made no finding about WP. The court awarded Mr Willis £25,000 by way of just satisfaction. In a number of other cases, the Government followed a policy of agreeing to make extra-statutory payments by way of friendly settlement to applicants whose cases were declared admissible. Since the 1998 Act came into force and pending the resolution of this litigation, the Government has made no more payments but has resisted proceedings in Strasbourg on the ground that the applicant has not exhausted his domestic remedies. The widowers claim that the Government’s refusal to make extra-statutory payments to them in the same way as to earlier Strasbourg applicants is itself a form of discrimination contrary to article 14. I shall deal with that argument last.

15. The period for which the Secretary of State is alleged to have been in breach of section 6(1), at any rate in respect of WPt and WMA, did not last very long. The Welfare Reform and Pensions Act 1999 abolished widow’s benefits for widows whose husbands died on or after 9 April 2001. WPt was replaced by a bereavement payment of £2,000, WMA by a widowed parent’s allowance and WP by a bereavement allowance payable for 52 weeks. All three benefits were payable to widows and widowers alike. Thus widowers achieved equality with

widows but widows bereaved on or after 9 April 2001 no longer had the right to a pension for life to which they would have been entitled under the previous legislation. The rights of existing widows to WP were preserved.

*Objective justification for widows' pensions*

16. In considering whether discrimination between men and woman in the payment of WP was objectively justified, two points must be kept in mind. The first is that WP was never a means tested benefit. It was paid to all widows who satisfied the age qualification on bereavement or upon the cessation of WMA, irrespective of whether they were in employment or receiving a private pension or other income. Its justification therefore did not depend upon the greater need of any particular widow but upon a perception that older widows as a class were likely to be needier than older widowers as a class or, for that matter, younger widows as a class. No doubt means testing would have been more discriminating but the use of more complicated criteria increases the expense of administration and reduces take-up by those entitled.

17. The second point is that there has never been any social or economic justification for extending WP to men under pensionable age. The argument for WP was that in the social conditions which prevailed for most of the last century, it was unusual for married women to work and that it was unreasonable to expect them to be equipped to earn their own living if they were widowed in middle age. This argument self-evidently did not apply to men. The position was not quite the same in relation to WMA because there were slightly stronger arguments for saying that a man who might have to give up or reduce his work to look after dependent children should be treated in the same way as a widowed mother. It is not necessary to go into the counter-arguments (for example, that mothers bringing up children alone for reasons other than widowhood are usually in an even weaker position: see the *Finer Committee on One-Parent Families* (1974) Cmnd 5629 Vol. 1, pp. 283-284) because neither the Government in Strasbourg nor the Secretary of State before your Lordships has argued that discrimination in the payment of WPt and WMA was objectively justified in the last few years of the twentieth century. Both benefits were extended to men by the 1999 Act, which was passed to the accompaniment of ministerial statements that the existing system was unfair and "woefully out of date". But WP was not extended to men. It was for practical purposes abolished; replaced by a 52 week bereavement allowance to both sexes

to ease the transition to single status. So the question in the case of WP is not so much whether there was justification for not paying it to men as whether there was justification for not having moved faster in abolishing its payment to women.

18. With these two considerations in mind, I shall summarise the history of widow's pensions. They were first introduced by the Widows', Orphans' and Old Age Contributory Pension Act 1925. The Act provided a pension of 10 shillings a week to any widow whose husband had paid sufficient contributions. There was no age qualification or time limit on payment. Widows were as such entitled to support. But during the Second World War, large numbers of women worked in the armed forces or civilian employment, replacing men on active service. Public attitudes to widowhood changed. Sir William Beveridge said in his 1942 *Report on Social Insurance and Allied Services* (Cmd 6404, paragraph 153) that there was no reason why a childless widow should get a pension for life. If she was able to work she should do so. He recommended that all widows should be paid a 13 week transitional allowance to help them adjust to their new circumstances but that longer term pensions should be confined to widows with dependent children. The Government did not accept this advice in full. It considered that an older widow, who had in accordance with convention stayed at home during a long marriage to look after husband and children, would often be severely disadvantaged if she was required to earn her own living. The National Insurance Act 1946 therefore not only gave effect to Beveridge's recommendations by introducing WMA and a widow's allowance for 13 weeks after bereavement but also provided WP for widows who were over 50 at the date of the husband's death or who ceased to qualify for WMA when they were over 40.

19. The secular trend in the position of women in employment over the next half century reinforced Beveridge's view that being a widow should not, as such, entitle one to a pension. More and more women entered the labour market. But the trend was a slow one and crude comparisons of the numbers of economically active men and women are misleading. Far more women than men worked part-time and the great majority of women were (and remain) unable to escape from the traditional low-paid activities of cooking, caring and cleaning. So the trend to equality was counteracted by political pressure from groups representing widows who claimed that, as the United Kingdom became more prosperous, benefits for widows should be increased rather than reduced. The policies pursued by successive governments were therefore not entirely consistent. The Family Allowances and National

Insurance Act 1956 raised to 50 the age at which a woman could claim WP after ceasing to be entitled to WMA. On the other hand, the National Insurance (Old persons' and widows' pensions and attendance allowance) Act 1970 reduced to 40 the age at which WP would be payable (at a reduced rate), whether as a result of bereavement or the cessation of WMA..

20. In 1985 the government published a Green Paper on Social Security Reform which pointed out (in paragraph 10.9) that the current system of benefits dated from days when far fewer married women worked:

“Today two thirds of all married women with children over school age, and over a half of widows between 40 and 60, go to work. The present pattern of benefits nonetheless provides support without regard to widows' other income, in many cases long after they have ceased to be responsible for bringing up children. The Government's view is that it is right to give greater emphasis to providing for widows of working age who have children to support, and for older widows less able to establish themselves in work.”

21. Despite this acknowledgement of changes in social conditions, the Social Security Act 1986 made relatively modest adjustments to the system. The 26 week transitional widow's allowance was abolished and the lump sum WPt of £1,000 substituted. The age at which WP became payable, whether on bereavement or cessation of WMA, was raised to 45 and entitlement to the full rate postponed until 55. These provisions were subsequently consolidated in the 1992 Act.

22. The 1986 changes were opposed by a strong lobby on behalf of widows. But no one suggested in the course of the Parliamentary debates that WP should be extended to men. It is true that Cruse, a non-governmental organisation for “the widowed and their children”, which had taken widowers on board in 1980, said in their 1986-87 annual report:

“We ... continued to press for a widower's pension, based on his wife's national insurance contributions, and for an allowance to be paid to widowed fathers.”

23. But this pressure does not appear to have persuaded anyone to raise the question of WP for widowers in Parliament. The first serious suggestion that widowers should in principle be paid the same benefits as widows came from the European Commission. There had been a Council Directive 79/7/EEC in 1978 on “the progressive implementation of the principle of equal treatment for men and women in matters of social security” which expressly excluded survivors’ benefits. In 1987 the Commission produced a proposal for a new Directive (Com (87) 494 Final). It drew attention in an explanatory memorandum to statement of the Court of Justice in *Razzouk and Beydoun v Commission of the European Communities* (Cases 75/82 and 117/82), [1984] ECR 1509, 1530, para 16 (a case concerning survivors’ pensions under the Community’s own Staff Regulations) that the principle of equal treatment of men and women “forms part of the fundamental rights the observance of which the court has a duty to ensure.” Article 4 of the draft Directive provided that there should be no discrimination on grounds of sex in the payment of survivorship benefits:

“and to this end:

- (a) either the recognition on the same terms for widowers of entitlement to the pensions and other benefits provided for widows;
- (b) or the replacement of widows’ benefits by the creation or extension of a system of individual rights open to all surviving spouses regardless of sex.”

24. The House of Lords Select Committee on the European Communities (Sub-Committee C) held an inquiry into the proposal in 1989. Miss Joan C. Brown, a writer on social security matters, said in evidence to the Committee that there was no case for paying older widowers the same pensions as older widows. The only way to produce equality was to level down. But hasty action would cause real hardship to large numbers of older widows who had chosen many years earlier to follow the conventional path of staying home to look after husband and children:

“the effect of earlier social patterns on women still have to be worked through. This suggests the need to phase out the older widow’s pension over a long period – in the order of 10-15 years. Without this, there would be a serious risk of poverty among older widows who had followed the social

norms of their day and now find themselves at a severe disadvantage in a changed world as a result.”

25. The Select Committee accepted Miss Brown’s evidence and reported (Session 1988–89, 10th Report, HL Paper 51):

“87. ... In the United Kingdom...there might be reluctance to reproduce for widowers the pension a childless widow can receive under the national insurance scheme, irrespective of her earnings, if she is aged 45 or more when her husband dies. This is in recognition of the difficulty the widow may find in re-establishing herself in the labour market- whereas a widower’s earning ability would not ordinarily be prejudiced in this way.

88. The Committee consider that, despite these difficulties, the concept of equal treatment must require that, eventually, men and women should be provided with survivors’ benefits on the same terms. Employment patterns are changing and, if it becomes the norm for married couples to be dependent on the earnings of both partners for most of their working lives, it will make sense for equal survivors’ benefits to be available. There is also a need to avoid putting families at a disadvantage if the mother, rather than the father, becomes the principal breadwinner. It would, however, be perverse to deprive widows of benefits they still need in the interests of sex equality. To reduce this danger, a substantial period should be allowed – at least 15 years – before Member States are obliged to equalise survivors’ benefits. Community law recognises a principle of ‘legitimate expectation’ which would support this approach.”

26. The Government published its response on 4 April 1990 (Cm 1038). It said at para 15:

“Within the state social security system the Government do not think there is any merit in introducing a universal state insurance benefit for widowers on a par with those currently provided for widows. To extend the current provisions for widows to widowers would cost about £350

million a year. The available evidence indicates that widowers are more likely to be in full time work than widows, are more likely to have higher earnings than widows and are less likely to have dependent children. As a consequence the Government have made it clear to the Commission that the equalisation of survivors' benefits should be removed from this draft directive entirely."

27. In 1991 the Commission withdrew the draft directive pending further consultation with Member States and there has been no further European Union initiative on the question.

28. Mr Cox QC, on behalf of Messrs Withey, Martin and Naylor, said that there was no evidence that the Government had given consideration to the equalisation of survivorship benefits before 1998. But this is not the case. Not only was there a full investigation by the Select Committee, followed by a Government response, but over the next few years the question of paying WMA to widowed fathers was raised on more than one occasion (see, for example, a Private Member's Bill introduced by Mr Hartley Booth MP on 13 April 1994 (Hansard HC Debates (6<sup>th</sup> Series) vol 241, cols 212-213) and a Written Answer by the Secretary of State for Social Security (Hansard HC Deb (6th Series) vol 255, 1 March 1995, col 621)). No one suggested paying WP to widowers or, unsurprisingly, abolishing WP for widows. Cruse said in evidence in these proceedings that Mr Hartley Booth's decision to confine his Private Member's Bill to WMA was "tactical" but the need for such tactics suggests that there would have been little support for anything more.

29. The abolition of WP came as part of a wider reform of survivorship and other social security benefits in the 1999 Act. It was preceded in 1998 by a Consultation Paper which drew attention to the fact that, in 1995, 7 out of 10 married women worked compared with 1 in 8 in 1946. Half of widows under 60 worked and 47% of widows now had income from occupational pension schemes. The Government took the view that widows without dependent children no longer needed long term support. The extension of WP to men was "not acceptable": it would cost another £250 million a year and would mean giving help to people who were, as a class, unlikely to need it.

30. But the abolition of WP was strongly opposed by some members of Parliament, partly on the ground that elderly widows were still

disadvantaged compared with men or younger widows and partly on the ground that WP was a contributory benefit and that it would be a breach of faith to deny it to the widows of men who had made contributions and arranged their affairs on the assumption that it would be available. An opposition amendment deferring the abolition of WP until 2020 was defeated but the Government agreed that the changes should not come into force until 9 April 2001 and that the rights of women bereaved before that date should be preserved.

31. This brief history demonstrates that the decision to achieve equality between men and women by levelling down survivors' benefits (subject to vested rights) was by no means easy or obvious. It is true that by 2000 the proportion of older women (50-59) who were "economically active" was 65.9% against 72.5% for men. But those figures must be adjusted to reflect both greater part-time working by women (44% as against 9%) and the concentration of women in low-paid occupations. The comparative disadvantage of women in the labour market had by no means disappeared.

32. The question then is whether the continued payment of WP to women in the period 1995-2001 and its continuation for women bereaved before 9 April 2001 was objectively justified. Moses J [2002] EWHC 191 (Admin) held that it was but the Court of Appeal [2003] EWCA Civ 813; [2003] 1 WLR 2623 thought otherwise. It is not in dispute that the jurisprudence of the European Court of Human Rights allows Member States to treat groups unequally in order to "correct factual inequalities" between them: see *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 284, para 10. Furthermore, in making decisions about social and economic policy, particularly those concerned with the equitable distribution of public resources, the Strasbourg court allows Member States a generous margin of appreciation: see *James v United Kingdom* (1986) 8 EHRR 123, 142, para 46. In a domestic system which (unlike the Strasbourg court) is concerned with the separation of powers, such decisions are ordinarily recognised by the courts to be matters for the judgment of the elected representatives of the people. The fact that the complaint concerns discrimination on grounds of sex is not in itself a reason for a court to impose its own judgment. Once it is accepted that older widows were historically an economically disadvantaged class which merited special treatment but were gradually becoming less disadvantaged, the question of the precise moment at which such special treatment is no longer justified becomes a social and political question within the competence of Parliament.

33. Why then did the Court of Appeal decide that by 1995 there was no longer any objective justification for WP? Their three reasons were brief. First, they examined the statistics of men and women in employment and noted, at para 66, that “the change between 1995 and 2000 can be seen to be relatively modest”. The figures did not span a watershed, that is to say, rise and then fall back to more or less the same level. The change was gradual, as it had been for many years.

34. Secondly, at para 67, the Court of Appeal quoted statements by Government spokesmen during the passage of the 1999 Act through Parliament, stressing that the old system was outdated.

35. Thirdly, at para 68, they drew attention to 14 European countries, together with Russia and Turkey, which had “established equal entitlement to survivors’ benefits by 1995.”

36. The first reason seems to mean that whenever Parliament decided to make the change to equalise survivors’ benefits in response to the gradual historic trend towards greater economic activity by women, it would follow that for some years there had been no objective justification for the previous system. It would always be the case that the changes over the preceding few years had been relatively modest. In my respectful opinion, this proposition is fallacious. It contradicts the earlier acceptance by the Court of Appeal, at para 63, that:

“in answering this question a very considerable margin of discretion must be accorded to the Secretary of State. Difficult questions of economic and social policy were involved, the resolution of which fell within the province of the executive and the legislature rather than the courts. In this context we revert to the fact that the issue was the point in time at which benefits which had long been enjoyed by widows should be withdrawn. No statistical formula or calculation could provide a precise answer to this question.”

37. The Court of Appeal seems to have treated the decision of Parliament in 1999 to abolish WP from 9 April 2001 as an acknowledgement that there could have been no possible reason for the legislature not taking such a step at that time and therefore as demonstrating that it should have taken the same step at an earlier date.

But in my opinion the courts are not in a position to say that the 1999 decision was inescapably right or that a different decision, whether earlier or later, would have been inescapably wrong. It was a matter for legislative judgment.

38. The references to what Government spokesmen said in 1999 seem to me essentially debating points. Perhaps they represented the Government's opinion, although it is fair to point out, first, that they referred not to WP in particular but to the whole survivors' benefit system, part of which is not alleged to have been objectively justified, and, secondly, that they are couched in rhetoric characteristic of a new Government changing the previous system. But the question is not what the Government thought but whether Parliament could reasonably have taken a different view, then or five years earlier.

39. Finally, at para 68, the Court of Appeal agreed with Moses J that the information available about the position in other Council of Europe countries did not enable the court to assess the "overall economic impact of the measures taken." In particular, we do not know whether the achievement of equality involved the withdrawal of a benefit which widows had enjoyed for half a century. Nevertheless, the Court of Appeal said that the evidence about other countries "[cut] the ground from the submission...that there were good reasons for the Government to take no steps to bring this country into line with our neighbours until 1998." But we have no idea of the extent to which we are "[in] line with our neighbours" except in the content-free sense of not making a distinction between widows and widowers. That seems to me an inadequate basis for deciding that the widows' benefits should have been abolished earlier.

40. I therefore agree with Moses J that the preservation of WP for widows bereaved before 9 April 2001 was objectively justified. It involved no breach Convention rights.

#### *Section 6(2) of the 1998 Act*

41. No objective justification is claimed for the payment of WPt and WMA at the relevant times. The Secretary of State does submit, in an argument based on the unreported decision of the European Court of Human Rights in *Walden v Liechtenstein* (Application No 33916/96) (16 March 2000) that there was nevertheless no breach of Convention

rights because Parliament had to be allowed a reasonable time to legislate to put the matter right. I shall come back to this point later. Meanwhile, I turn to the second important point in this appeal, which is whether, assuming that non-payment of WPt and WMA to widowers involved breaches of Convention rights, the Secretary of State's acts or omissions are immunised by section 6(2) of the Act.

42. The Secretary of State relies upon section 6(2)(b). He says that, notwithstanding the injunction in section 3 to read and give effect to legislation in a way which is compatible with Convention rights, sections 36 and 37 of the 1992 Act cannot be read as applying to widowers. Mr Cox QC, for Messrs Withey, Martin and Naylor, tried unsuccessfully to persuade Moses J and the Court of Appeal to do so but before your Lordships the widowers accept that it cannot be done. So the Secretary of State says that section 6(2)(b) applies because sections 36 and 37 are provisions which "cannot be read or given effect in a way which is compatible with the Convention rights" and that in paying WPt and WMA he was "acting so as to give effect to...those provisions."

43. The widowers say that they not complaining that the payments to widows infringed their Convention rights. Their complaint is that no similar payments were made to them. They accept that the 1992 Act imposed no obligation upon the Secretary of State to make payments to widowers but argue that he could have made such payments by exercising the common law powers of the Crown as a corporation sole to make discretionary payments of funds under its control. The breach of Convention rights therefore arose out of a failure to exercise a common law power and this is entirely outside section 6(2)(b).

44. Mr Sales, for the Secretary of State, accepted that sections 36 and 37, while imposing a statutory duty to pay WPt and WMA to widows, did not make it unlawful for the Crown to make equivalent extra-statutory payments to widowers. It was therefore not the case that the Secretary of State, as a result of primary legislation, "could not have acted differently" within the meaning of section 6(2)(a). But he submitted, and Moses J accepted, that the case fell within section 6(2)(b). The Secretary of State was acting incompatibly with Convention rights because he was giving effect to sections 36 and 37.

45. The Court of Appeal, at para 135, rejected Mr Sales's concession that the Crown would have had a power at common law to make extra-statutory payments. In their opinion, sections 36 and 37, requiring

payments only to widows, would have made it an abuse of power to make payments to widowers. They applied the principle in *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508. However, the 1998 Act displaced the effect of this principle and required the Crown to make extra-statutory payments equivalent to WPt and WMA in order to achieve compatibility with Convention rights. The Court of Appeal therefore accepted, for a different reason, Mr Sales's concession that section 6(2)(a) did not apply. But they also held, at para 119, that section 6(2)(b) did not apply:

“The 1992 and 1999 Acts expressly require the Secretary of State to pay benefits to widows in accordance with their terms. If he retains a common law power to make payments to widowers, we cannot see how a decision not to exercise that power can be said to be necessary in order to give effect to the provisions, express or implied, of either Act.”

46. Mr Sales submitted to your Lordships that the Court of Appeal was wrong to say that the Crown could not have made extra-statutory payments to widowers before the 1998 Act came into force. As a corporation sole, the Crown has the same right to deal with its property as any other legal person. It needs no statutory authority to do so. There are constitutional conventions in the relationship between the Crown and Parliament as to when the Crown will spend money voted by Parliament without a specific statutory authority to do so (see the Concordat between the Treasury and the Public Accounts Committee to which reference is made in Halsbury's Laws of England (4<sup>th</sup> edn reissue) vol 8(2) (1996), para 230), footnote 4 but these are flexible conventions and not legally binding. The principle in the *De Keyser's Royal Hotel* case is, says Mr Sales, nothing to the point because it deals with an implied statutory extinction or restriction of the historic prerogative powers which belong to the Crown as supreme executive authority. The right to spend money is not a power which the Crown enjoys as executive but simply by virtue of being a legal person like any other. A statute would have to be a good deal more explicit before it could be interpreted as extinguishing such a commonplace power. Mr Sales added that it would be unfortunate if the dicta in the Court of Appeal cast doubt upon the validity of extra-statutory schemes such as the Criminal Injuries Compensation Scheme, which was originally established without any statutory authority.

47. There seems to be to be a good deal of force in these submissions, but I need not express a concluded opinion because, if they are right, they lead to the same conclusion as that reached by the Court of Appeal, namely that section 6(2)(a) does not apply. I should add that I also have some difficulty in seeing why, if it would have been an abuse of power for the Secretary of State to make discretionary extra-statutory payments to widowers before the 1998 Act came into force, it should afterwards have become compulsory. But I put these questions aside and turn to the question of whether section 6(2)(b) applies.

48. The Court of Appeal rejected the Crown's argument on section 6(2)(b) on the ground that a decision not to make extra-statutory payments was not "necessary in order to give effect to the provisions, express or implied" of the 1992 or 1999 Acts. But section 6(2)(b) says nothing about a decision having to be necessary for any particular purpose. If the 1992 or 1999 Acts had made it *necessary* not to make extra-statutory payments, the case would have fallen under section 6(2)(a). The Secretary of State could not have acted differently.

49. Clearly, section 6(2)(b) has a different purpose. It assumes that the public authority could have acted differently but nevertheless excludes liability if it was giving effect to a statutory provision which cannot be read as Convention-compliant in accordance with section 3. It follows that section 6(1) does not apply if the Secretary of State was acting incompatibly with Convention rights because he was giving effect to sections 36 and 37 of the 1992 Act.

50. The widowers say that the incompatibility did not arise because the Secretary of State was giving effect to sections 36 and 37. It arose because he did not make equivalent extra-statutory payments. But the payments under sections 36 and 37 are essential to any complaint of discrimination. If the Secretary of State had not paid widows, he would have infringed no Convention rights by not paying widowers. If section 6(1) "does not apply" to the acts of making payments under sections 36 and 37, the argument for unlawful discrimination in domestic law collapses.

51. This reasoning is in my opinion supported by the evident purpose of section 6(2), which was to preserve the sovereignty of Parliament: see Lord Nicholls of Birkenhead in *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2004] 1 AC 546, para 19. If legislation cannot be read compatibly with Convention rights, a public authority is

not obliged to subvert the intention of Parliament by treating itself as under a duty to neutralise the effect of the legislation. As Moses J said, at para 185, the widowers' submissions on section 6(2) :

“come...perilously close to a submission that the court should impose a duty to grant benefits where Parliament has chosen not to do so.”

52. It follows that in my opinion the acts and omissions of the Secretary of State incompatible with Convention rights, that is to say, the payment of WPt and WMA to widows without making similar payments to widowers, was immunised by section 6(2)(b). The widowers' claims under section 7(1)(a) must therefore be dismissed, in the case of WP because there was no incompatibility with Convention rights and in the case of WPt and WMA because of section 6(2)(b). Moses J, who came to a similar conclusion, made a declaration that sections 36 and 37 of the 1992 Act were incompatible with Convention rights. But both sections have been repealed and I see no point in making such a declaration now.

#### *Victim status and retrospectivity*

53. These conclusions make it strictly unnecessary to decide whether, if there had been no objective justification for WP or no section 6(2) defence, these widowers would have been victims for the purposes of bringing an action under section 7(1)(a). But the question has been argued and I shall therefore express some views on the hypothesis that the Secretary of State was acting unlawfully.

54. A person may bring a claim under section 7(1)(a) only if he is a “victim” of the unlawful act. By section 7(7), a person is a victim of an unlawful act only if he:

“would be a victim for the purposes of article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.”

55. It is therefore necessary to identify an unlawful act (which section 6(6) treats as including a failure to act) and then to ask whether

the claimant would be regarded as a victim under article 34 if he brought proceedings in Strasbourg in respect of that Act. And section 22(4) provides that an act or omission cannot have been unlawful if it took place before the Act came into force.

56. On the stated hypothesis, the unlawful act was in my opinion a failure after 2 October 2000 to make available survivors' benefits to widowers who wished to claim them. How does one identify the widowers who wished to claim such benefits? The entitlement of a widow depended upon her making a claim within 3 months. If she did not make a claim to WPt within 3 months of bereavement she lost her entitlement. In the case of WMA and WP, she was entitled to weekly payments from bereavement or 3 months before the date of the claim but not for any earlier period. The general principle applied by the European Court of Human Rights is that a victim is someone "directly affected" by the impugned measure. Applying this principle, the court has decided that a man can be a victim of discrimination in respect of survivors' benefits only if he has done something which identifies him as having wished to make a claim. I put the matter in this way because a man could not have made a claim in exactly the same way as a woman. For women, there was a prescribed form. But for men, of course, there was no such form because no such benefits could be claimed at all.

57. What for this purpose counts as demonstrating that one wished to make a claim? In *Cornwell v United Kingdom* (1999) 27 EHRR CD 62 the court treated an inquiry about the availability of benefits as sufficient. This suggests that any act will count if the appropriate official could reasonably have inferred that the applicant would have made a formal claim if there had been a form on which to make it. Moses J said that a claim to benefits had to be made clear in writing. The Court of Appeal disagreed and I think that the Court of Appeal was right. No doubt it would be better for good administration if such shadow-claims had been made in writing. But the Secretary of State, by refusing to allow such claims at all, has put it out of his power to insist that they be made in any particular form. If the principle I have suggested is correct, namely that the applicant must have done something to indicate to an appropriate official that he would have made a formal claim if this had been possible, then an oral inquiry should suffice.

58. The next question is when the claim, or equivalent of a claim, has to be made. In my opinion claims made before the 1998 Act came into force do not count. They cannot constitute the claimant a victim in

respect of an unlawful act because until then the Secretary of State could not have been doing anything unlawful in rejecting them or taking no notice of them: see section 22(4). I reject the suggestion that the Secretary of State was obliged to preserve them in case the law of England should one day make it unlawful for him not to make survivors' benefits available to men. I likewise reject the submission that earlier claims remained active because they showed a continuing intention to make a formal claim if it should be possible to do so. An intention is not enough unless it is communicated to an appropriate official at a time when rejection would be unlawful. It is therefore necessary to be able to point to a claim made after 2 October 2000. But an act which amounts to an express or implied reaffirmation of an earlier claim would in my opinion be sufficient. It would convey to the official that the applicant would make a claim then and there if he was able to do so.

59. In the present case, Mr Hooper's solicitors wrote to the Department on 4 October 2000 referring to an earlier claim. Mr Withey filled in an application form on a widow's benefit form on 12 October 2000 and Mr Martin did the same on an uncertain date on October 2000. Mr Naylor wrote on 2 October 2000 asking to appeal against the refusal of benefit. In my opinion each of them became a victim on those dates and their cause of action under section 7(1)(a), if they had one, would have dated accordingly.

#### *Walden v Liechtenstein*

60. In *Walden v Liechtenstein* (Application No 33916/96) (16 March 2000) the applicant was a Liechtenstein pensioner who complained that calculation of the joint pension due to himself and his wife by reference only to his own contribution record discriminated unfairly against couples where the wife had a better contribution record than the husband. The domestic administrative courts agreed that there had been discrimination but said that it was mandated by primary legislation and could not be remedied without amendment. On 24 May 1996 the State (Constitutional) Court found the law to be unconstitutional but refused to set it aside on the grounds that this would be disruptive and contrary to good administration. It could have suspended the order quashing the law for a maximum of six months but was concerned that the new law would not be in place in time. In fact the new, non-discriminatory law came into force on 1 January 1997.

61. The applicant complained that until the new law came into force his Convention rights had been violated. The Strasbourg court agreed with the domestic courts that the previous law had violated the applicant's rights under article 14 but held that, in the events which had happened, the refusal to quash the discriminatory law was equivalent to suspending it. The temporary preservation of the old law served the legitimate aim of maintaining legal certainty and the period of just over six months was proportionate.

62. I must confess to finding this a puzzling decision which may be explicable by reference to the way it was argued. ("The court notes that the parties' submissions in the present case concentrate on the question whether the State Court should have set the contested provisions aside"). I can quite understand that if one has a form of discrimination which was historically justified but, with changes in society, has gradually lost its justification, a period of consultation, drafting and debate must be included in the time which the legislature may reasonably consider appropriate for making a change. Up to the point at which that time is exceeded, there is no violation of a Convention right. But there is no suggestion in the report of *Walden v Liechtenstein* that the discrimination between married couples was ever justified and I find it hard to see why there was no violation of Convention rights as long as the old law remained in place.

63. In this case, the Secretary of State has not offered justification for WPt and WMA at any relevant time. It is not as if he was saying that they remained justifiable until shortly before the 1998 Consultation Paper was published and that afterwards it was reasonable to allow the period actually taken for the extension of the benefits to men to be enacted and brought into force. He has not addressed the question of justification at all. In those circumstances, if he had not been protected by section 6(2), he would not in my opinion have been able to resist liability on the grounds that a period for changing the law ought to have been taken into account.

#### *Discrimination between widowers and pre-2000 Strasbourg petitioners*

64. The Government has, as I mentioned earlier, followed a policy of arriving at a friendly settlement to pay off widowers who petitioned Strasbourg before the 1998 Act came into force and obtained a declaration (sometimes unopposed) that their complaints were admissible. But they have not been willing to pay off those who

petitioned after the Act came into force (defending the proceedings on the grounds that the applicants have not exhausted domestic remedies), still less those who have not petitioned at all. The widowers say that this is itself discrimination in according them fundamental rights and freedoms and therefore an infringement of article 14.

65. In my opinion, there is nothing in this complaint. The argument fails for a number of reasons. The first question is whether discrimination by reference to whether or not someone has started legal proceedings is covered by article 14 at all. In *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39; [2004] 1 WLR 2196, 2213, paras 48-49, Lord Steyn (with the agreement on this point of all other members of the House) said that article 14 required discrimination to be by reference to some status analogous with those expressly mentioned, such as sex, race or colour. (See also *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, 732-733, para 56.) Being a person who has started legal proceedings does not readily appear to qualify as a status.

66. Secondly, article 14 requires that the discrimination concern the “enjoyment of the rights and freedoms set forth in this Convention”. Those rights must come within the ambit of one of the articles in Section 1 of the Convention, which is headed “Rights and Freedoms”. But the right to compensation for infringement of a Convention right cannot be described as the enjoyment of that right. On the contrary, it is awarded because the applicant has not enjoyed the right in question. It arises, so far as it can be described as a right at all, from the Strasbourg court’s power to award just satisfaction in article 41 in Section 2 of the Convention, which is headed “European Court of Human Rights”.

67. Thirdly, there are clear grounds of objective justification for the Government distinguishing between applicants who petitioned before the 1998 Act came into force and the appellant widowers. The Government is entitled to have its domestic obligations under the 1998 Act clarified by this court before the Strasbourg court considers whether the domestic system, taken as a whole, complies with the Convention. As for the suggestion that the Government should pay petitioners who have not petitioned Strasbourg at all, it would require the Government to abandon the protection of section 6(2) in domestic law, or the 6 month limitation period in article 35 of the Convention or both. I see no reason why the Government should do so.

*Disposal*

68. For these reasons I would allow the appeals of the Secretary of State and dismiss the appeals of the widowers.

**LORD HOPE OF CRAIGHEAD**

My Lords,

69. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he has given I too would allow the appeals of the Secretary of State and dismiss the appeals of the widowers. I should like however to add some words of my own on the second important point in these appeals, which is whether the Secretary of State can rely on the exception which section 6(2)(b) of the Human Rights Act 1998 provides to the general rule in section 6(1) that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

70. Section 6(2) provides that subsection (1) does not apply to an act if:

- “(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
- (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.”

Paragraphs (a) and (b) both qualify the basic principle in section 6(1) that it is unlawful for a public authority to act in a way that is incompatible with the Convention rights. The purpose of these paragraphs is to prevent section 6(1) being used to undermine another of the Act’s basic principles. This is that in the final analysis, if primary legislation cannot be interpreted in a way that is compatible with them, Parliamentary sovereignty takes precedence over the Convention rights.

As section 3(2)(b) and (c) makes clear, the validity and continuing operation or enforcement of primary legislation, and of subordinate legislation too where the removal of the incompatibility is prevented by primary legislation, is unaffected by the Act if it cannot be read and given effect in a way which is compatible with the Convention rights: see also section 4(6)(a).

71. The situation to which paragraph (a) is addressed arises where the effect of the primary legislation is that the authority has no alternative but to do what the legislation tells it to do. The language of the paragraph tells us that this may be the result of one provision taken by itself, or that it may be the result of two or more provisions taken together. Where more than one provision is involved, they may be part of one enactment or they may be found in several different enactments. The key to its application lies in the fact that the effect of this legislation, wherever it is found, is that a duty is imposed on the authority. If the legislation imposes a duty to act, the authority is obliged to act in the manner which the legislation lays down even if the legislation requires it to act in a way which is incompatible with a Convention right. The authority has no discretion to do otherwise. As it is a duty which has been imposed on the authority by or as a result of primary legislation, Parliamentary sovereignty prevails over the Convention right. The defence is provided to prevent the legislation from being rendered unenforceable.

72. The situation to which paragraph (b) is addressed on the other hand arises where the authority has a discretion, which it has the power to exercise or not to exercise as it chooses, to give effect to or enforce provisions of or made under primary legislation which cannot be read or given effect to in a way which is compatible with the Convention rights. The source of that discretion may be in a single statutory provision which confers a power on the authority which it may or may not choose to exercise. That was the situation *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929, where the Secretary of State's discretion under section 77 of the Town and Country Planning Act 1999 as to whether the planning application should be called in was under consideration and the question was whether he could ever exercise that discretion in a way which was compatible with the Convention right. It was also the situation in *R v Kansal (No 2)* [2001] UKHL 62; [2002] 2 AC 69, where the prosecutor, by leading and relying at the trial on compulsory questioning evidence under section 433 of the Insolvency Act 1986 which provided that statements made by a person in response to a requirement imposed by the Act or rules made under it may be used in

evidence in proceedings against him, was acting so as to give effect to that section; see also *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, where there was a statutory power which in its discretion the council was entitled to exercise. But the source of the discretion that is given to the authority may also be found in several statutory provisions which taken together have that effect. Or, as there is nothing in the language of the paragraph to indicate the contrary, it may be found in the common law.

73. The important point to notice about paragraph (b) is that the source of the discretion does not matter. What matters is (a) that the provisions in regard to which the authority has this discretion cannot be read or given effect compatibly with the Convention rights and (b) that the authority has decided to exercise or not to exercise its discretion, whatever its source, so as to give effect to those provisions or to enforce them. If it does this, this paragraph affords it a defence to a claim under section 7(1) that by acting or failing to act in this way it has acted unlawfully. In this way it enables the primary legislation to remain effective in the way Parliament intended. If the defence was not there the authority would have no alternative but to exercise its discretion in a way that was compatible with the Convention rights. The power would become a duty to act compatibly with the Convention, even if to do so was plainly in conflict with the intention of Parliament.

74. Moses J held that section 6(2)(b) of the 1998 Act provided the Secretary of State with a defence to the allegation that he had acted unlawfully by declining to make the payments to widowers. He reached the same conclusion in *R (Wilkinson) v Inland Revenue Commissioners* [2002] EWHC 182 (Admin); [2002] STC 347, 359, paras 45-49, as to whether the defence was available to the commissioners who had declined to give a bereavement allowance to widowers which was equivalent to that which they were required to give to widows by section 262 of the Income and Corporation Taxes Act 1988. He noted that the common law power to make extra-statutory allowances, if exercised, would lead to compatibility but refraining from exercising the power would lead to incompatibility. The effect of the argument that the commissioners were not entitled to rely on section 6(2)(b) was to convert the power to give an extra-statutory allowance into a duty to do so. That would destroy the power altogether. It would replace it with an obligation to make widowers the same allowance as widows, as this would be the only way that the commissioners could act, as section 6(1) requires, in a way which was compatible with the widowers' Convention right.

75. The Court of Appeal in the present case said that the decision of Moses J on this point was in error, but I think with respect that his decision was the right one in both cases. In the view of the Court of Appeal the 1992 and 1999 Acts expressly required the Secretary of State to pay benefits to widows in accordance with their terms. He did not need to rely on any common law power to make payments to widowers to do what the statutes told him to do, which was to make payment to widows. So a decision not to exercise the common law power could not be said to be necessary in order to give effect to the statutes. Accordingly the defence under section 6(2)(b) was not available: [2003] 1 WLR 2623, 2667, para 119. But section 6(2)(b) does not seek to address cases where the exercise of the power is necessary. That situation is covered by section 6(2)(a). The fact that the exercise of the power is not necessary does not take it outside the ambit of section 6(2)(b).

76. In *R (Wilkinson) v Inland Revenue Commissioners* [2003] EWCA Civ 814; [2003] 1 WLR 2683, 2698, para 53, where the power was one which was given to the commissioners by statute, the Court of Appeal said that if circumstances were to arise in which it was necessary to exercise that power in order to avoid a breach of Convention rights they could see no basis upon which they could rely upon section 6(2)(b) to justify a refusal to exercise the power. In my opinion this reasoning, which treats the power as a duty to act compatibly with the Convention rights, fails to give effect to the true purpose and function of this paragraph. It overlooks the principle which lies at the heart of the scheme of the Act that the Convention rights must in the end, if it is not possible under section 3(1) to interpret legislation in a way which is compatible with them, give way to the sovereignty of Parliament.

77. Mr Goudie QC for Mr Hooper, whose argument on this point Mr Cox QC adopted on behalf the other widowers, said that the Secretary of State's defence under section 6(2)(b) must fail for one or other of two reasons. He presented them as alternatives. On the one hand, he said, the Secretary of State could not bring himself within the opening words of section 6(2)(b). This was because the 1992 and 1999 Acts could be given effect in a way that was compatible with the widowers' Convention rights by making payments to them as well as to widows. By doing this the Secretary of State would be performing his statutory duty under the 1992 and 1999 Acts to make payments to the widows, and he would be performing his duty under section 6(1) of the 1998 Act by exercising his common law powers so as to avoid breaches of the widowers' Convention rights. On the other hand the Secretary of State could not bring himself within the closing words of section

6(2)(b). It would have provided him with a defence if he had been acting so as to give effect to or enforce the primary legislation. But his failure to exercise his common law powers had nothing to do with giving effect to the statutory scheme which had been laid down by the 1992 and 1999 Acts.

78. In my opinion this approach to the construction of section 6(2)(b) too is in conflict with the way in which the basic scheme of the Act gives primacy to Parliamentary sovereignty over the Convention rights. According to Mr Goudie's first alternative argument, where a statutory scheme operated by the Secretary of State contains a feature which is incompatible with Convention rights which cannot be cured by means of the interpretative obligation in section 3(1) of the 1998 Act, section 6(1) requires him to exercise his common law power to make good that defect. The effect is to convert the Secretary of State's power into a duty. It becomes a duty to make extra-statutory payments out of public funds which, in unambiguously clear terms, Parliament has decided he should not make. And the argument that the defence in section 6(2)(b) is available only where a decision whether or not to exercise a statutory power is in issue ignores the width given to the expression "public authority" by section 6(3), which does not limit its application to bodies which are creatures of statute and have no powers which they may exercise other than statutory ones.

79. In my opinion therefore the Secretary of State is entitled to rely on section 6(2)(b), and it follows that his act in not exercising his common law power by making payment to widowers was not unlawful. The route which provides him with this defence is a simple one. The starting point is the widowers' claim under section 7(1) that his refusal to make the payments to them which the statutes required him to pay to widows was made unlawful by section 6(1) of the 1998 Act because he was acting in a way which was incompatible with their Convention right. Section 3(1) of the Act provides that, so far as it is possible to do so, the relevant provisions of the 1992 and 1999 Acts must be read and given effect to in a way that is compatible with Convention rights. It is now common ground that that it is impossible to read the references in the female gender in these sections as including the masculine. So, to adopt the language of the opening words of section 6(2)(b), these are provisions of primary legislation which cannot be read or given effect to in a way that is compatible with the Convention rights.

80. Mr Goudie's argument that the Secretary of State cannot bring himself within these opening words fails at this point. Section 3(1) and

section 6(2)(b) are different sides of the same coin. If the effect of applying section 3(1) is that the provisions of the primary legislation can be read and given effect in a way which is compatible with the Convention rights, it is the duty of the public authority to act compatibly with them. Otherwise it will be acting in a way that is made unlawful by section 6(1). But if the provisions cannot be read and given effect in that way the defence which section 6(2)(b) provides is available. In this way, as in others, the Act preserves the sovereignty of Parliament. A public authority is not obliged, in the performance of its duty under section 6(1) not to act in a way that is incompatible with Convention rights, to read and give effect to primary legislation in a way that conflicts with the intention of Parliament.

81. The Secretary of State had to consider whether the 1998 Act allowed him to decline to exercise his common law powers to make the payments to the widowers which they asked him to make to match those which he was under a duty to make to widows under the provisions of the 1992 and 1999 Acts. An act, for the purposes of section 6(1), includes a failure to act: section 6(6). So the question is whether he was giving effect to those provisions by failing to exercise the power which the common law gave him to make equivalent payments to widowers. As it is now common ground that those provisions can only be read and given effect by confining the payments to widows and not extending them to widowers, the answer to this question is self-evident. A common law power to make payments for which the statutes do not provide is only a power. By declining to exercise it, the Secretary of State was simply doing what the 1992 and 1999 Acts told him to do. He was giving effect to their provisions, as they obliged him to make payments to widows only and not to both widows and widowers.

82. It is important to note that it makes no difference that the power which the Secretary of State was declining to exercise was a common law power and not one given to him by statute. Unlike section 6(2)(a), which disapplies section 6(1) where as a result of one or more provisions of primary legislation the public authority could not have acted differently, section 6(2)(b) says nothing about the origin of the act, or the failure to act, which gives effect to or enforces the provisions of primary legislation which cannot be read or given effect in a way which is compatible with Convention rights. Where, as in *R v Kansal (No 2)* [2002] 2 AC 69, the public authority is doing what the statute authorises him to do the origin of its act will be found in the statute. But that cannot always be said to be so, especially where the power enables the authority to refrain from acting in a way that would be compatible with the Convention rights. The failure which in proceedings under section

7(1) a person alleges to amount to an act which is made unlawful by section 6(1) may consist simply of a refusal to give effect to the statute in a way which is compatible with a Convention right because it cannot be read as giving power to do so to the authority. But it may also, as in this case, consist of a refusal to exercise a power which has its origins elsewhere because to exercise it in a way that was compatible with the Convention would conflict with the intention of Parliament.

83. The expression “public authority” is not fully defined anywhere in the 1998 Act. What the Act does instead is to address itself to some particular issues by saying what the expression includes and does not include: see section 6(3). Many bodies which are obviously public authorities will be entirely creatures of statute. But bodies which are included in the definition of “public authority” for the purposes of this Act because certain of their functions are functions of a public nature are not so limited. It is the nature of their functions, not the nature of the body that performs them, that is determinative in their case. The scope of the defence which section 6(2)(b) provides would be impeded if it was available only where the failure to act could be linked to a power which was given to the authority by statute because the definition of “public authority” is not limited in that way. It includes bodies which, because they are not creatures of statute, are largely if not entirely dependent upon the common law when taking decisions as to what they can and cannot do. There is no indication in section 6(2)(b) or elsewhere that public authorities whose powers are not derived from statute or whose powers are derived in part from the common law are in a less favourable position for the purposes of the defence which it provides than those which are entirely the creatures of statute. The primacy that is given to the sovereignty of Parliament requires that they be treated in the same way, irrespective of the source of the power.

## **LORD SCOTT OF FOSCOTE**

My Lords,

84. The main issue in these appeals, shortly stated, is whether the Secretary of State acted unlawfully in declining to pay to the four claimants, each a widower, sums of money equivalent to the benefits that, if they had been widows, they would have been entitled to be paid pursuant to sections 36 to 38 of the Social Security Contributions and Benefits Act 1992. I have had the advantage of reading in draft the

opinions prepared by my noble and learned friends Lord Hoffmann, Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood and respectfully agree with their conclusion that the Secretary of State did not act unlawfully in declining to make these payments. I agree, therefore, that the appeals of the Secretary of State should be allowed and the appeals of the widowers dismissed. There are, however, some differences between my noble and learned friends as to the application of section 6(2)(a) and (b) of the Human Rights Acts 1998 to these cases. So I want to express in my own words my opinion on that part of reasoning. I want also to question the assumption that the discrimination complained of by the widowers engages their rights under the Convention.

85. The case of each of the widowers is based on the unchallengeable fact that sections 36,37 and 38 of the 1992 Act discriminated between widows and widowers in favour of the former. Statutory benefits, namely, widow's payment (section 36), widowed mother's allowance (section 37) and widow's pension (section 38), could be claimed as of right by widows, provided certain specified statutory conditions were met, but could not be claimed in any circumstances by widowers. The claimants say that this discrimination was in breach of article 14 of the Convention. Section 6(1) of the 1998 Act says that it is unlawful for a public authority to act in a way which is incompatible with a Convention right and section 6(6) says that an "act" includes a failure to act. So, the argument goes, the Secretary of State's refusal to pay them sums equivalent to the benefits to which they would have been entitled had they been widows was unlawful. They claim an appropriate remedy (see section 8 of the 1998 Act).

86. The claimants do not now dispute that the language of the 1992 Act excludes them from claiming a statutory right to the payments they seek. They accept that the relevant sections of the 1992 Act cannot "be read and given effect in a way which is compatible with" article 14 (see section 3(1) of the 1998 Act). But they point out that the Secretary of State has a common law power (subject to parliamentary authority under the annual Appropriation Acts) to make payments out of public funds where he thinks it desirable and appropriate to do so and that he has in fact made extra-statutory payments to widowers who had instituted proceedings before the Strasbourg court. He has done so in order to settle their claims before that court for redress for wrongful discrimination. The widowers now before the House say that the Secretary of State's failure to make similar payments to them is not only an unlawful discriminatory failure to place them in the same position as the widows who can claim benefits under the 1992 Act but, in addition,

constitutes an unlawful discrimination as between them and the Strasbourg claimants to whom the ex-gratia payments have been made.

*Is a Convention right engaged?*

87. The widowers' claims raise a number of issues. But underlying all these issues is the proposition that the payment of statutory benefits to widows but not widowers, or the payment of extra-statutory benefits to Strasbourg claimant widowers but not to widowers who have not taken their complaints to Strasbourg, engages a Convention right of the widowers. This is not a proposition that has been subjected to any critical examination before your Lordships but it is not in my opinion self-evident and warrants a little examination.

88. Article 14 of the Convention says that:

“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 ... etc”.

This is not a free-standing prohibition against discrimination. It bars signatory states from being discriminatory in the way in which they guarantee the substantive rights set out in the Convention (see *Clayton & Tomlinson's The Law of Human Rights*, vol 1 para 17.79). Contrast the corresponding article in the Charter of Fundamental Rights of the European Union, “proclaimed” at the Nice European Council in December 2000 and now incorporated in the Treaty establishing a Constitution for Europe signed on 29 October 2004:

“1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin .... [etc] ... shall be prohibited” (article 21 of the Charter: article II-81 of the Treaty)

This article expresses a free-standing anti-discrimination prohibition. article 14 does not. Strasbourg jurisprudence, predating the enactment of the 1998 Act, has interpreted article 14 as requiring a complainant of discrimination to show that the complaint falls within the “ambit” of some substantive Convention right (see *Rasmussen v Denmark* (1984) 7

EHR 371). It is not necessary to show that the substantive Convention right has actually been breached. And in *Willis v United Kingdom* (2002) 35 EHRR 547) the Strasbourg court held that discrimination in favour of widows and against widowers in the payment to the former but not to the latter of the social security benefits with which these cases now before the House are concerned constituted a breach of article 14 taken in conjunction with article 1 of Protocol No 1. The court did not consider it necessary to express a view as to whether the discrimination was also a breach of article 14 taken in conjunction with article 8.

89. My Lords, I have remarked already that the question whether the discriminatory character of the statutory scheme for payment of benefits to widows but not to widowers engaged any Convention right was not addressed by counsel. So no final conclusion on the question can be expressed by your Lordships. But I want to take this opportunity of making clear my misgivings about the assumption that the answer to the question must be affirmative. The Strasbourg's court's conclusion in *Willis* that Convention rights were engaged by the statutory discrimination because the benefits were "... a sufficiently pecuniary right to fall within the ambit of article 1 of Protocol No 1" (see para 36) seems to me, if I may respectfully say so, to overlook that the statutory scheme deprives widowers of nothing. It no more deprives widowers of a "possession" than it deprives a widow who does not make her application in time or whose deceased husband had not paid the requisite contributions of a "possession". As to article 8, it would be necessary, I think, if the widowers complaints were to be held to be within the "ambit" of article 8, to categorise the payment of the statutory benefits to widows as being a means whereby the United Kingdom demonstrates its respect for family life (c/f *Petrovic v Austria* (1998) 33 EHRR 307, para 29) and to categorise the failure to make equivalent payments to widowers as indicating a lack of due respect for the widowers' family life. My initial reaction to such a submission if it were made would be, I confess, sceptical. The principle that article 14 discrimination will be in breach of a Convention right if it is within "the ambit" of a substantive Convention right ought, in my view, to be confined within the requirements of the principle of certainty. The Strasbourg's court's decision in *Willis* 35 EHRR 547 seems to me difficult to reconcile with that principle. Article 14 cannot be transformed by the jurisprudence of the Strasbourg court into a simple prohibition, along the lines of its Charter counterpart, against any discriminatory treatment. That would be an alteration, or extension, for Parliament, not the Strasbourg court, to make.

90. However, on the footing, accepted by the Secretary of State before your Lordships and in the Court of Appeal, that the discrimination complained of is within the ambit of either article 1 of Protocol No 1 or article 8, I must address the section 6(2) issue.

*What is the effect of section 6(2) (a) and (b) of the 1998 Act?*

91. Section 6(2) mitigates the effect of section 6(1). Subsection (1) says that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. But subsection (2) disapplies subsection (1) in respect of any case which falls within paragraph (a) or paragraph (b) of subsection (2) ie if the case falls within paragraph (a) or paragraph (b) it is not unlawful for the Secretary of State to act in a way incompatible with a Convention right.

92. As my noble and learned friends have pointed out, subsection (2) is intended to preserve the supremacy of Parliament. A sovereign Parliament has power to legislate in a manner incompatible with Convention rights if it chooses to do so. If Parliament does do so, the legislation is effective and must take effect accordingly. There are not, under English domestic law, any fundamental constitutional rights that are immune from legislative change. So paragraph (a) says that if as a result of a provision of primary legislation the Secretary of State could not have acted differently, it is not unlawful for him to act in a way incompatible with a Convention right.

93. It follows, in my opinion, from paragraph (a) that the act of the Secretary of State in authorising payment of the section 36, section 37 and section 38 statutory benefits to widows who satisfy the requisite statutory conditions and in refusing to authorise payment of those benefits to widowers, or for that matter to widows who do not satisfy the statutory conditions, cannot be categorised as a section 6(1) unlawful act. The act is discriminatory but it is not unlawful. The widowers, and the widows who do not satisfy the statutory conditions, are not entitled to the statutory benefits. So the Secretary of State cannot authorise the payment to them of the statutory benefits.

94. For my part I regard the conclusion expressed in the previous paragraph as determinative of these appeals. But reliance is placed by the widowers not on the failure of the Secretary of State to authorise payment to them of the statutory benefits – they recognise that they

cannot bring themselves within the statutory language – but on his failure to exercise his common law power to make them extra-statutory payments corresponding in amount to the statutory benefits. My noble and learned friends Lord Hoffmann and Lord Hope of Craighead have expressed the conclusion that this way of putting the widowers' case is met by paragraph (b) of subsection (2) – the Secretary of State, in declining to exercise his extra-statutory common law power, “was acting so as to give effect to or enforce” the relevant provisions of the 1992 Act. My noble and learned friend Lord Brown of Eaton-under-Heywood, however, has expressed some doubts about the applicability of section 6(2)(b) to an exercise by the Secretary of State of his common law power (see paras 112 and 113 of Lord Brown's opinion). But, nonetheless, my noble and learned friend rejects the widowers' reliance on the common law power. He does so on the ground that an exercise of the common law power so as to subvert the intentions of Parliament as expressed in the 1992 Act would be an abuse of that power (see paras 119 and 120) and expresses a preference for paragraph (a) rather than paragraph (b) as the torpedo that sinks the widowers' reliance on the Secretary of State's refusal to exercise the common law power.

95. I, too, if forced to a choice, would prefer the paragraph (a) to the paragraph (b) route; but I regard the difference between them, when applied to a case such as the present, as immaterial. Whether one is looking at paragraph (a) or paragraph (b), it is the provisions of sections 36, 37 and 38 of the 1992 Act that make it inappropriate for the Secretary of State to create, via his common law power, a scheme entitling widowers to the same benefits as those which the parliamentary enactment has confined to widows and withheld from them.

96. In any event, however, I would reject the widowers' claims for a reason that has nothing to do with section 6(2). The widowers' claims are article 14 discrimination claims. They cannot claim to be entitled to statutory benefits. The statutory language bars them. So they claim that the Secretary of State should have exercised his common law power in their favour. But where is the discrimination? Leaving aside for the moment the payments made to the Strasbourg claimants, to which I must return, what discrimination has the Secretary of State perpetrated in failing to make extra-statutory payments to these widowers? Who are the comparators? The widows are not apt comparators for they are the statutory beneficiaries under a statutory scheme that does not include widowers (section 6(2)(a)). The fact of the matter is that, bar the Strasbourg claimants, the Secretary of State has not made comparable extra-statutory payments to anyone. His failure to make extra-statutory payment to these widowers cannot, therefore, be categorised as

discriminatory. It is, of course, true that he has declined to exercise a power available to him to place the widowers in possession of sums of money comparable to the statutory benefits of widows. But I would, for my part, reject the proposition that a failure to make an extra-statutory payment to match the benefits to which widows are entitled under a discriminatory statutory scheme is itself an act of discrimination. If that were not so it would be an act of discrimination to decline to make extra-statutory payments to widows who had not claimed in time, or to widows whose husbands had not paid the requisite contributions. The widowers' concentration on the common law power that enables the Secretary of State to make extra-statutory payments to all sorts of people in all sorts of circumstances must not be allowed to divert attention from the only discriminatory feature in this case, namely, the statutory scheme itself. I would reject the widowers' claims on the ground that the Secretary of State's failure to make the extra-statutory payments was not discriminatory as between widows and widowers. The widows, as statutory beneficiaries under the statutory scheme, were not apt comparators.

97. Finally I come to the widowers' argument based on the extra-statutory ex-gratia payments made to the Strasbourg claimants. The Secretary of State's refusal to make comparable payments to widowers who had not instituted proceedings in Strasbourg was, I would accept, discriminatory as between them and the Strasbourg claimants. But the refusal cannot, in my opinion, be categorised as an "unlawful act" for section 6(1) purposes.

98. First, whatever may be the justification for regarding the discrimination under the 1992 Act in favour of widows and against widowers as discrimination falling within the ambit of either or both of article 8 or article 1 of Protocol No.1, I can see no possible justification for regarding the discrimination in favour of Strasbourg claimants and against widowers who had not instituted proceedings in Strasbourg as within the ambit of either article. Article 14, I repeat, is not a free-standing prohibition against discrimination. Second, I would regard the desirability of settling the claims instituted before the Strasbourg court as constituting an eminently reasonable objective justification for the payments to those claimants. For both reasons I would reject the widowers' reliance on the payments made to the Strasbourg claimants.

99. For the reasons I have given I would allow the Secretary of State's appeals and dismiss the widowers' appeals. On all points I have

not expressly mentioned I am in full agreement with the opinions expressed by my noble and learned friend Lord Hoffmann.

## **LORD BROWN OF EATON-UNDER-HEYWOOD**

My Lords,

100. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann and (subject to this opinion) for the reasons he has given I too would allow the Secretary of State's appeals and dismiss the widowers' cross appeals. Since, however, I have found some considerable difficulty with regard to the application here of section 6 of the Human Rights Act 1998 ("the 1998 Act") I prefer to express my conclusion on this issue in my own words.

101. Most materially section 6 provides:

- “(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if—
  - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
  - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.”

102. Subject to the Secretary of State's argument based on *Walden v Liechtenstein* (Application No 33916/96) (16 March 2000) (which fails for the reasons given in paras 60-63 of Lord Hoffmann's speech), it is common ground, first, that the payment to widows but not to equivalent widowers, during the relevant period, of a widow's payment and widowed mothers' allowance pursuant respectively to sections 36 and 37 of the Social Security Contributions and Benefits Act 1992 was incompatible with the widowers' Convention right under article 14 read

with article 8 (and/or with article 1 of Protocol 1); and, secondly, that, by virtue of section 6 (1) of the 1998 Act, this would be unlawful under domestic law unless section 6 (1) is disapplied here by section 6 (2). The critical question arising with regard to these two benefits, therefore, is whether the Secretary of State can rely on section 6 (2).

103. If and insofar as the widowers' complaint relates to the payment of the benefits to widows, clearly the Secretary of State can rely on section 6 (2) (a): he had no option but to make these payments: sections 36 and 37 required it. To meet that difficulty the widowers, therefore, complain, not of the payment to the widows, but rather of the non-payment of equivalent benefits to themselves. The first question which a complaint in this form raises is whether the Secretary of State could have acted differently in this regard: could he, had he wished, have made matching payments to widowers? He contends that he could and let it be assumed for present purposes that he is right, at any rate to this extent: that the Crown has a general common law power to make extra-statutory payments whenever it thinks it right to do so—as, for example, when the Criminal Injuries Compensation scheme was first set up.

104. The bulk of the argument, therefore, has focused on section 6 (2) (b) and it is this provision which to my mind gives rise to particular difficulty in a case like this.

105. The essential role of section 6 (2) in the 1998 Act is, of course, clear. It is, just as section 6 (6) is, a necessary corollary to the cardinal principle enshrined in the Act—exemplified too by sections 3 (2) (b) and (c) and 4 (6) (a)—that of the sovereignty of Parliament. If the legislation cannot, despite the Court's best efforts pursuant to section 3 (1), "be read and given effect in a [Convention compatible] way," and if the authority "could not have acted differently" (section 6 (2) (a)) and/or "was acting so as to give effect to or enforce" legislative provisions "which cannot be read or given effect in a [Convention compatible] way" (section 6 (2) (b)), then the complainant cannot succeed in his claim: the authority will not have acted unlawfully under domestic law. The most the complainant can attain is a declaration of incompatibility pursuant to section 4 (2)—the last thing most complainants want since it carries with it no redress (save as to costs) although of course it unlocks the door to a successful application in Strasbourg.

106. All this, of course, is clear. What is altogether less clear is precisely what is meant by an authority "acting so as to give effect to or

enforce” incompatible legislative provisions within the meaning of section 6 (2) (b). It is useful to start with three authoritative illustrations of such instances, the decisions of this House respectively in *R (Anderson) v Home Secretary* [2002] UKHL 46; [2003] 1 AC 837 (“*Anderson*”), *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2004] 1 AC 549 (“*Aston Cantlow*”) and *R v Kansal (No 2)* [2002] 2 AC 69 (“*Kansal*”)—although none of them, it is worth pointing out at once, were discrimination cases.

107. *Anderson* concerned the Secretary of State’s power under section 29 of the Crime (Sentences) Act 1997 to refer the cases of mandatory life prisoners to the Parole Board and, if so recommended by the board, then to release such prisoners on licence. The claimants sought, not a declaration that section 29 was incompatible with their article 6 rights, but rather a declaration that the Secretary of State must exercise his discretion under the section so as not to exceed the tariff recommended by the judiciary. They succeeded only in getting a declaration of incompatibility. As Lord Bingham of Cornhill put it, at para 30:

“Since ... the section leaves it to the Home Secretary to decide whether or when to refer a case to the Board and he is free to ignore its recommendation if it is favourable to the prisoner, the decision on how long the convicted murderer should remain in prison for punitive purposes is his alone.”

Lord Hutton alone referred specifically to section 6 of the 1998 Act, at para 82:

“ ... [I]n forming his own view whether to accept the recommendation of the judiciary as to tariff or to fix a longer tariff period and when to refer a case to the Parole Board, the Home Secretary is acting in accordance with the intention of Parliament expressed in section 29. In deciding for himself when to release a prisoner the Home Secretary is, for the purposes of section 6 (2) (b) ‘acting so as to give effect to’ section 29.”

108. *Aston Cantlow* concerned the PCC’s power under section 2 (2) of the Chancel Repairs Act 1932 to bring proceedings to recover from those liable as lay rectors monies for the repair of the chancel. The

House held that, even assuming the PCC would otherwise have been acting unlawfully under section 6 (1), they would have been protected by section 6 (2) (b). Lord Nicholls of Birkenhead, at para 19, approved what was noted in *Grosz, Beatson & Duffy, Human Rights: the 1998 Act and the European Convention* (2000), p72: a public authority is not obliged to neutralise primary legislation by treating it as a dead letter.

109. Lord Hobhouse of Woodborough, at para 93, said:

“Incontrovertibly the PCC were seeking to give effect to and enforce provisions of [the 1932 Act]. On the above-stated assumption, the PCC’s Act in suing the Wallbanks comes squarely within the exception. Paragraph (b) of the subsection [6 (2)] is to be contrasted with paragraph (a) which is manifestly intended to cover cases where the public authority did not have any alternative but to act as it did (ie it was compelled to do so). Paragraph (b), on the other hand, covers situations where the public authority was empowered by legislation to act as it did and the intention of the legislation, whilst leaving open a measure of discretion, was that it should use the power provided.”

110. *Kansal* concerned a prosecutor’s power under section 433 of the Insolvency Act 1986 to use evidence obtained by compulsory questioning. The House rejected the appellant’s contention that compatibility with his Convention rights could be, and therefore had to be, achieved by refraining from ever exercising this power. As Lord Hope of Craighead pointed out, at para 88, in deciding to adduce this evidence the prosecutor was giving effect to the legislation:

“Section 433 authorised [the prosecutor] to lead and to rely on that evidence. He was entitled also to give effect to section 433 by asking the judge to hold that in terms of that section the evidence was admissible.”

111. Moses J in the present case, at para 178, described *Kansal* as “an example of a case where exercise of the power conferred by the statutory provision would inevitably lead to incompatibility with the Convention.” He gave as another example the Divisional Court’s decision in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport & the Regions* [2001] 2 All ER 929

(“*Alconbury*”) (unaffected in this respect by the House of Lords subsequent decision allowing the Secretary of State’s appeal), holding that since every exercise of the Secretary of State’s power to call in planning applications under section 77 of the Town and Country Planning Act 1999 would inevitably breach article 6 of the Convention, section 6(2) (b) was engaged: “We do not think it is legitimate to read down a legislative provision so as to extinguish it (para 104).” Moses J contrasted that with Forbes J’s decision in *R (Friends Provident Life Office) v Secretary of State for the Environment, Transport & the Regions* [2001] EWHC Admin 820; [2002] 1 WLR 1450 where, following the House of Lords’ ruling in *Alconbury* that the exercise of the section 77 call in power was not after all incompatible with article 6, it was unsuccessfully argued instead that a *refusal* to call in a planning application under section 77 would necessarily be incompatible with article 6. Forbes J concluded that the obligation to call in a planning application to ensure compliance with article 6 would only arise in some cases, for example where there were significant issues of fact to be decided and because, therefore, the discretion remained largely intact, section 6 (2) (b) did not apply.

112. As for the present case, Moses J recognised that it differs from *Alconbury* and *Kansal*—cases where compatibility could only be achieved by refraining from any exercise of the power—because here the widowers’ contention is that the power (the common law power to make matching payments) *must* be exercised. He concluded, however, that the three cases share an important feature, namely that compatibility could only be achieved by converting a power into a duty. He applied the identical process of reasoning in the parallel case of *R (Wilkinson) v Inland Revenue Commissioners* [2002] STC 347 where the argument was that the commissioners were bound to exercise their power under section 1 of the Taxes Management Act 1970 to allow widowers an equivalent allowance to the widows bereavement allowance enjoyed by widows under section 262 of the Income and Corporation Taxes Act 1988. Having concluded in each case that the effect of the widowers’ argument was “to destroy the power altogether”, he decided in both that the section 6 (2) (b) defence applied.

113. The Court of Appeal disagreed with Moses J about the application of section 6 (2) (b) in both cases. Their decision on the point in *Wilkinson* [2003] 1 WLR 2683 was strictly unnecessary since they had already concluded (rightly, as Lord Hoffmann’s speech in that case makes clear) that the commissioners did not in fact have the power the widowers contended they had under section 1 of the 1970 Act, so that the section 6 (2) (a) defence applied without complication. It is

nevertheless instructive to see what the Court of Appeal said in each case, and most convenient to start with their judgement in *Wilkinson*:

“52 ... It seems to us that section 6 (2)(b) addresses the grant by Parliament of a statutory power which, regardless of the circumstances in which it is exercised, will inevitably be incompatible with Convention rights. In such circumstances the power cannot be given effect to in a way which is compatible with the Convention, and thus section 6 (2) (b) enables the exercise of the power without breach of section 6 (1).

53. We appreciate the argument that if a failure to exercise a statutory power will inevitably involve a breach of Convention rights, section 6 (2) (b) is engaged, because implicit in the statutory power is the right to refrain from exercising the power. We make no comment as to whether that argument is sound or unsound. We simply observe that it has no application to the facts of this case. Section 1 of the 1970 Act is a wide general power. In most circumstances exercising that power will involve no incompatibility with the Convention. Equally, in most circumstances failing to exercise the power will involve no incompatibility with the Convention. If circumstances arise under which it is necessary to exercise the power in order to avoid a breach of Convention rights, we can see no basis upon which the commissioners can rely upon section 6 (2) (b) to justify a refusal to exercise the power.”

114. In other words the Court of Appeal in *Wilkinson* was saying that the commissioners’ section 1 power (just as the Secretary of State’s section 77 call in power in *Friends Provident*) [2002] 1 WLR 1450 would only sometimes, not invariably, have to be exercised to achieve Convention compatibility and in that situation the section 6 (2) (b) defence does not apply. True, the (postulated) section 1 power would have had to be exercised in every case where a widower was claiming a matching allowance; but so too the section 77 power would have had to be exercised in every case where a substantial factual issue arose.

115. I turn then to the Court of Appeal’s reasoning in the present case [2003] 1 WLR 2623:

“116 ... We shall set out, in stages, the [Secretary of State’s] argument as we understand it. (1) Section 6 (2) (b) provides an authority with a defence when a statute *requires* the authority to Act in a way which is incompatible with a Convention right; section 6(2)(b) provides an authority with a defence where a statute confers on an authority *a power* which, if exercised, will necessarily involve infringement of a Convention right. (2) The 1992 and 1999 Acts, on their true construction, leave unfettered the Secretary of State’s common law power to pay benefits to widowers if he chooses so to do. (3) Each Act might, for the avoidance of doubt, have provided ‘this Act is without prejudice to the Secretary of State’s common law power to pay benefits to widowers, if he chooses so to do.’ The position would still have been precisely the same as (2). (4) Each Act might have stated: ‘(i) The Secretary of State may pay benefits to widowers if he chooses so to do; (ii) The Secretary of State may refrain from making payments to widowers if he chooses so to do.’ The position would still have been precisely the same as in (2) and (3). (5) Had the Acts expressly authorised the Secretary of State to refrain from paying benefits to widowers, the exercise of that statutory power would necessarily have involved infringing their Convention rights. In such circumstances section 6(2)(b) would have provided him with a defence. (6) Parliament cannot have intended that, by leaving implicit what could have been expressed, the Secretary of State’s discretion should be fettered by the 1998 Act.

117. We accept the starting point of this argument. If a statute confers an express power which can only be exercised in a manner which infringes a Convention right, then Parliament has expressly authorised a breach of the Convention. Section 6(2)(b) preserves the supremacy of Parliament by permitting an authority to exercise the power granted by Parliament.

118. The chain of reasoning that follows is, however, fallacious. If the 1992 and 1999 Acts do not restrict a common law power enjoyed by the Secretary of State to make payments to whomsoever he pleases, it does not follow that Parliament has thereby authorised the Secretary of State to ignore the requirements of the 1998 Act when deciding whether or not to exercise that power. A duty in certain circumstances to make payments to widowers is in no way incompatible with a general common law power to make payments to anybody.

119. The 1992 and 1999 Acts expressly require the Secretary of State to pay benefits to widows in accordance with their terms. If he retains a common law power to make payments to widowers, we cannot see how a decision not to exercise that power can be said to be necessary in order to give effect to the provisions, express or implied, of either Act. The decision of Moses J on this point was in error.”

116. Here too, it appears, although less explicitly than in *Wilkinson* [2003] 1 WLR 2683 the Court of Appeal were pointing out that the general common law power to make payments to anyone will not, contrary to Moses J’s suggestion, be “destroy[ed] altogether” by a conclusion that it *must* be exercised to make matching payments to widowers. There will be many other situations in which the power, including in particular the discretion to refuse payment, will be available.

117. For my part I find the Court of Appeal’s reasoning on this part of the section 6 (2) argument compelling. Indeed I would go further: I would reject entirely the suggested analogy between cases (like *Kansal* [2002] 2 AC 69 and *Alconbury* [2001] 2 All ER 929) where an express statutory power can only ever be exercised in a manner which infringes a Convention right, and cases like the present (and *Wilkinson*) where it is contended rather that any *refusal* to exercise the power would infringe a Convention right. The suggestion is, of course, that by the same token that *Kansal* and *Alconbury* decided that the section 6 (2)(b) defence is available if otherwise any exercise of the power would inevitably lead to incompatibility, so too it is available if otherwise any non-exercise of the power would breach the Convention. Superficially the similarity is clear and the suggested analogy at first blush plausible. But in my judgment it would be wrong to extend *Kansal* in this way.

118. Plainly it is not the case that section 6 (2)(b) applies whenever a statutory discretion falls to be exercised in a particular way to ensure compliance with a Convention right. This occurs in a host of different situations and, so far as I am aware, no one has ever suggested that, had the discretion not been exercised compatibly, the public authority would nevertheless have been protected against a domestic law claim by the section 6 (2)(b) defence on the basis that otherwise a power would be turned into a duty. So much I take to be clear. Why, then, should it make all the difference if the statutory discretion is one which, to secure Convention compliance, will have to be exercised in every case and not

merely in some cases? Why should the section 6 (2)(b) defence apply if the discretion would otherwise always have to be exercised in a particular way, but not when this is only sometimes the case? Still on occasions the power is being treated as a duty. Why should the issue turn on how narrowly the power is conferred, or whether, perhaps only exceptionally, the power can be exercised compatibly with the Convention—essentially chance matters?

119. I would accordingly reject the suggested analogy. To have held, as was unsuccessfully argued in *Kansal* and *Alconbury*, that a statutory power can never be exercised would be one thing; to say that it must always be exercised is another. The first, as was decided in those cases, would be to give no effect whatever to the legislation; the second, it is true, would be to convert the power into a duty, but that, as already explained, is often required so as to secure Convention compliant decision-making. To recognise that the power must invariably be exercised is still “to give effect” to it. The legislation is not, as it would have been in *Kansal* and *Alconbury*, set at nought. Rather it is to be interpreted as required by section 3 of the 1998 Act: the word “may” is to be construed and applied as “must” whenever this is necessary to achieve Convention compatibility.

120. In deciding this question it should be borne in mind that the wider the ambit given to section 6 (2) the more often will the United Kingdom be acting incompatibly with article 13 of the Convention: the requirement (not incorporated into domestic law) to provide an effective domestic remedy for any breach of the Convention. This no doubt is the thinking underlying the submissions advanced in the leading textbooks on the 1998 Act that section 6 (2) should be given a narrow construction—consistent with the construction given by this House in *Hampson v Department of Education and Science* [1991] 1 AC 171 to a comparable provision, section 41 (1)(b) of the Race Relations Act 1976—see *Clayton & Tomlinson The Law of Human Rights* (2000), vol 1, at para 5.105 A and *Grosz, Beatson & Duffy Human Rights: the 1998 Act and the European Convention* (2000) at para 4-21.

121. It follows that I reject too Forbes J’s reasoning in *Friends Provident* [2002] 1 WLR 1450: even had it been necessary for Convention compatibility always to exercise the section 77 call in power, that would not in my judgment have given rise to a section 6 (2)(b) defence. I therefore conclude that this part of Moses J’s reasoning in the present case and in *Wilkinson* is unsound—an issue

upon which the Court of Appeal in *Wilkinson* expressly declined to express a view.

122. It does not follow, however, that the Secretary of State's section 6 (2)(b) defence here (or in *Wilkinson*) must fail as the Court of Appeal held it must. All that I have concluded thus far is that, in deciding not to make matching payments to widowers, the authority was not "acting so as to give effect to" their power to make such payments (the Secretary of State's common law discretion in the present case; the commissioners' (wrongly assumed) statutory discretion in *Wilkinson*). In short, I have rejected the argument that to hold that the power *must* be exercised would be to convert the power into a duty and thus destroy it. That, however, is not the end of the case. Rather there seems to me a quite separate and distinct argument available to the respondent authority both here and in *Wilkinson*. This is the argument that they cannot be required to act in such a way as to subvert the intention of Parliament. It is on this basis that I would hold that the section 6 (2) defence to be available. In each case it is plain that Parliament's unambiguous intention was that payments (or allowances) *should* be made to widows and *should not* be made to widowers. The failure of the widowers' section 3 argument in both cases establishes this beyond question. Despite the Secretary of State's argument set out in para 116 of the Court of Appeal's judgment in the present case—see para 111 above—the position is not, in my judgment, the same as it would have been had the 1992 and 1999 Acts expressly stated:

“(i) The Secretary of State may pay benefits to widowers if he chooses so to do.”

Had those been the circumstances it could plainly not have been said that Parliament's unambiguous intention was that widows only were to be paid.

123. Given Parliament's unambiguous intention in the matter it would seem to me an obvious abuse of power for the Secretary of State to have introduced a scheme to make matching extra-statutory payments to widowers. Whatever his general common law power to make such payments, he could not lawfully exercise it inconsistently with Parliament's clearly expressed will. The extra-statutory Criminal Injury Compensation scheme, for example, would not have been lawful had Parliament just rejected a Bill promoted to enact it—consider the analogous situation in *R v Secretary of State for the Home Department*,

*Ex p Fire Brigades Union* [1995] 2 AC 513, in particular Lord Nicholls' analysis, at p 575 H – 576 B.

124. It is for this reason that in my judgment the Secretary of State is entitled to rely on the section 6 (2) defence. I understand that my Lords prefer to put the case under section 6(2)(b), on the basis that in deciding not to make matching payments the Secretary of State was “acting so as to give effect to” sections 36 and 37 of the 1992 Act, sections mandating payment of the benefits to widows only. My preference is rather to put it under section 6 (2)(a) on the basis that: “as a result of [sections 36 and 37], the [Secretary of State] could not have acted differently”: he had to pay the widows and could not lawfully have made matching payments to widowers. Either way I conclude that the defence is made out.

125. I should say that I have some difficulty in accepting the approach adopted in para 50 of Lord Hoffmann's speech: that the whole case for unlawful discrimination in domestic law collapses because section 6 (1) “does not apply” to the acts of making payments under sections 36 and 37, an essential part of the discrimination complaint. On this approach, of course, the section 6 (2) defence would apply equally even had the statute conferred on the Secretary of State an express discretion to pay benefits to widowers too. As already pointed out, the complaint here is not that mandatory payments *were* made to widows but rather that, despite such payments to widows and the power to make them also to widowers, they were not in fact made to widowers. An act includes a failure to act (section 6 (6)) and it is that failure which is said to be unlawful under section 6 (1) and which accordingly needs to be immunised under section 6 (2).

126. The Court of Appeal, I should note, thought that the introduction of the 1998 Act made all the difference to whether it would have been unlawful for the Secretary of State to create a matching scheme for widowers; they held that the 1998 Act *required* the introduction of such a scheme so as to avoid incompatibility. I respectfully disagree: such a conclusion to my mind undermines rather than respects the sovereignty of Parliament.

127. I add just this. The unusual feature of this case and the particular difficulty it presents is that, as a discrimination case, it has two limbs: payment to widows, non-payment to widowers. It is in this context that the courts have to decide what the sovereignty of Parliament dictates. Two arguments appear to me to have become entangled in the course of

this litigation: one, that the will of Parliament is subverted by treating a power as a duty; the other that the will of Parliament is subverted by paying widowers as well as widows. The first argument I reject, the second I accept. It is on that basis that I agree that the section 6 (2) defence applies in this case.