IN THE UPPER TRIBUNAL **Case No.** UA-2021-SCO-000030-BB
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

Secretary of State for Work and Pensions

Appellant

- v –

AB

Respondent

Before: Upper Tribunal Judge Ward

Decision date: 10 March 2022
Decided on consideration of the papers

Representation:
Appellant: Mr Wayne Spencer, Decision Making and Appeals
Respondent: Information and Advice Hub, South Ayrshire Council

DECISION

The decision of the Upper Tribunal is to allow the Secretary of State's appeal. The decision of the First-tier Tribunal made on 12 April 2021 under number SCO84/20/00660 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it as follows:

The claimant is not entitled to bereavement support payment on her claim made on 10 February 2020.

REASONS FOR DECISION

1. The respondent in the present proceedings, Ms B, claimed bereavement support payment following the death on 28 October 2019 of her partner, the late Mr M. By a decision dated 16 March 2020, the Secretary of State decided she was not entitled.

2. Section 30 of the Pensions Act 2014 provides:

> "(1) A person is entitled to a benefit called bereavement support payment if—
>
> (a) the person's spouse or civil partner dies…",

and various other conditions are met.

3. Ms B and Mr M had been living together as a couple since 2000, but had not gone through any formality of marriage. Mr M had previously been married and his marriage was not brought to an end by divorce until February 2016.

4. The First-tier Tribunal ("FtT") allowed Ms B's appeal on the basis that (a) she could rely on the decision of the Administrative Court in *R(Jackson) v SSWP* [2020] EWHC (Admin); and (b) she could in the alternative rely on having established under Scots law marriage by cohabitation with habit and repute with Mr M.

5. The Secretary of State sought permission to appeal on the ground that in *Jackson* the court had made a declaration of incompatibility of the legislation with the European Convention on Human Rights, but such a declaration did not confer a right to benefit. Benefit could only be paid in accordance with domestic legislation as it stood, unless and until Parliament remedied the incompatibility by passing further legislation, known as a "remedial order" (which it had – and still has - yet to do). There was in fact an apparent further difficulty with the FtT's reliance on *Jackson* which I drew to the parties' attention, in that the case had held that the refusal of the higher rate of bereavement support payment to a surviving unmarried partner in a family with dependent children was a breach of human rights, following the earlier decision of the Supreme Court in relation to the previous system of bereavement benefit in *Re McLaughlin* [2018] UKSC 48; like *Re McLaughlin* before it, it is concerned only with the refusal of benefit to families, but in the present case there are no dependent children.

6. A further apparent difficulty with the FtT's decision presented itself in that, although s.3(1) of the Family Law (Scotland) Act 2006 had in general terms abolished marriage by cohabitation with habit and repute, it had preserved it where the relationship began before the commencement date of section 3(1) of the Family Law (Scotland) Act 2006 (4 May 2006) and concluded afterwards. As a matter of fact rather than law, the couple were plainly together for a period which would meet that requirement. It appeared however that because Mr M had remained married to his former wife until their divorce in 2016, he had lacked the legal capacity to be a party to a marriage by cohabitation with habit and repute with Ms B until the divorce went

though. As the Stair Memorial Encyclopedia puts it (see "Child and Family Law (Reissue)" at para.533) (emphasis added):

"(7) The parties must have legal capacity to marry each other[20]. If there is a legal impediment which is permanent, for example forbidden degrees of relationship, the couple will never be married, however long they cohabit. However, if the legal impediment is temporary, for example non-age or the fact that one of the parties is already validly married to a third party, the couple may become married after the temporary impediment has been removed[21]. In these circumstances, the relevant period of cohabitation for the purpose of inferring tacit consent is restricted to the period of cohabitation after the impediment has been removed[22], though the period before the removal of the impediment may be taken into account in determining the character of the cohabitation[23]."

7. Footnote 21 in the above passage is a reference to the case of *Vosilius v Vosilius* 2000 SCLR 679 where the period of cohabitation was calculated only from when one of the parties' divorce was finalised, which when applied to the present case would lead to a much shorter period of cohabitation being legally relevant and all of it falling after 4 May 2006.

8. Consequently, I gave permission to appeal, highlighting these two areas. I also drew to the attention of Ms B and those advising her that there are pending cases before the Upper Tribunal seeking to establish that the refusal of bereavement benefit to a surviving partner where there are no dependent children was also a breach of human rights.

9. The directions invited submissions on the matters in paras 5 and 6 and also invited Ms B to indicate whether she wished to run the argument in para 8 and if she did, required her to address the recent decision of the Court of Appeal in *SSWP v Akhtar* [2021] EWCA Civ 1353.

10. On 7 March 2022 a submission form was received from her representative. The form contained no grounds for resisting the appeal at all but asked for an oral hearing. The stated reason was that Ms B "would like an oral hearing to hear both sides, however if possible she would prefer a video hearing". I asked a clerk to check with Ms B's representative whether grounds of resistance had been omitted in error and the representative confirmed that they had not been.

11.There is no right to an oral hearing in these cases. I have had regard to the stated reasons for the request as Rule 34(2) requires, but it is not appropriate to commit scarce public resources to one (either those of the Upper Tribunal or those of the Secretary of State in pursuing the appeal) in circumstances where Ms B and her representative have not raised any point of disagreement on the relevant law for the Upper Tribunal to adjudicate upon.

12. As regards *Jackson*, both the concerns identified in para 5 above are made out.

13. As regards marriage by cohabitation with habit and repute, no challenge has been made to the position in para 6 above, which appears correct.

14. Consequently, Ms B's claim for bereavement support payment would fall to be determined on the footing that she was the unmarried partner of the late Mr M. As the legislation only provides for payment to a "spouse", she could only succeed if in

relation to a family without dependent children that was itself a breach of human rights (and in due course came to be remedied by Parliament.) She has not elected to pursue the argument that such is the case. I consider it appropriate to respect that choice: the route would be an arduous one with legal difficulties along the way and no guarantee of success. Consequently, while I have considered on my own initiative whether to sist this case pending the Upper Tribunal cases referred to in para 8, I have decided not to.

15. Accordingly, the Secretary of State's appeal is allowed and the decision must be remade in terms that Ms B does not qualify for the lower rate of bereavement support payment. I am sorry that this decision will doubtless be an unwelcome one.

C.G.Ward
Judge of the Upper Tribunal
Authorised for issue on 10 March 2022